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Department of Education

Trenton

NEW JERSEY
SCHOOL LAW DECISIONS

January 1, 1970, to December 31, 1970

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Board of Education of the Township of Woodbridge,

Petitioner,

v.

Township Council of the Township of Woodbridge, Middlesex County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Francis C. Foley, Esq., Hutt & Berkow (Stewart M. Hutt, Esq., of Counsel)

For the Respondent, Isadore Rosenblum, Esq.

Petitioner, the Board of Education (hereinafter "Board"), appeals from an action of the Council of the Township of Woodbridge (hereinafter "Council") appropriating a lesser amount of money for the current and capital expenses of the school district for the school year 1969-70 than the amount proposed by the Board in its budget, which was twice rejected at the polls. The Board alleges that the Council acted arbitrarily, unreasonably, and capriciously, without consideration of the needs of the school system, and with improper political motivation. Respondent denies these allegations.

A hearing in this matter was conducted on May 5 and 6, June 6, and July 16, 1969, at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

At the annual school election on February 11, 1969, the Board submitted proposals for the following amounts to be raised by local taxation for 1969-70:

For current expenses	$12,788,931.34
For capital outlay	130,292.00
For vocational evening schools	15,500.00
TOTAL	$12,934,723.34

After these proposals were rejected by the voters, they were resubmitted at a special election on February 26, 1969, as provided by law, and were again rejected. Thereafter the proposed budgets were submitted to Council, which certified the following amounts to the Middlesex County Board of Taxation to be raised by local taxation:

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	Amount Certified	Amount Cut From Budget
For current expenses	$11,946,877.34	$842,054.00
For capital outlay	92,292.00	38,000.00
For vocational evening schools	13,000.00	2,500.00
TOTAL	$12,052,169.34	$882,554.00

The hearing examiner does not find the evidence sufficient to establish that in making its determination Council acted arbitrarily, unreasonably, or capriciously, or was motivated by improper political considerations. The Board and Council met to discuss the budget prior to the public hearing thereon. Testimony as to the possible acceptability of the budget by Council is inconclusive, varying with the witnesses. In its deliberations after the budget had been formally submitted to it, Council clearly considered whether budget items could be deferred or eliminated, or whether other economies could be effected in operations. Council's witnesses further asserted that the budget detail furnished to it was less complete than in previous years, and that the Board had not, with respect to some items, indicated priorities of need which would have aided it. Although Council did submit, as a part of its answer to the petition herein, a breakdown by line item of the budget cuts which it believed could be effected, it did not set forth its underlying reasons therefor. The hearing examiner does not find, from this lack, evidence to support the Board's allegation that Council acted without reason; however, Council's failure to supply its "underlying determinations and supporting reasons" *(Board of Education of East Brunswick v. Township Council of East Brunswick*, 48 *N.J.* 94, 105 (1966)) until after the issues had been joined in the pleadings impeded the expeditious hearing of the case and generated a climate unfavorable to the efficient and objective presentation of the facts in this case.

As set forth in the Board's budget and in Council's answer, the line item appropriations, Council's proposals, and the resultant cuts are shown in the following table:

Acc't No.	Item	Board's Budget	Council's Proposal	Amount Of Cut
CURRENT EXPENSES:				
110b	Salaries - Bd. Secy's Office	$ 97,018	$ 74,018	$ 23,000
110f	Salaries - Supt's Office	133,715	96,965	36,750
110g	Salaries - Central Research	24,945	20,145	4,800
110k	Salaries - Purchasing	23,595	18,595	5,000
110m	Salaries - Printing	1,800	1,450	350
130f	Supt's Office - Other Expenses	7,500	6,600	900
130j	Building & Grounds - Other Expenses	1,350	1,150	200
130k	Purchasing - Other Expenses	2,500	1,500	1,000

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130m	Printing - Other Expenses	6,000	5,000	1,000
211	Salaries - Principals	645,294	633,294	12,000
213.1	Salaries - Teachers	9,179,100	8,761,100	418,000
213.2	Salaries - Bed-side Teachers	47,000	34,675	12,325
213.3	Supplementary Teachers	40,000	35,000	5,000
214a	Salaries-Librarians	160,615	155,785	4,830
214b	Salaries-Guidance	327,995	319,496	8,499
214c	Salaries-Psychol. Services	112,000	99,600	12,400
215a	Salaries - School Clerks	339,092	319,092	20,000
220	Textbooks	144,360	129,360	15,000
230b	Periodicals, Newspapers	5,300	4,300	1,000
230c	A-V Materials	25,700	20,700	5,000
240	Teaching Supplies	250,877	225,877	25,000
250a	Misc. Supplies	26,600	21,600	5,000
250b	Travel Expenses-Instruction	18,951	14,951	4,000
410a3	Salaries-Nurses	209,350	194,350	15,000
420	Health Expenses-Other	31,765	28,765	3,000
510b	Salaries-Drivers	45,845	43,845	2,000
520b	Public Carrier-Fares	83,494	73,494	10,000
540	Pupil Transportation Insurance	3,000	2,000	1,000
550	Transportation-Other Expenses	16,318	12,318	4,000
610a	Salaries-Custodians	1,022,663	984,663	38,000
620	Contracted Services-Plant	7,700	5,700	2,000
630	Heat for Buildings	121,794	96,794	25,000
640	Utilities	230,000	225,000	5,000
650	Supplies-Plant Operation	60,500	57,500	3,000
660	Other Expenses-Plant Operation	9,000	8,000	1,000
710	Salaries-Maintenance	132,954	121,954	11,000
720a	Upkeep of Grounds	50,000	30,000	20,000
720b	Repair of Buildings	100,000	90,000	10,000
720c	Repair of Equipment	32,000	29,000	3,000
730b	Replacement of Non-Educational Equipment	23,830	13,830	10,000
740	Other Expenses-Maintenance	109,050	84,050	25,000
810	Employee Retirement	209,084	204,084	5,000
820	Insurance	424,595	409,595	15,000
1020	Athletic Expenses	87,799	82,799	5,000
J-3	Special Schools	123,420	115,420	8,000
	Total Current Expense Cuts			$842,054
CAPITAL OUTLAY:				
1230 & 1240	Remodeling & Equipment	$131,732	$106,732	$ 25,000
	Appropriation from Balances			13,000
	Total Capital Outlay Cuts			$ 38,000

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VOCATIONAL EVENING SCHOOL:				
E-1	Total	$ 31,000	$ 28,500	$ 2,500

The findings, conclusions and recommendations of the hearing examiner as to each of the listed items are as follows:

110b - Salaries - Board Secretary's Office. Council proposes the elimination of the position of assistant board secretary at a saving of $10,500. The testimony establishes that the assistant secretary was transferred to the position of transportation coordinator as of February 1, 1969, and the Secretary finds that he alone cannot complete his duties in regular working hours. The addition of another high school and other building additions, the accounting for more federal programs, and the addition of 250 more to the payroll since July 1, 1967, have increased the toal work load and responsibility of the Secretary's office. Absent any sufficient testimony to the contrary, the hearing examiner finds the position of assistant secretary to be necessary to the efficient operation of the school system, and recommends the restoration of $10,500 for that purpose. For the same reasons he recommends restoration of $10,000 proposed to be cut from the employment of two additional clerks in the Secretary's office. No additional clerks have been added since July 1, 1967, to assist with the additional clerical workload that has occurred. Further, in the light of testimony that last year it was necessary to spend $18,000 for clerical overtime and $3,400 for temporary clerical help, the hearing examiner concludes that an appropriation of $5,000 for overtime, plus the addition of two clerks, is reasonable and consistent. It is therefore recommended that the proposed cut of $2,500 for overtime clerical help be restored.

110f - Salaries - Superintendent's Office. Council proposes to save $36,750 in this account in the following manner:

1. Employ Superintendent at $25,000 instead of $30,000 - save $5,000
2. Eliminate one assistant superintendent and fix maximum salary of the other at $22,000 - save $26,000
3. Eliminate one clerk's position - save $5,000
4. Reduce clerical overtime by one-half - save $750

The testimony established that at the time of the hearing a new Superintendent had been employed under contract for $30,000 to replace the retiring Superintendent. The hearing examiner recommends the restoration of $5,000 to enable the Board to fulfill its contract. The Board proposed to pay $24,000 each to two assistant superintendents, one of which positions was vacant at the time of the hearing. The hearing examiner finds these positions essential in a school district such as Woodbridge, with approximately 21,700 pupils and over 900 teachers in 31 schools. It is recommended that the $26,000 for these positions be restored. The hearing examiner further finds no basis for reducing the number of clerks from four to three, as proposed, and therefore recommends restoration of $5,000 for the fourth clerk. However, the necessity for the full appropriation of $1,500 for clerical overtime was not clearly demonstrated by the evidence, and it is therefore recommended that the proposed cut of $750 be sustained.

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110g - Salaries - Central Reserach. The Board's budget proposed $19,800 for an assistant to the Superintendent for research and pupil accounting. The testimony shows that there is one other assistant to the Superintendent, whose salary is charged to account 110f. Council proposes a cut of $4,800 in the salary appropriation for this item, asserting that the new appointee to this position should not start at the same salary as the incumbent retiring after 39 years' service. However, in examining the total salary array for administrative officers, including principals, assistant superintendents, and Superintendent, the hearing examiner concludes that the Board's salary appropriation is consistent, and recommends the restoration of $4,800 to this account.

110k - Salaries - Purchasing. The testimony indicates that a purchasing department was instituted as of July 1, 1969, with a purchasing agent and one clerk. It is proposed to add another clerk for 1969-70, on the ground that the present staff is insufficient. However, the Superintendent testified that during 1968-69, most of the purchasing was done through his office. In light of the previous recommendations for increasing the clerical staff in the central administrative offices, the hearing examiner finds that the need has not been demonstrated for the addition of a clerical position in this account, and recommends that Council's reduction of $5,000 shall stand.

110m - Salaries - Printing. This account was budgeted for $1,100 for 1968-69, and the Board proposes to increase the appropriation to $1,800. Council recommends cutting the increase of $700 by half, to $350. The testimony shows that the printing is done during the summer by a school graphic arts instructor and a helper. Testimony that the volume of work to be done has increased lacked sufficient documentation to support a finding that the budget increase of over 60% is warranted. It is recommended that Council's reduction of $350 be undisturbed.

130f - Superintendent's Office - Other Expenses. The proposed reduction of $900 in this account is related to Council's proposal to limit the number of assistant superintendents to one. An appropriation totaling $900 is included in the Board's budget for travel and convention expense for each assistant superintendent. In view of the hearing examiner's recommendation that money be appropriated for two assistant superintendents, *supra,* it is accordingly recommended that $900 be restored to this account.

130j - Buildings and Grounds - Other Expenses. Council recommends elimination of a $200 convention and travel allowance for the assistant superintendent chargeable to this account. In view of a similar allowance amounting to a total of $900 appropriated for each assistant superintendent charged in line item 130f, *supra,* the hearing examiner recommends that the reduction of $200 be sustained.

130k - Purchasing - Other Expenses. For 1968-69, $1,000 was budgeted for this account. The Board testified that this appropriation proved to be completely unrealistic, and was overspent by $1,000 after six to seven months'

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operations. Printed forms account for an expenditure of $1,000 to $1,500 yearly, and postage amounts to $1,000 per year. It was testified in connection with item 110k, *supra*, that the purchasing office issues from 8,000 to 10,000 purchase orders yearly, and processes 60 to 75 bids in that period of time. Council asserts that economy should be practiced, and recommends a reduction of $1,000 from the Board's appropriation of $2,500 for 1969-70. In light of the testimony demonstrating the work volume, and absent testimony as to specific areas in which costs could be reduced or further limited, the hearing examiner recommends restoration of $1,000 to this account.

130m - Printing - Other Expenses. The Board's budget for this item for both 1968-69 and 1969-70 is $6,000, of which $5,000 is allocated for machine supplies. Council urges prudence in use of supplies, and recommends $1,000 reduction in the appropriation. At the conclusion of the 1969-70 school year, this account had been overexpended by more than $5,000. The hearing examiner finds no basis for reducing this account, and recommends restoration of the $1,000 cut.

211 - Salaries - Principals. Council recommends eliminating one high school assistant principalship, so that each of the three high schools in the district will have the same administrative complement, thereby saving $12,000. The testimony shows that each high school has a principal and a vice-principal, but that Woodbridge Senior High School, with 2180 pupils, has two assistant principals, while Colonia Senior High School, with 1689 pupils, and John F. Kennedy Senior High School, with 1163 pupils, each have one assistant principal. The Board urges that the second assistant is needed at Woodbridge Senior High School to maintain comparable administration-to-pupil ratios, and also to provide supervision of pupil transportation, which is a major function at the largest high school. Respondent urges that the enrollment difference between the second largest and largest high schools is not sufficient to warrant an additional assistant principal, and that the assignment of duties does not warrant a high cost man. The hearing examiner finds that the evidence supports the need for two assistant principals at Woodbridge Senior High School to assist in the supervision and management of a large and complex school operation. Restoration of the $12,000 reduction is recommended.

213.1 - Salaries - Teachers. Council proposes a reduction of $418,000 in this account, with the following recommendations:

1. Increase elementary school class size by five per cent (an average of 1.3 pupils per class), thereby eliminating need for 21 teachers at an average of $7,600 for a reduction of	$159,600
2. Of the 18 new teachers requested, employ only the four specialists, thus eliminating 14 new positions at $7,600 each, for a reduction of	106,400

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3. Eliminate 20 teaching positions at the junior and senior high school levels at $7,600 each, for a reduction of	152,000
Total Reduction	$418,000

Testimony on this item was extensive, and revealed most clearly the need for full communication and discussion between Board and Council in order that Council might reach its determinations. For example, a Council witness noted an apparent discrepancy between the 898 teachers assigned to specific schools in the district and the 960 teachers reported as employed in the district. Testimony clarified the figures, by showing that in addition to the teachers assigned to particular schools, additional teachers of subjects such as art, music, and physical education serve more than one school and were not reflected in the 898 figure. It is also clear that Council was not originally aware of the size of junior and senior high school enrollments.

As to elementary school class size, the testimony and exhibits show that in 1968-69 the average class size was 27.2 pupils, with a range from 20 to 35 pupils, and with 22 per cent of the classes enrolling over 30 pupils. It was also testified that enlarging class sizes by an empirical five per cent cannot be accomplished, and that the actual increase in some classes in some schools would have to be as high as 33 per cent, in order to achieve the proposed reduction in staff. Moreover, petitioner says, its negotiated agreement with the teacher group commits it to continued effort to reduce, not increase class size. Further, the Board asserts, the proposed reduction would necessitate vacating some elementary classrooms, 72 of which were added by the district's most recent bond issue. Finally, it was testified that an increase in elementary school enrollment could be expected from the reported closing of kindergarten classes in a parochial school, thereby requiring two additional kindergarten teachers. The hearing examiner finds that the proposed reduction of 21 elementary school teachers cannot be accomplished except at the expense of a thorough and efficient school system, and recommends that a $159,600 reduction to be accomplished by this means be restored.

With respect to the elimination of 14 new positions, the testimony establishes that all of these positions were allocated to the three senior high schools, as follows:

1. A remedial reading teacher for each school, for a total of three.
2. Six classroom teachers for Colonia Senior High School, where an enrollment increase of approximately 250 pupils is anticipated.
3. Five classroom teachers for Woodbridge Senior High School, where an enrollment increase of approximately 220 pupils is expected.

With the additional teachers, it is anticipated that pupil-teacher ratios will range from 19.3 in Kennedy Senior High School to 21.2 in Woodbridge Senior High School, with the overall high school ratio increasing from 19.67 in 1968-69 to 20.58 in 1969-70. The hearing examiner finds that the 14 positions proposed to

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be eliminated are necessary for the maintenance of a thorough and efficient high school program in Woodbridge. It is recommended that the $106,400 budgeted for these positions be restored.

For the reasons set forth as to teacher requirements at the senior high school level, no positions can be abolished there. Junior high school enrollments are estimated for 1969-70 at 5,373, with 248 teachers employed in the five junior high schools, for an average pupil-teacher ratio of nearly 21.5. If the reduction of 20 teachers were to be accomplished at the junior high school level, the ratio would increase to nearly 23.6. In the critical junior high school years, such an increase would unfavorably affect some class sizes, at the expense of the schools' programs. It is accordingly recommended that the $152,000 proposed reduction from this item be restored.

The uncontroverted testimony of Council's witness shows that the estimated annual teacher turnover rate in Woodbridge is about 150 teachers, and that an average of $1,000 in turnover savings results from replacement of these teachers, for an estimated turnover savings of $150,000. Examination of the Board's unexpended balances in the teachers' salary account at the end of the 1969-70 school year shows that $171,605 remained in this account. It is therefore recommended that a total reduction of $150,000 in this account be allowed as anticipated turnover savings. The total amount to be restored to this account is therefore recommended to be $268,000.

213.2 - Salaries - Bedside Teachers. For 1968-69, the Board budgeted $30,000 for this item and by February 1969 spent the entire sum. For 1969-70, the Board's budget provides $47,000, from which it proposes to spend $22,750 for two full-time teachers and approximately $2,500 per month for four part-time teachers. At the time of the hearing 82 pupils were receiving bedside teaching. Council recommends cutting the increase of $17,000 in half, although the proposed reduction of $12,325 is somewhat more than half of the budgeted increase. In any event, the past experience of the Board in this account, the reported case load, and the statutorily mandated nature of special forms of instruction for the handicapped pupils clearly demonstrate the probable necessity for the amount appropriated by the Board. It is recommended that $12,325 be restored to this account.

213.3 - Salaries - Supplementary Teachers. For 1968-69, the Board budgeted $30,000 for this account. As of May 31, 1969, over $41,000 had been spent. (R-3) The Board appropriated $40,000 in this account for 1969-70. Council recommends cutting the increase of $10,000 by half. The Board's testimony shows that 192 cases of handicapped children requiring supplementary instruction have been identified, and that 49 teachers are engaged in this work. Council recommends that the increase of $10,000 be reduced by half to $5,000, contending that past experience shows such an increase to be adequate. The data presented do not show experience beyond the 1968-69 school year, which offers clear testimony to show that $40,000 is certainly no more than adequate. It is therefore recommended that $5,000 be restored to this account.

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214a - Salaries - Librarians. In its original budget proposal (P-13), the Board had provided $155,785 for this account. As a result of salary negotiations conducted while the budget was being formulated, the Board readjusted the appropriations, increasing many accounts to provide money for negotiated salary increases, and decreasing others so that the total amount to be raised did not change. The increase in this account amounted to $4,830, for a total of $160,615. Council recommends eliminating the increase, and reverting to the lower figure, but offers no rationale for so doing. The hearing examiner finds no basis for reducing this account when there has been no effective challenge of the validity of the Board's overall salary program. It is recommended that $4,830 be restored.

214b - Salaries - Guidance. The same situation obtains in this account as in 214a, *supra.* For the same reason, the hearing examiner recommends the restoration of $8,499 cut by Council. (The hearing examiner notes that the difference between the original budget proposal of $319,595 and the final appropriation of $327,995 is $8,400, instead of $8,499 as actually cut by Council. However, since the larger figure became a part of the total by which the sum certified to the County Board of Taxation was determined, a possible typographical error becomes the determinant of the amount to be restored.)

214c - Salaries - Psychological Services. In 1967-68 the Board spent $92,010 in this account. The 1968-69 budget provided $177,600, and the Board spent approximately $150,000 of the appropriation. For 1969-70, an appropriation of $112,000 was made by the Board, of which $99,600 was provided for salaries of the existing staff, and $12,400 for the employment of a learning consultant and fees for psychiatric services. Council's recommendation for a cut of $12,400 was based on an understanding that this amount was for the employment of an additional psychologist, which Council believed unnecessary. In consideration of this misunderstanding, and absent an effective challenge of the Board's projected use of the $12,400 and in further consideration of the Board's assertion of its need for additional services to continue a minimum program for the handicapped children of the district, the hearing examiner recommends restoration of the $12,400 reduction in this account.

215a - Salaries - School Clerks. Council recommends reducing the appropriation in this account by $20,000, to be accomplished by eliminating one clerical position in each of the three high schools and one junior high school clerical position, in order to make the number of clerks in senior high school and in junior high school the same. Council offered no testimony in support of its proposal to achieve absolute parity. The Board's testimony shows the senior high school enrollment to be increasing, and the junior high school enrollment to be essentially unchanged for 1969-70. Council's witness testified that the clerical position to be eliminated from junior high school is in Avenel Junior High School, which has the highest enrollment of all the junior high schools. Testimony shows the ratio of clerks to pupils in the junior high schools to range from 1:270 to 1:300. In the light of the multifarious clerical duties to be performed, the hearing examiner finds the present number of clerks to be

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reasonable for thorough and efficient school operation, and recommends restoration of $20,000 to this account.

220 - Textbooks. Past and proposed expenditures for textbooks are shown as follows:

1967-68	actual	$112,040
1968-69	budgeted	115,242
1969-70	proposed	144,360

Council contends that the proposed increase for 1969-70 is excessive, and recommends halving the increase for a reduction of $15,000. The Board bases its need for its appropriation on the oeration of a replacement formula based on an estimated textbook life of five years. The testimony, taking into account higher textbook prices, does not satisfactorily explain the sharp disparity between past and projected expenditures. Council's proposed cut will still provide a greater rate of increase from 1968-69 to 1969-70 than was projected in making the 1968-69 budget. It is recommended that Council's reduction be sustained.

230b - Periodicals, Newspapers. The Board's appropriation in this account for 1969-70 is $5,300, compared to a budget of $4,625 for 1968-69, and a testified expenditure of $3,373 in 1967-68. Council regards an increase of approximately 60 per cent over the two-year period as excessive, and recommends reducing the appropriation by $1,000. The Board asserts that the increased amount is needed, but provides insufficient documentation to support the need. The hearing examiner recommends restoring $325 of the proposed reduction to provide an amount equal to the 1968-69 appropriation, and sustaining the remaining $675 of the reduction.

230c - Audio-Visual Materials. The Board's budget for this item increased from $17,155 for 1968-69 to $25,700 for 1969-70. Council considers the increase of approximately 50 per cent too great, and recommends limiting the increase to 20 per cent, with a resultant cut of $5,000. While the Board's witness characterizes this reduction as too severe, the testimony in support of the Board's budget is inadequate to support a finding that the increase proposed by the Board is necessary for a thorough and efficient school system. It is recommended that Council's reduction of $5,000 be sustained.

240 - Teaching Supplies. Fiscal data on this item reveal the following facts:

1967-68	actual	$224,285
1968-69	budgeted	225,438
1969-70	proposed	250,877

Contending that over the past three years, the appropriation for this item has proved sufficient, Council recommended maintaining spending at the 1968-69 level, and cut $25,000 from this account. In light of data showing a projected net increase in enrollment of only 26 pupils over the 1968-69 total of 21,670, and absent testimony showing a need for the proposed budget increase, the hearing examiner finds that Council's reduction will leave an amount sufficient to maintain a per-pupil spending level at the 1968-69 figure. It is recommended that Council's reduction of $25,000 be sustained.

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250a - Miscellaneous Supplies. The Board's budget of $26,600 for 1969-70 is an increase of $2,900 over the 1968-69 appropriation. Council proposes a reduction of $5,000 in this account, on the grounds that in past years the budget was more than adequate, and that economy can be practiced. The Board's testimony shows that $1,000 of the increase was designed for a new elementary school testing program, but that without the increase the program could be operated, with a less efficient reporting system. No further support of an increase in the budget is found. It is recommended that Council's cut be reduced enough to provide as much money as was available in this account for 1968-69, by restoring $2,100 of the cut and sustaining $2,900.

250b - Travel Expenses. In 1967-68 the Board spent $18,808 in this account. Its budget for 1968-69 amounting to $16,750 was underspent by $4,000, although the foundation for increased need was the added personnel covered in this account since 1967. In light of this experience, the hearing examiner finds the increase unsupported by adequate evidence of need. It is recommended that spending be held at the 1968-69 budgeted figure. It is therefore recommended that of Council's recommended $4,000 cut, $1,800 be restored and $2,200 be sustained.

410a-3 - Salaries - School Nurses. Council proposes reducing the number of school nurses from 22 to 20, for an economy of $14,000, and reducing the appropriation for substitute nurses from $3,600 to $2,600. The Board's testimony asserts that all nurses are fully engaged in their duties, their assignment to one or two schools being based on pupil load. Council believes that the workload now carried out by two of these nurses could be distributed over the remainder of the nursing staff. There is no evidence that such a redistribution could be effected without impairment of the efficiency of the health program of the schools, and the hearing examiner recommends that the $14,000 reduction for two nurses be restored. The budget of $3,600 for nurse substitutes is less than two per cent of the payroll in this account. This is a reasonable allowance to provide substitutes, and cannot sustain a reduction of $1,000. It is accordingly recommended that this cut be restored.

420 - Health Expenses - Other. Council proposes a cut of $3,000 in this account, to be accomplished by reducing expenses for the tuberculosis screening program by $1,000 and physical examinations by $2,000. The Board's testimony pointed to the statutorily required tuberculosis screening program, and to a physical examination program at $1.50 per examination. Council offered no testimony on this point. The examiner finds that the Board's appropriation of $31,765 is necessary for the required tuberculosis screening program and for the necessary and reasonable costs of the physical examination program. It is recommended that the $3,000 cut be restored.

510b - Salaries - Drivers. Council proposes a reduction of $2,000 from the $45,845 appropriated for salaries of drivers of pupil transportation vehicles. The budget for this item for 1968-69 was $41,100, which had been exceeded at the time of the hearing. It was anticipated that the present staff of eight part-time

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drivers, working six to eight hours daily, transporting special education pupils, would need to be augmented by two in 1969-70. Council asserted that by rearranging schedules the number of part-time drivers could be reduced, but offered no testimony to support this assertion. The hearing examiner finds the Board's appropriation to be necessary, and recommends restoration of the $2,000 reduction.

520b - Public Carrier - Fares. The spending data for this item are as follows:

1967-68	actual	$57,975
1968-69	budgeted	60,000
1969-70	proposed	83,494

Council regards the approximate 40 percent increase for 1969-70 as excessive, and recommends a reduction of $10,000. The Board offered no substantial evidence in support of an increase of this size. It is accordingly recommended that Council's recommendation be undisturbed.

540 - Pupil Transportation Insurance. The following data were offered in connection with this item:

1967-68	actual	$1,846
1968-69	budgeted	3,000
1968-69	actual	2,600
1969-70	proposed	3,000

Council's statement that "in previous years monies actually spent on budget were $1,000 or less" finds no support in the Board's budget statement and the testimony presented at the hearing. It was further testified that it is anticipated that insurance will be needed for two additional vehicles at $471.50 each for 1969-70. The hearing examiner finds the Board's appropriation to be needed for this item, and recommends restoration of the $1,000 cut by Council.

550 - Transportation - Expenses. The Board increased its appropriation for this item to $16,318 for 1969-70 from $15,377 in 1968-69. Council recommends a reduction of $4,000, noting an increase for vehicle rental from $3,000 in 1967-68 to a projected $12,000 for 1969-70. The Board's testimony shows that in 1967-68, two small vehicles for transportation were rented. This number increased to eight in 1968-69, for an actual rental cost of nearly $10,000. It is planned to rent two more vehicles in 1969-70 to transport an additional 25 special education pupils and reduce cost of taxi hire by approximately $18,000. The hearing examiner notes that a saving is anticipated in the contracted transportation cost for 1969-70 (Item 520a). In consideration of the data supplied, and the projected economy in contracted transportation expense, the hearing examiner finds the appropriation in Item 550 to be reasonable and necessary, and recommends restoration of $4,000 cut by Council in this account.

610a - Salaries - Custodians. The Board's 1969-70 budget for this item is $1,022,663, which includes provision for four additional custodians and a 5 per cent overtime contingency. Council proposes eliminating the additional staff for

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a saving of $20,000, and rearranging work schedules to save $18,000 in overtime. The Board testified that three additional custodians will be required to staff a new building, and one additional to augment the staff at School No. 18, which has been doubled in size. The hearing examiner finds the additional staff necessary. The overtime charge is allocated to contingencies such as snow removal, storm clearance, furniture moving, etc. The hearing examiner notes an unexpended balance of nearly $10,000 in this account for 1968-69. The hearing examiner agrees that by judicious arrangement of work schedules a further saving can be effected in overtime wages. It is accordingly recommended that $20,000 be restored in this account, and the $18,000 remainder of the reduction be sustained.

620 - Contracted Services - Plant. Council recommended a reduction of $2,000 from the $7,700 appropriated in this account, asserting that some of the contracted work could be assigned to the custodial staff. The Board testified that if it omitted the extension of a window washing contract, the $2,000 could be saved. It further explained that in 1968-69, the cost of pest control had proved lower than anticipated. The hearing examiner notes that only slightly more than the 1968-69 appropriation had been spent. In light of the testimony and 1967-68 and 1968-69 experience, the hearing examiner finds that the appropriation in this account is too high, and recommends that Council's proposed reduction of $2,000 be undisturbed. Enough money will remain to continue the window washing contract.

630 - Heat for Buildings. The Board's budget for 1969-70 for this item is the same as for 1968-69: $121,794. As of the end of June 1969, $113,698 had been spent, and an increase of $9,000 to heat an increase of 120,000 square feet of space is anticipated for 1969-70. Council claims an increase of over 50 per cent in two years is excessive, and recommends a reduction of $25,000. In light of 1968-69 experience, the added rooms provided in the school system, and higher fuel costs, the hearing examiner finds that this account cannot sustain a reduction, and recommends restoration of the $25,000 reduction.

640 - Utilities. This account comprises costs of water (640a), electricity (640b), gas (640c), and telephone and telegraph (640d). Actual expenditures for 1968-69 exceeded budget figures significantly only in the electricity account. The Board's 1969-70 budget has been increased to reflect this additional need for electricity, and its budget for water has been increased approximately 5 per cent. Council stresses economy, and proposes a reduction of $5,000. Previous testimony has shown the addition of new and enlarged facilities for 1969-70, which will impose added requirements for utilities. Absent any evidence of inefficiency or wastefulness in the use of utilities, the hearing examiner finds the Board's estimate of its needs consistent with its past experience. It is therefore recommended that the reduction of $5,000 in this account be restored.

650 - Supplies - Plant Operation. Council recommends a reduction of $3,000 in the whole category of supplies for plant operation, contending that improved purchasing procedures should result in savings, and pointing out that

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actual expenditures in the past three years have been below budgeted amounts. The 1968-69 underexpenditure amounts to approximately $4,600. No evidence was presented in support of the Board's need for the budget appropriation in the face of lower previous expenditures. The hearing examiner finds that the proposed reduction is justified by recent experience and recommends that the $3,000 cut be sustained.

660 - Other Expenses - Plant Operation. The Board's budget for this item in 1968-69 was $8,309, which proved to be an adequate amount. The budget for 1969-70 is $9,000. Data supporting the increase were incomplete. As in the 650 account, *supra,* it would appear that the operation of a purchasing office should result in savings in this account. Council's reduction of $1,000 would cut the appropriation for 1969-70 below that for 1968-69, and would make no provision for higher costs. It is recommended that $300 of the cut be restored, and $700 be sustained.

710 - Salaries - Maintenance. The Board proposes to add an additional plumber at $11,000 to its present staff of three, on the ground of the additional needs for aging buildings. Council recommends that this additional expenditure be eliminated, absent a convincing showing of need for this employee. The hearing examiner agrees that such a need has not been demonstrated, and recommends that the reduction of $11,000 be sustained.

720a - Upkeep of Grounds. The Board's 1968-69 budget of $20,000 for this item was overspent by some $36,000. The Board proposed a budget of $50,000 for this item in 1969-70, from which Council seeks a cut of $20,000. Numerous items of repairs to playground, parking and sidewalk surfaces as well as replacement of flow valves at Woodbridge High School, were enumerated in support of the Board's increase. The hearing examiner finds that the evidence does not support an increase of the magnitude proposed by the Board, especially in light of the fact that only $385 is reported as having been spent in this account in 1967-68. It is recommended that certain maintenance items be spread over a longer period of time, and that Council's cut of $20,000 be sustained.

720b - Repair of Buildings. In 1967-68 the Board spent $39,625 in this account. For 1968-69 the budget was $80,075, but more than $120,000 was spent, some of it to complete repairs planned for 1969-70. As in 720a, *supra,* numerous items of repair were enumerated, some of them immediately necessary for preservation of buildings, others of such a nature that they can be deferred without damage to the thoroughness and efficiency of the school system. Council recommends cutting $10,000 from the Board's proposed increase of $20,000 in this account. The hearing examiner recommends that Council's cut be sustained.

720c - Repair of Equipment. The Board's budget for this item in 1968-69 was $25,800, which was increased to $32,000 for 1969-70. Council proposes a reduction of $3,000 in this item. In light of past expenditures, the hearing examiner finds that this reduction will provide for an increase adequate to the

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testified needs of the district. It is recommended that Council's reduction of $3,000 be sustained.

730b - Replacement of Non-Educational Equipment. Council considers as excessive a 300 per cent increase in the appropriation of $23,830 for 1969-70 over that of $7,664 for 1968-69. The Board's testimony shows that it plans to replace "worn-out" tractors, three maintenance vehicles, a diesel tractor, a scrubbing machine, and vacuum cleaners. Council recommends a reduction of $10,000 in this item. The hearing examiner concludes that a part of the replacement program can be deferred or spread over a longer period of time without damage to the thoroughness and efficiency of the school system, and recommends that Council's reduction of $10,000 be undisturbed.

740 - Other Expenses - Maintenance. Of a total 1968-69 budget of $87,539 in the three categories of expense in this account, the Board spent approximately $59,000. Its budget for 1969-70 is set at $109,050. While the Board attributed the underexpenditure of 1968-69 to inability to employ craftsmen, it offered no evidence that it will overcome that deficiency sufficiently to nearly double its expenditures in 1969-70. Council recommends a reduction of $25,000, which it points out will leave a budget of $84,050 for these maintenance items. On the basis of the past two years' experience, in both of which expenditures were below $60,000, the hearing examiner finds that the amount remaining after Council's reduction will provide for an adequate maintenance program. It is therefore recommended that the cut be sustained in the amount of $25,000.

810 - Employee Retirement. Various fixed charges for social security and pension accounts are included in this series of accounts. On the basis of its recommendations for reduction in personnel, *supra*, Council contends that a reduction of $5,000 can be sustained in these accounts. Since the hearing examiner's findings do not sustain a significant reduction in the number of employees, he must accordingly recommend the restoration of the proposed $5,000 cut.

820 - Insurance. This series of accounts covers premiums for property, employee, liability, hospitalization, medical-surgical and major medical insurance, and fidelity bond premiums, totalling $424,595 for 1969-70, in contrast to $291,818 for 1968-69. These accounts were overspent in the amount of $89,000 in 1968-69. The Board points to higher insurance rates, as well as the necessity to add property insurance for newly-constructed facilities for 1969-70. Council believes that $15,000 can be saved through a reduction in the number of employees, and through economies in its insurance program. The hearing examiner finds that the evidence supports the Board's appropriation, and recommends restoration of the $15,000 cut.

1020 - Athletic Expenses. The total budget for both senior and junior high school athletic expenses in 1968-69 was $83,500. The Board proposes a budget of $87,799 for 1969-70, on the grounds of the need for additional insurance for

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junior high school athletic teams and the inflated cost of athletic equipment. Council found that certain items in the 1969-70 budget were twice as high as the amounts budgeted for 1968-69. The hearing examiner finds that the evidence supports the increase proposed in the Board's budget, and recommends restoration of $5,000 cut by Council.

J-3 - Special Schools. Although the statements supplied by Council refer only to J-3 - Accredited Evening High School, it is apparent that its proposed reduction of $8,000 applies also to the regular evening adult school and summer school accounts, the total 1969-70 appropriations for these schools being $123,420, up from $112,258 in 1968-69. Council believes a $3,000 increase is sufficient, and recommends a cut of $8,000. The Board points to an increasing enrollment in the accredited evening high school, where $9,000 of the increase appears. While Council contends that the special school programs are not necessary, the hearing examiner finds that the importance of completing high school education and continuing adult education is well established, and recommends restoration of the $8,000 cut from this account.

1230 & 1240-Remodeling & Equipment. The Board's budget for 1969-70 for remodeling (Account 1230) and capital equipment purchases (Account 1240) amounts to $131,732. This appropriation is not generally comparable to a much higher appropriation for 1968-69, which contained a non-recurring new building item. Major new items are $5,000 for remodeling administrative offices and an increase from $1,737 to $18,192 to purchase several major items of equipment for plant operation. Council made a cut of $25,000 from the appropriation, and recommended appropriation of $13,000 from unexpended balances, for a total reduction of $38,000 in the amount certified to the County Board of Taxation. The hearing examiner finds no basis to justify the reduction proposed by Council. The plant operation equipment was shown to be necessary for efficient or safe operation, or to comply with requirements for waste disposal. No testimony was offered to show the availability of free balances to offset capital outlay costs. It is therefore recommended that $38,000 be restored to the amount certified to be raised by local taxation for capital outlay.

E-1 - Vocational Evening School. The Board accepts a reduction of $2,500 proposed by Council in this account.

The following table reflects the recommendations of the hearing examiner with respect to each of Council's suggested reductions:

Acc't No.	Item	Amount Reduced	Amount Restored	Amt. Not Restored
CURRENT EXPENSES:				
110b	Salaries-Bd. Secy's. Office	$ 23,000	$ 23,000	$ - 0 -
110f	Salaries - Supt's Office	36,750	36,000	750
110g	Salaries-Central Research	4,800	4,800	$ - 0 -
110k	Salaries- Purchasing	5,000	- 0 -	5,000

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110m	Salaries-Printing	350	- 0 -	350
130f	Supt's. Office-Other Expenses	900	900	- 0 -
130j	Buildings & Grounds Other Expenses	200	- 0 -	200
130k	Purchasing - Other Expenses	1,000	1,000	- 0 -
130m	Printing - Other Expenses	1,000	1,000	- 0 -
211	Salaries - Principals	12,000	12,000	- 0 -
213.1	Salaries - Teachers	418,000	268,000	150,000
213.2	Salaries - Bedside Teachers	12,325	12,325	- 0 -
213.3	Supplementary Teachers	5,000	5,000	- 0 -
214a	Salaries-Librarians	4,830	4,830	- 0 -
214b	Salaries-Guidance	8,499	8,499	- 0 -
214c	Salaries-Psychol. Services	12,400	12,400	- 0 -
215a	Salaries-School Clerks	20,000	20,000	- 0 -
220	Textbooks	15,000	- 0 -	15,000
230b	Periodicals, Newspapers	1,000	325	675
230c	A-V Materials	5,000	- 0 -	5,000
240	Teaching Supplies	25,000	- 0 -	25,000
250a	Misc. Supplies	5,000	2,100	2,900
250b	Travel Expenses-Instruction	4,000	1,800	2,200
410a3	Salaries - Nurses	15,000	15,000	- 0 -
420	Health Expenses-Other	3,000	3,000	- 0 -
510b	Salaries - Drivers	2,000	2,000	- 0 -
520b	Public Carrier-Fares	10,000	- 0 -	10,000
540	Pupil Transportation Insurance	1,000	1,000	- 0 -
550	Transportation - Other Expenses	4,000	4,000	- 0 -
610a	Salaries-Custodians	38,000	20,000	18,000
620	Contracted Services-Plant	2,000	- 0 -	2,000
630	Heat for Buildings	25,000	25,000	- 0 -
640	Utilities	5,000	5,000	- 0 -
650	Supplies - Plant Operation	3,000	- 0 -	3,000
660	Other Expenses-Plant Operation	1,000	300	700
710	Salaries-Maintenance	11,000	- 0 -	11,000
720a	Upkeep of Grounds	20,000	- 0 -	20,000
720b	Repair of Buildings	10,000	- 0 -	10,000
720c	Repair of Equipment	3,000	- 0 -	3,000
730b	Replacement of Non-Educational Equipment	10,000	- 0 -	10,000
740	Other Expenses - Maintenance	25,000	- 0 -	25,000
810	Employee Retirement	5,000	5,000	- 0 -

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820	Insurance	15,000	15,000	- 0 -
1020	Athletic Expenses	5,000	5,000	- 0 -
J-3	Special Schools	8,000	8,000	- 0 -
Total Current Expenses		$842,054	$522,279	$319,775
CAPITAL OUTLAY:				
1230 & 1240	Remodeling & Equipment	$ 25,000	$ 25,000	$ - 0 -
	Appropriation from Balances	13,000	13,000	- 0 -
	Total Capital Outlay	$ 38,000	$ 38,000	$ - 0 -
VOCATIONAL EVENING SCHOOL:				
E-1	Total	$ 2,500	$ - 0 -	$ 2,500
	Grand Totals	$882,554	$560,279	$322,275

* * * *

The Commissioner has reviewed the findings, conclusions, and recommendations of the hearing examiner as set forth above. He finds the amounts certified by Council to be insufficient to maintain a thorough and efficient school system in the Township of Woodbridge for the school year 1969-70. He therefore directs the Township Council of the Township of Woodbridge to certify to the Middlesex County Board of Taxation the following additional amounts:

For Current Expenses	$522,279
For Capital Outlay	$ 38,000

to be raised by local taxation for the school year 1969-70.

COMMISSIONER OF EDUCATION

January 6, 1970

DECISION OF THE STATE BOARD OF EDUCATION

On January 6, 1970, the Commissioner of Education of the State of New Jersey determined a dispute between the Board of Education of the Township of Woodbridge and the Township Council of the Township of Woodbridge over the 1969-70 school budget. Respondent-Appellant Township Council appealed from that determination solely on the ground that the Commissioner had neither constitutional nor valid statutory authority to make that determination.

Board of Education of the Township of East Brunswick v. The Township Council of East Brunswick, 48 *N.J.* 94 *(Sup. Ct.* 1966) and *Board of Education of City of Elizabeth v. City Council of the City of Elizabeth*, 55 *N.J.* 501 (*Sup. Ct.* 1970) leave no doubt but that the Commissioner has such authority. His decision is therefore affirmed.

October 7, 1970

Pending before Superior Court, Appellate Division.

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Wallace P. Russell,

Petitioner,

v.

Warren E. Bendixen,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, *Pro Se*

For the Respondent, *Pro Se*

Petitioner, a resident of Montville Township, challenges the qualifications of respondent to hold office as a member of the Board of Education of the school district on the grounds of conflicting interests. Respondent denies any such lack of qualification. By agreement of both parties, the matter is submitted on the basis of statements and documents supplementing the pleadings.

Respondent was elected to a seat on the Board of Education at the annual school election on February 11, 1969. At that time, the Board of Education was a party to certain agreements with Brook Valley, Inc., in which Corporation, petitioner alleges, respondent was assistant secretary. As such, petitioner contends, respondent has a claim against the Board of Education contrary to the requirements of *N.J.S.A.* 18A:12-2.

It appears that in 1966, after authorization by the voters, the Board of Education acquired land as a site for a new school by purchase from Brook Valley, Inc. On August 5, 1966, when the title was closed, an agreement was entered into under which $10,000 was placed in an escrow account to guarantee completion of unfinished roadway facilities. On August 6, 1968, respondent, in his capacity as assistant secretary of Brook Valley, Inc., requested payment of $7,500 to complete the road and water facilities to the new school. One week later, on August 13, 1968, the parties amended the escrow agreement to waive certain requirements, to provide for the payment of $7,500 to Brook Valley, Inc., if certain specified work was completed by September 1, 1968, and to extend the date for completion of the remainder to June 1, 1969. Thereafter, at a meeting of the Board on October 22, 1968, the $7,500 agreed upon was paid to Brook Valley, Inc., leaving a balance of $2,500 in the escrow account. All of these transactions occurred prior to respondent's election to the Board of Education on February 11, 1969. Also in evidence is a copy of a letter dated February 3, 1969, from respondent to Brook Valley, Inc., tendering his resignation as assistant secretary effective February 11, 1969.

Subsequent to the annual election in February 1969, the Board of Education acted on a number of matters related to Brook Valley, Inc., which

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modified, continued or culminated prior agreements between the two parties. Petitioner points out that the relationship still exists by his allegation that Brook Valley, Inc. is supplying water free of charge to the Mason School without any written agreement having been entered into.

On the basis of the above factual situation, petitioner alleges a "possible inconsistent interest," and asks the Commissioner to void respondent's election if such a condition is found to exist.

The statute which is pertinent to the issue herein is *N.J.S.A.* 18A:12-2, which provides:

> "No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board."

The Commissioner finds herein no evidence of claim or contract between respondent and the Board of Education which the statute proscribes. While certain financial agreements had been executed between the Board and the Corporation in which respondent was an officer, those arrangements were entered into before respondent became a candidate for a seat on the Board of Education and, in some instances, several years prior thereto. Assuming, *arguendo*, that respondent's occupancy of the office of assistant secretary in Brook Valley, Inc. would be incompatible with his duties as a Board member, it is clear that he did not hold those offices concurrently. The record shows, in fact, that he acted to sever his connection with the corporation prior to his election to the Board. The record is also devoid of any showing that respondent used his office as a Board member in any way to further his own interests or those of the company with which he had formerly been associated. Although the Board continued to have business dealings with Brook Valley, Inc., it appears that respondent abstained from participation in such actions in order to avoid even the appearance of conflicting interests. The Commissioner finds no evidence of incompatibility between respondent's present position of member of the Board of Education and his former employment as an officer of Brook Valley, Inc.

The Commissioner finds and determines that Warren E. Bendixen was elected to the Montville Township Board of Education for a full term of three years, and no evidence has been produced in this case to challenge his right to such office.

The petition is dismissed.

COMMISSIONER OF EDUCATION

January 12, 1970

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In the Matter of the Annual School Election Held in the Watchung Hills Regional High School District, Somerset County.

COMMISSIONER OF EDUCATION

Decision

This matter comes before the Commissioner of Education as a result of a controversy with respect to the validity of a nominating petition of a candidate for membership in the Board of Education of the Watchung Hills Regional High School District to be elected February 3, 1970. To resolve the dispute the Assistant Commissioner in charge of the Division of Controversies and Disputes conducted an inquiry on January 15, 1970, at the office of the Somerset County Superintendent of Schools in Somerville. Testimony was offered by the Secretary of the Board, the Superintendent of Schools, the petitioner who filed the petition at issue in behalf of the candidate (hereinafter "deponent") and her son, and an incumbent board member (hereinafter "incumbent") who is a candidate for re-election. The incumbent was represented by counsel. The testimony revealed the following factual situation.

As a regional school district, the annual school election in Watchung Hills will be held on February 3, 1970. A candidate who wishes to have his name placed on the ballot must file a nominating petition with the Secretary of the Board on or before 4:00 p.m. of the 40th day preceding the election. *N.J.S.A.* 18A:14-9. The 40th day, in this instance, occurred on December 26, 1969. For some time prior thereto and on that date also, the Secretary was confined to his home because of illness. During his absence a clerk in his office was designated by the Board as Acting Secretary and invested with the authority to perform the duties of the Secretary.

School was not in session on December 26 and the school offices were not staffed. The Acting Secretary informed the Superintendent that she would not be able to be present to keep the Secretary's office open for receipt of petitions, and the Superintendent volunteered to perform this responsibility for her, saying that he planned to be in his office that day and would receive any petitions which were filed. At approximately 3:30 p.m. on December 26, the petitioner herein appeared at the Superintendent's office and submitted a nominating petition (Exhibit 1) in behalf of candidate Wesley G. Matthei. The Superintendent examined the petition and called the deponent's attention to the fact that her signature had not been verified as required by *N.J.S.A.* 18A:14-11. He suggested that she seek a notary public or a member of the Bar to have the jurat completed and that she return the document by 4:00 o'clock.

Deponent testified that she was unable to locate a notary public on this first day after Christmas, that she went to the home of one lawyer to no avail, but finally succeeded in finding a second attorney at home who completed the jurat.

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Deponent testified further that travel was slow that day because of a fresh snowfall; that in order to save time she drove from the lawyer's home to the closest point at the rear of the school in preference to traveling the longer way around to the school's front entrance; and that she dispatched her 15 year-old son, who had accompanied her, to run through the woods at the school's rear to deliver the petition. The son testified that he entered the school's front entrance, and hastened to the Superintendent's office where his mother had first handed the petition to the Superintendent at 3:30 p.m., but he found no one there. He observed that the clock at that office read 3:58 o'clock. He returned to the school's main office where he encountered the Superintendent and the incumbent. The Superintendent called the boy's attention to the master clock in the main office which both agree showed 4:02 o'clock. The incumbent claims that it was 4:03 p.m. The Superintendent thereupon informed the boy that the petition came too late, and he could not accept it. The boy left the petition, however, and departed.

Deponent disputes the decision not to accept the petition in question because of late filing. She asks that the Commissioner review the circumstances, declare the petition valid and properly filed and order the candidate's name printed on the ballots.

Candidates for membership on a board of education must file a nominating petition in the form prescribed by statute with the secretary of the board on or before 4:00 p.m. of the 40th day preceding the election. *N.J.S.A.* 18A:14-9. The nominating petition must be verified by the oath of one or more of the signers before a person qualified to administer the required oath. *N.J.S.A.* 18A:14-11.

There is no need herein to determine whether deponent's son arrived at 3:58 or 4:02 or 4:03 p.m. for two reasons: first, the petition had already been filed prior to 4:00 p.m. at 3:30 o'clock by deponent herself and second, even if it had not been filed earlier, it was still acceptable at 4:02 or 4:03.

It is clear from the testimony that petitioner submitted a petition for a candidate at 3:30 p.m. There is no question that the petition contained the proper number of signatures, that the certificate was signed by the candidate, and that deponent had subscribed her signature to the oath. Although the petition was not received by the person designated by law for this purpose, that fact cannot be used to vitiate deponent's rights, no proper official having been made available, and the fault being that of the board of education and its employees. It is clear that the petition was submitted at the proper place prior to 4:00 p.m. and was received by the school official who had assumed responsibility therefor. The fact that it lacked the required jurat did not invalidate the petition nor require its correction prior to 4:00 p.m. on that day. Nowhere do the statutes require that an error or omission in the petition must be rectified before it can be received or that such a defect must be corrected before 4:00 p.m. on the last day for filing. On the contrary, the statutes provide that a defect in a nominating petition may be corrected at any time prior to the date of printing the ballots:

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18A:14-12

"When a nominating petition is found to be defective excepting as to the number of signatures, the secretary of the board shall forthwith notify the candidate of the defect and the date when the ballots will be printed and the candidate indorsing the petition may amend the same in form or substance, but not to add signatures, so as to remedy the defect at any time prior to said date."

The lack of jurat constitutes the kind of omission or defect contemplated by the statute and as such was capable of correction at any time between filing and the date of ballot printing. Deponent was under no burden to remedy her omission prior to 4:00 p.m. on December 26, but could have waited until the next day without invalidating the petition. The Commissioner holds, therefore, that deponent filed a valid petition prior to 4:00 p.m. on December 26.

But even if the first presentation of the petition had not occurred until 4:02 or 4:03 on December 26, should it have been rejected? This question was considered by the N.J. Superior Court in the case of *Pritel v. Burris*, 94 *N.J.* 485 (*App. Div.* 1967) and answered in the negative. Although the case involved the filing of nominating petitions in a municipal election, the principles enunciated by the court are entirely applicable to school elections.

In the Pritel case, plaintiff did not file her petition until 4:05. The clerk informed her that the deadline of 4:00 p.m. had passed and refused to accept her petition. In ruling that the clerk erred, the Court said at p. 492, 493:

" * * * the township clerk's refusal to accept her petitions because she appeared in his office five minutes after 4 p.m. runs counter to the liberal policy developed by our courts in recent years with respect to election matters.

"Election laws are to be liberally construed so as to effectuate their purpose and not so as to deprive voters of their franchise or render an election void for technical reasons. *Kilmurray v. Gilford*, 10 *N.J.* 435, 440 (1952), followed in *Wene v. Meyner*, 13 *N.J.* 185, 197 (1953). See also such opinions of this court as *Sharrock v. Borough of Keansburg*, 15 *N.J. Super.* 11, 19 (1951); *In re Moore*, 57 *N.J. Super.* 224, 251-52 (1959); *In re General Election in Bethlehem Tp.*, 74 *N.J. Super.* 448, 463-464 (1962); and *In re Chirico*, 87 *N.J. Super.* 587, 593 (1965). This expressed policy is equally applicable to the present case involving the late filing, by a few minutes, of nominating petitions. *Cf. In re Appl'n of Cucci*, 92 *N.J. Super.* 223 (*Law Div.* 1966). Those who signed the petitions because they believed in plaintiff's candidacy, and those voters * * * who would want to express their confidence in her at the polls * * * should not be deprived of their privileges by so minor a deviation from the * * * 4 p.m. provision.

"As we view that provision * * * it is ministerial at best, in order to accommodate the normal functions of the municipal clerk's office. We do not consider the statute as an absolute mandate that no petition may be accepted, even if it be filed one minute after 4 p.m. (Counsel for the clerk

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stated at oral argument that had plaintiff presented her petitions even seconds after 4 p.m., they should not have been accepted.) We perceive nothing that even minimally interfered with the regular course of the clerk's office in dealing with the details of the coming municipal election by his being required to accept nominating petitions presented only a few moments after the hour. The clerk remained in his office until 5:30 and, as noted, admitted that the activities of his office in preparing for the May 9 election would 'hardly' have been in any way harmed by accepting the petitions.

"Common sense and a proper concern for the rights of the electorate compels the conclusion that the clerk should have accepted plaintiff's petitions for filing on the Friday afternoon in question."

The Commissioner holds that the reasoning of the Court in this case is in all respects applicable to school elections and cites the principles laid down as a guide to school officials.

The Commissioner finds that a petition nominating Wesley G. Matthei was duly filed by one of his petitioners within the time allotted by statute, that any omission or defect in the petition was remedied, that Mr. Matthei, has been nominated, therefore, as a candidate for a full term of three years on the Board of Education, and his name is to be printed in the appropriate place on the ballot.

No drawing of names for position on the ballot having been conducted as required by *N.J.S.A.* 18A:14-13, for the reason that there was considered to be only one candidate at the normal time for such drawing, it is now necessary to hold a drawing to determine the order in which the names of the two candidates shall appear on the ballot. The Somerset County Superintendent of Schools is directed, therefore, to conduct a drawing following the procedures laid down in *N.J.S.A.* 18A:14-13 at 5:00 p.m. on January 23, 1970, at the office of the Secretary of the Watchung Hill Regional High School District. Both candidates, members of the Board of Education, school officials and any members of the public who care to may be present and witness the drawing. The Somerset County Superintendent of Schools shall certify the order of the names drawn to the Secretary of the Board of Education who shall thereafter make appropriate arrangements for the preparation of ballots.

It is so ordered.

COMMISSIONER OF EDUCATION

January 21, 1970

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MICHAEL AUSTIN, by his parent Elvin R. Austin; LYNN BRYANT, by her parent Dorothy Bryant; DEBORAH CHAMBERS AND DANA CHAMBERS, by their parents, Arthur Chambers and Roberta Chambers; DONNA HARRIS and KAREN HARRIS, by their parent Mary Harris; POYTON K. HINES, by his parent William E. Hines, Jr.; EVA GADDIES, by her parent Edythe G. Johnson; LILLIAN LEAK and THERESA LEAK, by their parent Richard Leak; DREW MILES, by her parent Thomas R. Miles; ROLAND MOLLET, MARK MOLLET, ADRIAN MOLLET, DOUGLAS MOLLET and KEITH MOLLET, by their parent Barbara Mollet; MARK PRESTON, by his parent Lacy Preston; RODNEY SNELL, by his parent Mary Snell; KIM TANNER and WILLIAM TANNER, JR., by their parent William Tanner; KENNETH WAKEFIELD and MARK WAKEFIELD, by their parent Dartha Wakefield; SHARON WILEY, by her parent Shirley Wiley,

Petitioners,

v.

Board of Education of the Township of Union,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioners, Morton Stavis, Esq.

For the Respondent, Simone and Schwartz (Howard Schwartz, Esq., of Counsel)

Petitioners are children enrolled in the elementary schools maintained by respondent. They contend, through their parents, that the Union Township Public Schools are racially segregated and that the Board of Education has failed to implement procedures consistent with petitioners' legal rights for the elimination of the unlawful discrimination alleged to exist. Respondent admits that its Jeferson School has a student body which is 99 per cent black but contends that it has formulated and adopted a new plan which will effectively eliminate all racial imbalance in the schools of the community.

A hearing of the issues was held before the Assistant Commissioner in charge of the Division of Controversies and Disputes at the Union County Court House, Elizabeth, on June 2 and 3, 1969. Briefs of counsel have also been filed.

The petition herein is, in effect, a reopening of an earlier matter cited as *Alston et al. v. Union Township Board of Education,* 1964 *S.L.D.* 54, decided by the Commissioner of Education April 6, 1964, and affirmed by the State Board of Education, 1964 *S.L.D.* 60, on July 8, 1964. Petitioners, in that case as herein, contested a plan adopted by the Board of Education to reduce the racial imbalance in the Jefferson School. It was established that the racial composition

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of the Jefferson School in the spring of 1963 was at least 95 per cent black while the black pupil population in each of the six elementary schools was 2 per cent or less. To correct this imbalance the Board adopted a "voluntary optional pupil transfer policy" under which any pupil in the Jefferson School District could elect to attend any other elementary school in the Township with a guarantee of continuity in that school until completion, and transportation for those living remote. Petitioners attacked this remedy on two grounds: (1) the burden of correcting the racial imbalance fell only on the black children who transferred out of their district to attend predominantly white schools with no requirement that white pupils would be brought into the Jefferson School; and (2) prediction of certain failure of the plan to accomplish the racial desegregation sought based on the experience of other school districts with similar "open enrollment" schemes. Respondent Board of Education argued, at that time, that its plan would produce a better balance of the races in all of the elementary schools than could be achieved "by any other workable plan suggested or considered." It contended that its proposal met all the requirements of an adequate desegregation plan and urged that it be given a reasonable trial.

In his decision in this earlier case, the Commissioner found that the Board of Education had a duty, which it recognized and accepted, to eliminate the condition of racial balance in its school system; that it had considered and evaluated a variety of solutions to the problem; and that it had adopted a plan in good faith which it believed represented the most effective remedy. He concluded that he would "take no position with respect to the merits of the plan nor intervene to set aside the policy before it has had fair opportunity, with the full cooperation and good will of all parties, to become fully effective." The Commissioner, therefore, dismissed the petition "without prejudice to its reinstitution at a subsequent time should the facts and circumstances so warrant." On appeal, the State Board affirmed.

Experience under respondent's optional transfer policy, in effect since September 1963, confirmed petitioners' contention that it would fail to realize the hoped-for reduction of the racial imbalance in the Jefferson School. What occurred may be shown by the following statistics:

		1963 Enrollment		1969 Enrollment	
School	**Capacity**	**White**	**Black**	**White**	**Black**
Conn. Farms	798	685	1	587	52
Hamilton	425	385	0	342	18
Jefferson	729	25	444	3	309
Livingston	771	713	15	624	56
Washington	879	829	0	748	34
Franklin	825	764	0	650	25
Battle Hill	906	735	0	826	23
Campus*	--	--	--	104	49
Totals	5333	4136	460	3884	566

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The slight increase in black pupil enrollment in the elementary schools other than Jefferson is accounted for by elective transfer made under respondent's optional transfer plan. It should be noted, too, that the reduced number of white pupils in the Jefferson School was likewise a by-product of such plan as white pupils also exercised the transfer option. The number of pupils by race electing to transfer to a school other than Jefferson is shown as follows:

m 'erson	1963-64		1964-65		1965-66		1966-67		1967-68		1968-69		Totals	
	B	W	B	W	B	W	B	W	B	W	B	W	B	W
ın. Farms	2	1	19	2	3	14	20	3	11	0	11	3	66	23
nilton	0	11	10	4	5	6	5	5	5	3	6	8	31	37
ngston	0	0	0	0	0	0	5	0	7	0	2	0	14	0
ıhington	0	0	5	0	15	0	9	0	6	2	14	3	49	5
nklin	0	3	0	0	7	0	12	7	1	2	7	5	27	17
tle Hill	2	0	3	5	5	3	4	1	7	1	6	6	27	16
ıpus	-	--	29	0	8	0	19	0	18	0	16	0	90	0
	4	15	66	11	43	23	74	16	55	8	62	25	304	98
als	19		77		66		90		63		87		402	

The above data disclose that during the six years that the Board's optional transfer plan was in effect 304 black and 98 white children residing in the Jefferson School area chose to attend other schools. While the result was a modest increase of black pupils in each of the predominantly white schools, no reduction in the percentage of black children in the Jefferson School was accomplished because almost 100 white pupils also elected to leave Jefferson. The concentration of black children in that school remained undiminished and in fact increased to almost 100 per cent.

*The Campus School, a college demonstration school located on the Newark College Campus and maintained by the College co-operatively with the Union Township Board of Education, was activated in September 1964. It was discontinued in June 1969 and its pupils reassigned to the Washington School as part of the plan under attack herein.

In the spring of 1969, respondent made public a new pupil assignment plan to be implemented at the opening of the 1969-70 school year. It appears that this action stemmed, at least in part, from a survey of respondent's school system made by representatives of the Federal government through the Department of Health, Education and Welfare. That agency found conditions of racial imbalance requiring corrective action. Thereafter, respondent adopted a new plan which provides, in pertinent part, as follows:

"I. The Voluntary Optional Pupil Transfer Plan which has been available to residents of the Jefferson School district will be terminated effective September 1,1969.

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"II. Jefferson School will be a Central Six School for all sixth grade pupils in the Union Township Public School System effective September 1, 1969.

"III. Assignment of children - effective September 1, 1969.

A. Kindergarten through fifth grade children presently enrolled in Jefferson School.

1. These children will be distributed among the other six elementary schools (K-5).
2. This distribution will take place in such a manner that there will be no less than two blacks per class and no more than six blacks per class.
3. Brothers and sisters in the same family will be assigned to the same school.
4. Assignments to these schools will be made by streets to keep friends and after school playmates together.
5. Assignment to Hamilton School will be made to those pupils residing closest to Hamilton School.
6. Free bus transportation will be provided for all pupils living more than 1½ miles from the assigned school.

B. Sixth grade students (effective September 1, 1969).

1. All public school students in grade six will attend Jefferson School.
2. Free bus transportation will be provided if the students live more than 1½ miles from Jefferson School.

C. Campus School children (effective September 1, 1969).

1. All students presently attending the Campus School grades Kindergarten through five, as a result of their option under the freedom of choice plan, will be assigned to Washington School. This keeps them with friends they have made in the Campus School.

D. Children who have optioned out of Jefferson School into our other elementary schools as a result of the freedom of choice plan.

1. These children (K-5) will remain in the school of their choice.
2. Free bus transportation will be provided if they live more than 1½ miles from the school.

E. The class size in our K-5 schools and the Central Six School will approximate 25 students per class."

Petitioners find this plan unacceptable and have filed the petition herein seeking to have it set aside.

Petitioners ground their attack on respondent's plan on two contentions: (1) it imposes a substantial and unequal burden upon the black community, and (2) it will have deleterious effects upon the black children.

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With respect to the first contention, petitioners point out that desegregation under this proposal is accomplished by dislocating black pupils from their normal attendance area and dispersing them among all of the other elementary schools. All of the black children in the Jefferson District, except those in the sixth grade, will be reassigned and bussed to six other locations. No white child, petitioner points out, will be required to attend a school outside of his regular attendance zone. While petitioners do not hold that every child has an absolute right to attend a neighborhood school, they do object to the disruption and dispersal of the children of the black community in order to achieve a racial balance when white children remain unaffected and retain the privilege of attending schools in their neighborhood. The denial of this privilege to black children while it is maintained for white pupils renders the plan discriminatory and unreasonable, in petitioners' judgment.

Secondly, petitioners allege that implementation of respondent's plan will be educationally harmful to black children. They cite the provision for reassignment under which there will be no less than two and no more than six black pupils in each class. Such a disproportionate number of blacks to whites will result in isolation of the black children, petitioners aver, with consequent damage to their educational progress. They argue that black children are handicapped when they constitute only a small number of the total group and that teachers tend to direct their attention to the majority group in a class while the educational interests of the minority go unattended. They fear that the preponderance of white pupils in each class will overwhelm and isolate the black children to the detriment of their best educational progress. Such a condition constitutes a denial of equal opportunity, in petitioners' view.

Petitioners concede that their contention that respondent's plan fails to provide equal protection to the black community might fall if the proposal were the only means of achieving effective integration. They maintain, however, that there are alternative remedies which would not only eliminate racial imbalance but would permit the black and white communities to share more equally the burden of dislocation and travel. To establish this point petitioners suggest a plan devised by their expert witness, a sociologist, which they claim would eliminate segregation at the Jefferson School and achieve racial balance at a level of 21 to 23 per cent black pupils at the Jefferson School and in the two elementary schools nearest to it.

Petitioners characterize their plan as a three-school "pairing." It would eliminate the separate attendance areas for the Hamilton, Jefferson and Battle Hill Schools and combine them into a single zone. Under such a combination all children of kindergarten grade in the three-zone area would attend the Hamilton School, those in grades one to three would go to the Jefferson School, and pupils in the fourth to sixth grade would be enrolled in Battle Hill. Petitioners' witness advocated further that the present optional transfer plan also be continued permanently "to provide some measure of desegregation of the other four schools and to give the Jefferson parents opportunity to choose what is best for their children, some of whom do very well in the necessarily isolated

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circumstances in more distant schools." (Tr. 53-54) Petitioners also propose that respondent give attention to (1) redistricting the junior high schools to produce a more even racial balance and (2) the elimination of "tracking" in the high school. The primary issue raised, however, is petitioners' contention that implementation of a desegregation plan which places unequal burdens on the black and white communities when it has been shown that there is a more equitable plan which will achieve the desired intermixture of the races, constitutes unlawful discrimination.

Respondent defends its plan as being sound both educationally and procedurally. Its Superintendent testified that the Board has considered a number of alternatives such as maintaining the status quo, closing the Jefferson School entirely, schools paired in various combinations, rezoning attendance areas, creation of a "magnet school," as well as the Central Sixth Grade Proposal at issue herein. The plan advanced by petitioners was among those considered and rejected in favor of the central sixth grade, respondent asserts, primarily because it failed to accomplish desegregation throughout the entire school system. Other unfortunate side effects of petitioners' plan, according to respondent, would be the necessity for pupils to change schools frequently and the fact that children from the same family would, in many instances, be attending different schools. Under its plan, respondent points out, every school and classroom in the district will reflect the racial composition of the community, pupils will not be forced to change schools during their first six school years but will remain in one school for grades K-5, and all children in a family will attend the same elementary school. Considerations such as these outweigh the fact that under the Central Sixth Grade Plan pupils in the Jefferson School District would attend a school out of their immediate area, in respondent's opinion. The amount of bussing petitioners' children will be subject to under respondent's plan does not constitute a hardship, in respondent's judgment, and witnesses were produced to substantiate this belief. Respondent contends that its Central Sixth Grade Plan is educationally the soundest it can devise and superior to petitioners' proposal in this respect.

Moreover, respondent urges, its plan meets the test of legal sufficiency while petitioners' proposal does not. Respondent cites *Booker v. Board of Education of Plainfield*, 45 *N.J.* 161 (1965), and the standards enunciated therein to be applied to desegregation proposals. It notes that the Court called for "the greatest dispersal (of the races) consistent with sound educational values and procedures," and maintains that petitioners' plan fails on this count for the reason that three schools would not be involved and would remain completely white. On the other hand, respondent contends, its Central Sixth Grade Plan would bring about the complete dispersal sought and would effectively desegregate every school in the district. Further, respondent urges, each of the other considerations, which the Court in the *Booker* case suggested needed to be taken into account, such as safety, convenience, time-economy, etc., were carefully studied by respondent before the Central Sixth Grade Plan was finally decided upon. Finally, respondent points out, its plan has been approved by the U.S. Department of Health, Education and Welfare as meeting the Federal

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guidelines for racial desegregation of public schools. Having thus formulated a plan which is educationally sound, which complies with the standards enunciated by the New Jersey Courts, and which satisfies Federal requirements, petitioners' sole basis for contesting the plan, respondent maintains, is merely that they favor their own proposal over the one adopted by the Board. Such a basis does not afford any ground, in respondent's judgment, for setting the plan aside or for intervention in any way by the Commissioner.

Respondent points out that its plan has already received approval of the United States Department of Health, Education and Welfare. The Commissioner considers this indication of satisfactory compliance with Federal standards for racial desegregation to be significant but not dispositive of the issues herein. It is not enough that respondent's plan meets Federal requirements. It must also be in harmony with the laws of New Jersey, and it is this test that the Commissioner is called upon to decide.

The Commissioner finds that petitioners have not established their allegation of invidious discrimination with respect to black children in this case. It is clear that respondent's plan effectively accomplishes system-wide desegregation as called for in *Booker* and complies with the guidelines laid down by the Court. Petitioners' plan, on the other hand, would bring about a better racial balance in only half of the schools, leaving the others unaffected. Moreover, it appears that respondent's arrangement is a complete long-range solution that will produce a balance of the races in the schools for the foreseeable future. The evidence fails to disclose any intention on the part of the Board to place the onus for desegregation on the black community or a failure on its part to consider and evaluate a variety of solutions. On the contrary, it appears that the Board considered a number of alternatives, including the one advocated by petitioners, and made a determination that the central sixth grade arrangement represented the most complete, long-term solution that could be devised. It is true that under this plan pupils from the Vauxhall section of the community, most of whom are black, will be required to attend an elementary school out of their immediate neighborhood for grades K-5, but it is also clear that all of the white pupils of the district (except those few who live in the Vauxhall area) will be displaced from their normal attendance area to sixth grade in the Jefferson School. While this does not constitute an equal balance in terms of movement, it must be recognized that most situations where the instant problem is found present such complex difficulties that a solution which is exactly equitable for every child or group is impossible to devise. Such is the case here. After considering all the possibilities, respondent selected the Central Sixth Grade Plan as the one which would afford the most complete and most permanent solution to the problem of racial imbalance and its reasons for doing so are valid, in the Commissioner's opinion.

Petitioners' allegation that respondent's plan is educationally unsound is also not supportable in this case. Petitioners' expert averred that black pupils would suffer isolation and educational harm under respondent's plan. His opinion was effectively refuted, however, by respondent's experts who cited the

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results of recent racial dispersal projects in public schools in a nearby state. The data resulting from scientifically devised research procedures in those programs, respondent's experts testified, indicate that the fears of isolation and poor progress expressed by petitioners' sociologist with respect to black pupils are not valid. Their findings show, rather, that given an opportunity to participate in a quality educational program in an environment representing the mainstream of the community, the achievement of black pupils and their emotional stability was equal to that of white children without regard to racial ratios within the class. In their opinion, the long-held assumptions of rejection and damage expressed by petitioners' witness have been disproved by recent research and can no longer be held valid.

In the Commissioner's judgment the fears expressed by petitioners that their children will be subject to anxieties and other forms of emotional stress, isolation and educational disadvantage can be raised more validly with respect to the educational program to be afforded than to the operation of respondent's plan. To a high degree, the conclusions of petitioners' chief witness assumed conditions of insensitive and inadequately trained teachers, an inappropriate curriculum, and generally a poor quality educational experience. Under such circumstance petitioners' fears could be well-grounded. No evidence was educed, however, that such conditions do or will exist in respondent's schools and the Commissioner will assume, therefore, that respondent intends to provide the kind of high quality educational program under its plan that will insure the richest and most equitable educational opportunities for each child in the district.

The Commissioner finds no need to deal with petitioners request that respondent provide a better racial balance in the junior high schools and eliminate "tracking" in the high school for the reason that no evidence was produced to establish these allegations. Under respondent's plan it appears that the racial balance achieved in the elementary schools will be carried into the junior high schools. The testimony on "tracking" in the high school was far from conclusive and failed to show any evidence of the kind of discrimination in curriculums which was struck down in the case of *Hansen v. Hobson*, 269 *F. Supp.* 401 (Washington, D.C. 1967), affirmed in *Smuch v. Hobson*, 408 *F. 2d* 682 (1969), to which petitioners alluded.

Finally, the Commissioner will point out that he has consistently held that when the matter is one of choice between plans aimed at reducing racial imbalance, each of which is legally sufficient and educationally sound, the discretionary prerogative lies with the local board of education and is not subject to dictation by the Commissioner or other person or agencies. In this case the Commissioner finds that respondent's plan will effectively eliminate racial imbalance in all of its public schools. He finds further that the plan is educationally sound and consistent with the requirements of New Jersey law. It will, therefore, remain undisturbed.

The petition is dismissed.

COMMISSIONER OF EDUCATION

January 21, 1970

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Sydney S. Lane,

Petitioner,

v.

Board of Education of the City of Bayonne, Hudson County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Schwager, Landau & Krantz (G. Lott Nostrand, Esq., of Counsel)

For the Respondent, John J. Pagano, Esq.

In this case, petitioner contests an action taken to retire her for reasons of disability, contending that she is not disabled but is fully qualified and desirous of continuing to teach. She prays to be reinstated as a teacher in respondent's school system in which position she had acquired tenure. Respondent admits moving to retire petitioner, but maintains that such action was necessary and proper in the circumstances. It moves for summary judgment on the grounds that there is no issue of material fact.

At a conference of counsel before a representative of the Commissioner of Education, held October 18, 1967, it was agreed that this matter could be expedited by appropriate examinations prior to a hearing on the merits of petitioner's claims. Accordingly it was decided that:

1. A psychiatric examination of petitioner would be made by a physician of her choosing, and a report thereof would be filed with respondent.
2. Petitioner would submit to a second psychiatric examination by a physician chosen by respondent, if desired.
3. If necessary, a further examination would be performed by a third psychiatrist to be chosen by joint agreement of counsel.

Respondent agreed to pay the costs of the examinations.

In accordance with these agreements, petitioner was examined on December 18, 1967, by a doctor chosen by her and on January 15, 1968, by one selected by respondent. Some conflict in the findings led counsel to agree upon a third psychiatrist who examined petitioner on July 18, 1968. Thereafter, respondent filed the instant motion for judgment on the grounds that there is no issue of material fact between petitioner and respondent. Argument on the motion was heard by the Assistant Commissioner in charge of Controversies and Disputes at Trenton on May 8, 1969.

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The following facts are not disputed. Petitioner was employed as a teacher in respondent's school system from September 1, 1943, until July 1, 1967, during which time she acquired tenure in her position. On April 13, 1967, respondent adopted a resolution to retire petitioner for reasons of disability which made her incapable of performing her duties, effective July 1, 1967, and subsequently filed certificates and documents pertinent thereto with the Secretary of the Teachers' Pension and Annuity Fund. Petitioner filed the petition herein to set aside respondent's action, on September 19, 1967. Thereafter, the various conferences and examinations referred to *ante* occurred and culminated in respondent's motion for summary judgment now before the Commissioner.

Although no complete report of petitioner's first examination has been submitted to the Commissioner, it appears from statements of respondent in the record, undisputed by petitioner, that the examination was conducted by Dr. A. R. Krenzel, of Philadelphia, Pennsylvania, and that he found (1) that petitioner had improved under treatment and (2) that she was able to resume her employment as a school teacher. Dr. F. A. Figurelli, selected by respondent to perform the second examination, reached the following conclusion:

> "It is my opinion that the pressures of classroom teaching could disturb patient's emotional stability, and precipitate a recurrence of her illness. At the present time patient appears to be improved, as stated by her psychiatrist. However, he does not feel that she is fully recovered; nor does he discount the probability of a recurrence of her illness. I tend to concur with him.
>
> "Recommendation: Encourage patient to obtain other type of employment.
>
> "Prognosis: Guarded."

These conflicting opinions led to the third examination on July 18, 1968, by Dr. Noel C. Galen, chosen by both counsel from a panel of physicians recommended by the President of the Bergen County Medical Association. After reciting petitioner's previous history of emotional illness, Dr. Galen made the following pertinent observations and conclusions:

> "* * * it is my distinct clinical impression that despite the fact that she is now in remission, there is below the surface a literal ferment of hostility, rage and resentment. Just when this will flower again in a paranoid episode is extremely difficult to determine. However, I feel that the elements of another psychotic episode are present.
>
> "In conclusion, I feel that although this * * * woman has presently compensated after three psychotic episodes, that the likelihood is high and that under stress situations and teaching children, there may be another occurrence of her previous illness. I therefore feel that the patient should not be placed where she is under stress from children at the present time."

Respondent contends that the weight of medical evidence establishes the

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validity of its action to retire petitioner from teaching duties. It points to the fact that although petitioner's physician, Dr. Krenzel, believed petitioner could return to teaching, each of the four other medical authorities consulted (Dr. William T. Fifer, respondent's chief medical examiner, Dr. John J. Mackin, Dr. Figurelli and Dr. Galen) recommended that petitioner not be returned to classroom teaching duties. That being so, respondent argues, there is no basis for a hearing. Such a hearing, if held, respondent contends, would amount to nothing more than a repetition of the medical reports already available and as such no purpose would be served. Respondent moves, therefore, to dismiss the matter at this juncture.

Petitioner opposes the motion for judgment, alleging that the language of the several psychiatrists is guarded and does not specifically hold that she should not teach, but only that there is a risk to her continuing health were she to be reinstated. Petitioner asks, therefore, that respondent's motion be denied and that she be afforded her day in court.

In the interest of affording a full hearing to petitioners who appeal to him, the Commissioner exercises great restraint in granting motions for judgment on the pleadings and only does so when the facts are abundantly clear, there is no issue of a genuine material fact, and resort to a further hearing would serve no good purpose. See *Judson v. Peoples Bank*, 17 *N.J.* 67(1954); *U.S. Pipe and Foundry Co. v. American Arbitration Association*, 67 *N.J. Super.* 384 *(App. Div.* 1961); *Rothman v. Silber*, 90 *N.J. Super.* 22 (*App. Div.* 1966).

The Commissioner concurs with respondent that further hearing in this case will shed no additional light on the questions raised. It is not uncommon to have conflicting medical reports in a matter of this sort, and final judgment must be based on a weighing of such expert opinion. It appears that all of the medical evidence has already been made a part of the record, and no further medical examinations or conclusions are contemplated. That being so, the Commissioner finds that there is no genuine issue of material fact herein, and the matter is a proper subject for consideration of summary judgment.

The Commissioner also concurs with respondent that the preponderance of the medical opinions establishes petitioner's incapability to continue teaching. While the doctors agree that petitioner is fortunately not experiencing a psychotic episode at present, the majority of them agree that, in her own best interests, she should not be exposed to the stress of classroom teaching. The Commissioner would point out further that his first duty must be to the children who attend the public schools. They are entitled to be instructed by teachers who are in good physical and emotional health. While the interests of teachers must be assiduously guarded, it is even more basic to protect the welfare of the pupils. In this case, competent medical advisors have expressed grave doubts of the teacher's health and capability. Such doubts must be resolved in favor of the children to be served, in the Commissioner's judgment. The Commissioner finds, therefore, that there is substantial evidence to establish the fact of petitioner's incapability because of illness, and there being no further issue of material fact, respondent's motion for summary judgment is appropriate and is hereby granted.

COMMISSIONER OF EDUCATION

January 21, 1970

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In the Matter of the Application of Branciforte Builders, Inc. for Reclassification.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Joseph C. Messina, Esq.

Petitioner, a contractor engaged in the construction of public school facilities, appeals from a determination of the Bureau of School Planning Services, hereinafter "Bureau," within the New Jersey State Department of Education, limiting the amount of work on which he is qualified to submit bids to $1,000,000. Petitioner asks that his classification be amended to $4,000,000. A hearing before the Assistant Commissioner in charge of Controversies and Disputes was held on May 26 and December 1, 1969, at the New Jersey State Department of Education, Trenton, New Jersey.

Bidders on public work for New Jersey boards of education are required to be classified by the State Board of Education with respect to the character and amount of public work on which they are qualified to submit bids. *N.J.S.A.* 18A:18-9 The procedures for obtaining such classification are set forth in rules and regulations of the State Board and are administered by the Bureau of School Planning Services within the State Department of Education. Appeals from classification determinations may be taken pursuant to *N.J.S.A.* 18A:18-12 which provides in pertinent part:

> "Any person, after being notified of his classification, being dissatisfied therewith * * * may request in writing a hearing before the commissioner, and may present such further evidence with respect to his financial ability, plant and equipment or prior experience, * * * as might tend to justify a different classification."

Petitioner makes such an appeal herein, contending that his financial ability, adequacy of plant and equipment, organization and prior experience justify a classification of at least $4,000,000.

The records within the State Department of Education reveal that petitioner's first application for classification was approved on January 4, 1963, for $450,000. His classification was renewed on periodic reapplications ranging from a low of $450,000 to a maximum of $2,000,000. On August 1, 1965, petitioner was classified for $1,000,000 and has remained at that figure since.

In support of his claim of adequate financial ability, petitioner called a representative of a bonding company who testified that his organization would not hesitate to underwrite petitioner's performance for an amount of $3,000,000. The Bureau concedes that petitioner's financial capacity is not in question in its determination that Branciforte Builders, Inc., be classified at a maximum of $1,000,000. Its decision, it states, is based not on financial incapacity but on reports which it has received of poor past performance by

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petitioner and the absence of any evidence of approval by boards of education employing him or any kind of written refutation of the complaints received from school districts with respect to his work.

Staff members of the Bureau testified that they have received numerous complaints from boards of education and architects for whom petitioner has done work. They contend that they have had more complaints with respect to petitioner than any other contractor; that they have held many conferences with him and/or his representatives pointing out the dissatisfaction expressed about the performance of his contracts; that they have asked petitioner to supply data refuting these reports or to furnish statements endorsing and recommending his work; and that, to date, no board of education has made a favorable report nor has petitioner supplied the Bureau with any kind of statement endorsing, approving or recommending his services. In answer to questioning, the Assistant Commissioner in charge of the Division of Business and Finance, who administers the operation of the Bureau, conceded that it might have been wiser, in view of the consistent unsatisfactory evaluations, to deny petitioner a classification in any amount. According to him the decision to qualify petitioner at $1,000,000 was a compromise to permit petitioner to undertake work of a scope limited to that amount but restricting him from bidding on larger projects until he could demonstrate his ability to perform his contracts in an acceptable manner. The Assistant Commissioner stated further that petitioner has shown little disposition to cooperate with local boards of education or the Bureau or to conform to the laws and rules under which it operates. In support of this allegation he elicited from petitioner an admission that, although he was not qualified to submit bids on work for more than $1,000,000, petitioner had in fact knowingly submitted a bid in excess of that amount to a board of education during the pendency of this litigation. Such reckless disregard of statute, rule and proper procedure is characteristic of petitioner and the manner in which he discharges his obligations to his employees, the Assistant Commissioner charged, and constitutes the basis for the Bureau's refusal to increase the amount for which he is qualified.

Petitioner denied the charge of unsatisfactory performance. In his testimony he attempted to explain and refute each of the complaints placed in evidence by the Bureau, claiming that they resulted from misunderstanding, distortion of the facts and the placing of blame on him for faults which in fact were the responsibility of other prime contractors, architects, or other parties. Petitioner urged that he was more sinned against than sinning in this respect. But, petitioner argues, even were he guilty of gross derelictions of performance, which he denies, performance reports are not a proper or appropriate basis for determining the limits of a contractor's capacity to bid on a job. In his opinion the standards to be applied should be limited to those set forth in the statutes requiring prequalification. These statues cite such criteria as financial capacity, adequacy of plant and equipment, organization and prior experience of the prospective bidder, petitioner notes, but fail to include past performance as a measure of classification. Inclusion of such a standard, when the statute is silent with respect to it, is arbitrary and unreasonable, petitioner maintains.

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The Commissioner cannot agree that past performance should not be considered in setting the classification of a prospective bidder. It is clear that Section 3 and Section 5 of *Chapter* 105 of the *Laws* of 1962 (*N.J.S.A.* 18A:18-10 and 12) enunciate the criteria cited by petitioner and make no mention of past performance. Section 7 of the *Act (N.J.S.A.* 18A:18-14), however, requires boards of education to provide and the Department of Education to gather such information:

> " * * * The specifications for every such contract subject to this chapter shall provide that the board of education, through its architect or other authorized agent, shall upon completion of the contract *report to the department as to the contractor's performance*, and shall also furnish such report from time to time during performance if the contractor is then in default." (Emphasis added.)

Moreover, Section 10 of the Act directs the State Board of Education to establish regulations for controlling the qualifications of bidders, which regulations are to include all "pertinent and material facts." In the rules and regulations adopted by the State Board pursuant to this statue may be found the following pertinent excerpt:

> "2.In classifying a bidder as to the character and amount of public work on which he shall be qualified to submit bids, the following shall be considered:
>
> a. Available capital and equipment
> b. Bidder's organization
> c. Bidder's experience and *record of performance* (Emphasis added.)
> d. All other pertinent and material facts

In the light of the Legislature's specific directive that information relating to performance be gathered for each bidder, petitioner's argument that such data cannot be used in determining his classification is without merit. The Legislature is deemed to be cognizant of its actions and its enactments may not be construed to reach an absurd or anomalous result. *Robson v. Rodriguez*, 26 *N.J.* 517 (1958); *Union County v. Benesch*, 98 *N.J. Super.* 167 (*Law Div.* 1967) Statutes in *pari materia* are to be construed together to effectuate the general legislative policy. *State v. Wean*, 86 *N.J. Super.* 283 (*App. Div.* 1965) The Commissioner, therefore, rejects this contention of petitioner and holds that consideration of past performance in the determination of a bidder's classification is a valid exercise of the discretionary authority vested in the Bureau.

The question which remains then is whether the Bureau's determination to limit petitioner to a classification of $1,000,000 is supported by sufficient evidence. The Commissioner finds that the classification set by the Bureau is proper and justified and that there is ample evidence in the record, not refuted successfully by petitioner, to support its determination.

It should be emphasized that the decision to impose a limitation of $1,000,000 on petitioner's bidding is not punitive in nature, but is done to provide a measure of protection for boards of education in their responsibility to

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insure that full value is received for public monies spent by them. The decision to qualify petitioner for contracts up to $1,000,000 also indicates that reports of past performance were not the sole criterion on which the Bureau relied and that the firm's financial ability permitted what otherwise might have been an even more severe limitation.

Bidders are subject to renewal of classification every six months. The Commissioner takes notice that petitioner's present classification expires on March 11, 1970, and he must apply for renewal before that date. The testimony reveals that petitioner currently has construction under way for several boards of education. The Commissioner will direct the Bureau to take appropriate steps to evaluate petitioner's performance on these jobs prior to the date for renewal of his classification. Such steps may include but are not limited to on-site inspections, conferences with authorized representatives of the employing boards of education, written reports, etc. Petitioner may also supply the Bureau with documentary evidence to support a claim of satisfactory performance. The Bureau will then reconsider petitioner's classification at the time of renewal on the basis of the new and current information to be gathered on recently finished or still uncompleted projects in which petitioner is a contractor. Petitioner's classification will remain at $1,000,000 pending further investigation and reconsideration by the Bureau at the time of renewal.

The appeal is dismissed without prejudice.

COMMISSIONER OF EDUCATION

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Board of Education of the Borough of Spotswood,

Petitioner,

v.

Board of Commissioners of the Borough of Spotswood, Middlesex County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Daniel Golden, Esq., (Edwina S. Hibel, Esq., of Counsel)

For the Respondent, Guido J. Brigiani, Esq.

The Board of Education of the Borough of Spotswood (hereinafter "Board") appeals from an action of the Board of Commissioners of that Borough (hereinafter "Commissioners") certifying to the Middlesex County Board of Taxation lesser amounts to be raised by local taxation for the current expenses and capital outlay for the school year 1969-70 than the amounts submitted to and rejected by the voters at the annual school district election on February 11, 1969, and at a special election on February 25, 1969. Petitioner alleges that respondent's action was arbitrary and unlawful, and that the amounts as submitted to the electorate are necessary for the operation of a thorough and efficient school system in the district. Respondent denies these allegations, and asserts that the amounts fixed by it are sufficient to maintain a thorough and efficient school system.

A hearing in this matter was conducted on June 25, 1969, at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

At the annual and special school elections the Board proposed amounts as shown in the table below to be raised by local taxation to support current expense and capital outlay appropriations for the school year 1969-70. After these items were rejected at both elections, the budget was submitted to the Commissioners, who made reductions in both accounts, as shown in the table, and, by resolution dated March 24, 1969, certified the reduced amounts to the County Board of Taxation as follows:

	Current Expense	Capital Outlay
Proposed by Board	$937,477.00	$14,483.50
Reduced by Commissioners	36,000.00	8,500.00
Certified to Board of Taxation	$901,477.00	$ 5,983.50

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In a statement in explanation of its action, the Commissioners assert that the Board's budget called for an increase of $230,000 in current expenses over its 1967-68 budget. Of this increase, the statement sets forth, $107,000 is for certain salary increases to implement various salary guides. From the remaining $123,000, the Commissioners cut $36,000, asserting that other aspects of education, besides salaries, "can be reduced without preventing the Board of education from providing a thorough and efficient system of free public schools in the Borough."

The Board's appropriation, the Commissioners' proposal, and the resultant reductions are shown as follows:

Acc't. No.	Item	Board's Budget	Comms' Proposal	Am't. Of Reduction
Current Expense:				
120a	Public School Accountant's Fee	$ 2,500	$ 2,000	$ 500
130a	Board Members' Exp.	1,200	1,000	200
130b	Bd. Secy's Office Exp.	1,000	500	500
130d	School Elections Exp.	1,500	1,200	300
130f	Supt's. Office Exp.	700	500	200
130m	Printing and Publishing Exp.	700	500	200
130n	Misc. Admin. Exp.	650	550	100
213.2	Salaries-Bedside Teachers	6,800	6,000	800
213.3	Salaries-Supp. Teachers	8,000	7,500	500
250b	Travel Exp.-Instr.	1,400	700	700
420c	Misc. Exp.-Health Serv.	755	255	500
520	School Transp.	93,494	88,494	5,000
610a	Salaries-Custodial	37,734	32,734	5,000
720a,b,c	Contr. Serv.-Maint.	13,000	11,000	2,000
740a,b,c	Other Exp.-Maint.	1,500	1,000	500
870	Tuition	509,000	490,600	18,400
1100	Community Services	600	- 0 -	600
	Total Current Exp. Reductions			$36,000
Capital Outlay:				
1220c	Impr. to Sites	$ 8,000	$ 3,000	$ 5,000
1240d	Equip.-Plant Operation	3,500	- 0 -	3,500
	Total Capital Outlay Reductions			$ 8,500

Testimony was heard from witnesses from the Board of Education and the school administration in support of the Board's petition for restoration of the Commission's cuts. The Mayor of the Borough testified as to the resolution of the Commission establishing the amounts to be certified to the County Board of Taxation. Otherwise respondent relies upon a schedule setting forth its underlying reasons and explanations for suggested reductions. The findings, conclusions and recommendations of the hearing examiner as to each of the suggested reductions are as follows:

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With respect to Items 120a, 130a, 130b, 130d, 130f, 130m, and 130n, the Commissioner points out that in 1967-68, the total expenditure for administration (100 series) was $16,267. For 1968-69, the budget rose to $19,100. For 1969-70, the budget of the Board, excluding the salary for the new position of Superintendent, is $22,500. By reductions totaling $2,000 in the above-mentioned items, the Commission proposes to bring the spending level for school administrative services down to a point near that for 1968-69.

120a - Public School Accountant's Fee. In 1968-69, the Board budgeted $2,000 for this account. As of the date of the hearing it had expended $2,100. The Board Secretary testified that the auditor had quoted a fee of $2,500 for 1969-70, and the Board had contracted to pay that amount. Absent any showing by the Commissioner that this legally required service could be performed for $2,000, as it recommends, the hearing examiner recommends restoration of $500 to this account.

130a - Board Members' Expenses. The original budget appropriation for 1968-69 in this account was $1,000. As of May 31, 1969, over $1,440 had been spent. The 1969-70 appropriation by the Board of $1,200 is proposed by the Commission to be cut back to $1,000. It was testified that this account provides not only for annual dues to the State Federation of District Boards of Education and the Middlesex County Federation, but also for publications, committee expenses, and attendance at workshops and conventions. The cut of $200 proposed by the Commission would eliminate workshop and convention expenses, it was testified. The hearing examiner finds that the increase of $200 proposed by the Board is reasonable, and recommends restoration of its proposed elimination by the Commission.

130b - Board Secretary's Office Expenses. It was testified that expenditures and commitments in this account as of May 31, 1969, amounted to $938, against a budgeted appropriation of $400 for 1968-69. Expenditures in 1967-68 had amounted to $630.67. The Commission proposes a reduction of $500 from the $1,000 appropriation, but gives no supporting reason. It is recommended that the $500 be restored to this account, since it was testified that $400 is needed to install a new and more efficient bookkeeping system, over and above usual and recurring expenses charged to this account.

130d - School Elections Expenses. The Commission recommended a cut of $300 for this item, bringing the appropriation to the 1968-69 level. The Board has stipulated that it will accept the reduction as recommended.

130f - Superintendent's Office Expense. The Superintendent testified that the $700 appropriated for this item is needed to provide $500 for supplies and $200 for brochures for teacher recruitment. The appropriation of $500 for 1968-69 was not fully expended. Absent a clearer indication of the need for an increased appropriation than was adduced by the testimony, it is recommended that the proposed reduction of $200 be undisturbed.

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130m - Printing and Publishing Expenses. The 1968-69 budget for this account was $500, of which $339 had been expended to May 31, 1969. The Board's appropriation for 1969-70 is $700, from which the Commission proposes to cut $200. Although it was testified that the Board contemplates additional public relations expense for 1969-70, the evidence supplied does not support the need for an additional $200 in this account. It is recommended that the Commission's cut be undisturbed.

130n - Miscellaneous Administration Expenses. The budget of $500 for 1968-69 was increased to $650 for 1969-70. Because of the creation of the new position of Superintendent of Schools, miscellaneous expenses previously chargeable to instruction accounts must now be charged to this account. In both 1967-68 and 1968-69, actual expenditures exceeded $500. For these reasons, the hearing examiner recommends restoration of the $100 proposed to be cut by the Commission.

213.2 - Salaries - Bedside Teachers. The spending data in this account are as follows:

1967-68	actual	$5,257.13
1968-69	budgeted	3,000.00
1968-69	spent to May 31, 1969	7,577.87
1969-70	proposed	6,800.00

The Commission recommends a reduction of $800 for 1969-70. The testimony of the Board shows that in 1968-69, there were 21 pupils receiving bedside instruction, one or two of whom are expected to be permanently in need of such instruction during their school years. No significant change in the number of pupils to be served is anticipated for 1969-70, it was testified. Absent any testimony that the need will be reduced, and in the light of prior years' experience, the hearing examiner finds that the need for a $6,800 appropriation is necessary, and recommends restoration of the proposed $800 reduction.

213.3 - Salaries - Supplemental Teachers. It was testified that in 1968-69, eight supplementary teachers for 29 pupils were employed on an hourly basis for a total cost of $11,670 as of May 31, 1969. In 1967-68, $8,480 was spent for this purpose. The Board's budget for 1968-69 was $4,500; for 1969-70 it was increased to $8,000. The Commission proposes a reduction of $500, but offers no evidence or reason to support a lesser need. The hearing examiner finds the Board's proposed increase reasonable in light of two years' experience, and recommends restoration of the $500.

250b - Travel Expenses - Instruction. In 1967-68, the Board spent $1,059 for this item. Its appropriation for 1968-69 was $400. Expenditure data for 1968-69 were not supplied, although the entire 250 account shows a surplus as of May 31, 1969. The budgeted appropriation for 1969-70 of $1,400 would be halved by the Commission's proposed $700 reduction. Although it was testified that approximately ten teachers are reimbursed for travel within the school district at an average of $100 each, and travel expenses for workshops are

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reimbursed, the spending data do not support this figure. The hearing examiner does not find that the evidence supports the need for an appropriation of $1,400. It is recommended that $400 of the proposed cut of $700 be sustained, and $300 be restored, to provide an appropriation of $1,000 in this account.

420c - Miscellaneous Expenses - Health Services. An appropriation of $755 in this account for 1969-70 is described by the Commission since it did not appear in the 1967-68 or 1968-69 budgets. The Commission recommends that it be reduced by $500 to $255. The Board Secretary testified that the money is needed to provide 120 x-rays for staff members at $3.00 each, $200 for dental service materials, and physical examinations for special education pupils. Since these health services are vital elements of the educational program, the hearing examiner recommends the restoration of $500 in this account.

520 - School Transportation. The Commission recommends a general reduction of $5,000 in the transportation account. It asserts that the 1968-69 transportation expenditures amount to about $80,000, and recognizes the need for two additional buses for high school transportation in 1969-70, at an added cost of $8,500. It concludes, therefore, that the Board's appropriation of $93,944 for all transportation costs can be reduced by $5,000. It also recommends rebidding the present bus contracts. The increase is shown by the Board to arise essentially from an expected ten per cent increase in the cost of contracts for four routes to be advertised for bidding, amounting to $4,800, two new routes to be advertised for bid at an expected cost of at least $5,000 each, and a 15 per cent increase in the cost of two contracts to be renewed, at about $560. Increases of $450 in the cost of non-public school transportation costs and $2,200 for transportation of special education pupils are offset by decreases of $700 in the appropriation for field trips and $2,010 for additional transportation. The hearing examiner finds that the need for a transportation appropriation of $93,494 has been established by the evidence and recommends restoration of $5,000 to this account.

610a - Salaries - Custodial. The 1968-69 budget figure for custodial salaries and wages was $32,550. The increases proposed for 1969-70 raised this to $37,734. The custodial staff consists of a superintendent of buildings and grounds, who does full-time custodial work in one of the four school buildings, and three custodians. To meet the acknowledged need for more custodial help, the Board employs boys who work part-time on an hourly wage basis. The Board planned in 1969-70 to add more adult help in order to relieve the superintendent of buildings and grounds of full-time custodial work. The Commission proposes that boys be employed, at a lower hourly rate than would be necessary to employ an adult. While in no way depreciating the value of the work opportunity afforded to boys, the hearing examiner finds that the Board's proposal will provide the necessary custodial services and at the same time permit the custodial superintendent to perform the functions which such a supervisory job entails. It is recommended that the $5,000 cut by the Commission be restored.

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720a, b, c - Contracted Services - Maintenance. The Board budgeted $11,000 for contracted maintenance services for 1968-69. For 1969-70 it eliminated a previous $2,000 appropriation for upkeep of grounds, but increased the amount for repairs to buildings from $8,000 to $12,000, for a net increase in the 720 account of $2,000. The Commission asserts that the $2,000 increase can be eliminated, recommending that building repairs should be bid, and that a professional evaluation and schedule of building repairs should be made. The Board testified that the major part of the building repairs increase was planned for the Birchall School, a 68-year-old building in need of exterior and interior painting, replacement of windows damaged by dry rot, and sandblasting and painting of the fire escape. Necessary as these repairs are, the evidence is insufficient to show that other planned repairs in other buildings are equally urgent and cannot be deferred. The evidence further shows that nearly $1,600 of the $11,000 budgeted for 1968-69 had not been spent or committed at the time of the hearing. The hearing examiner finds that the need for a $2,000 net increase in this account has not been established, and recommends that the Commission's $2,000 reduction be sustained.

740a, b, c - Other Expenses - Maintenance. The Board's budgets for both 1968-69 and 1969-70 for the total 740 account are the same - $1,500. However, expenses of $500 for upkeep of grounds for 1968-69 are eliminated, and $500 for repair of equipment in 1968-69 has been reduced to $200. The resulting $800 difference is reflected in an increase from $500 to $1,300 for repair of buildings. The Commission proposes eliminating $500 of this increase. In light of the reduction in the appropriation for the 720 account, *supra*, this reduction in "other expenses," which provide for materials for building repairs, is consistent. The hearing examiner accordingly recommends that the Commission's reduction of $500 be sustained.

870 - Tuition. The Commission proposes a reduction of $18,400 from the increase from $414,563.50 in 1968-69 budget figures to $509,000 budgeted for 1969-70. The basis for the reduction, the Commission asserts, is the overestimation of the number of pupils to be sent to junior and senior high schools in another district, and the number of special education pupils for whom tuition must be paid. Basing its estimates on present enrollments and past experience, the Commission believes that junior high school tuitions can be reduced by 11 pupils at $680 for a total of $7,480; high school tuitions can be reduced by 10 pupils at $880, for a total of $8,800; and special education tuition can be reduced a total of $2,000, based on present enrollments. (The hearing examiner notes that the total proposed savings amount to $18,280, not the $18,400 which the Commission eliminated.) Revised enrollment figures offered by the Board at the hearing show a need for $484,532, a reduction of $4,468 from budgeted figures for junior and senior high school tuition; and a need for $14,934 for special education tuition, instead of the $21,000 budgeted figure, a reduction of $6,066. The total tuition reduction shown by the Board's revised estimates is thus $10,534. The Board's witness acknowledged overestimates of tuition enrollments in previous years, but asserts that the 1969-70 estimates are accurate. The hearing examiner recognizes the difficulty

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of making accurate projections, but finds that the Board's estimates have been carefully prepared and should be given credence. It is therefore recommended that tuition funds be provided on the basis of the Board's revised figures which show a total need of $499,466. This will result in restoring $8,866 of the Commission's cut, and sustaining $9,534.

1100 - Community Services. The Commission proposed eliminating the $600 budgeted in this account. The Board stipulates that it accepts this reduction.

1220c - Improvements to Sites. The Board appropriated $8,000 for this account, $5,000 of which was designed for black-topping school grounds to improve drainage. The Commission eliminated this $5,000, contending that this improvement can be deferred as not urgently required for the efficient operation of the school system. The Board concedes that $1,000 for black-topping at Appleby School can be deferred, but insists that $4,000 is needed for similar work at Birchall School, where poor drainage creates dampness which damages plaster walls and generates an unwholesome odor. The hearing examiner finds that the need for $4,000 for black-topping at Birchall School is clear, and recommends restoring $4,000 and sustaining $1,000 of the Commission's proposed reduction.

1240d - Equipment - Plant Operation. The Commission recommended deferring the proposed purchase of a "mini bus" and thereby reduced this account by the total appropriation of $3,500. The Board stipulates that this reduction is acceptable.

The recommendations of the hearing examiner for restoring or sustaining part or all of the Commission's proposed reductions are shown as follows:

Acc't. No.	Item	Am't. Of Reduction	Am't. Restored	Am't. Not Restored
Current Expense:				
120a	Public School Accountant's Fee	$ 500	$ 500	$ - 0 -
130a	Board Members' Exp.	200	200	- 0 -
130b	Bd. Secy's. Office Exp.	500	500	- 0 -
130d	School Elections Exp.	300	- 0 -	300
130f	Supt's. Office Exp.	200	- 0 -	200
130m	Printing and Publishing Exp.	200	- 0 -	200
130n	Misc. Admin. Exp.	100	100	- 0 -
213.2	Salaries - Bedside Teachers	800	800	- 0 -
213.3	Salaries - Supp. Teachers	500	500	- 0 -
250b	Travel Exp.-Instr.	700	300	400
420c	Misc. Exp.-Health Serv.	500	500	- 0 -
520	School Transp.	5,000	5,000	- 0 -
610a	Salaries-Custodial	5,000	5,000	- 0 -
720a, b,c	Contr. Serv.-Maint.	2,000	- 0 -	2,000
740a, b,c	Other Exp.-Maint.	500	- 0 -	500

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870	Tuition	18,400	8,866	9,534
1100	Community Services	600	- 0 -	600
Total Current Expense		$36,000	$22,266	$13,734
Capital Outlay:				
1220c	Impr. to Sites	$ 5,000	$ 4,000	$ 1,000
1240d	Equip.-Plant Operation	3,500	- 0 -	3,500
	Total Capital Outlay	$ 8,500	$ 4,000	$ 4,500

The Commissioner has reviewed and considered the findings, conclusions and recommendations of the hearing examiner as set forth above. He finds and determines that the amounts certified by respondent to the Middlesex County Board of Taxation for the current expenses and capital outlay of the Spotswood School District are insufficient for the maintenance and operation of a thorough and efficient system of public schools for the 1969-70 school year. He therefore directs the Board of Commissioners to certify to said Board of Taxation the additional amounts of $22,266 for current expenses and $4,000 for capital outlay, to be raised by local taxation for the support of the Spotswood Public School System for the school year 1969-70.

COMMISSIONER OF EDUCATION

January 30, 1970

* * * *

Board of Education of the City of Passaic,

Petitioner,

v.

Municipal Council of the City of Passaic, Passaic County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Louis Marton, Jr., Esq.

For the Respondent, Charles E. Miller, Esq.

Petitioner (hereinafter "Board") appeals from an action of the Municipal Council of the City of Passaic (hereinafter "Council") certifying to the Passaic County Board of Taxation lesser amounts of money to be raised by local taxation for the current expense and capital outlay needs of the school district for the school year 1969-70 than the amounts proposed by the Board and rejected by the voters at the annual and special school district elections. Respondent denies petitioner's allegation that it acted in an arbitrary and capricious manner, and asserts that after its reduction in the amounts certified, the Board will have adequate funds which will not affect the quality of education to be provided in the 1969-70 school year.

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At a preliminary conference held on May 1,1969, the Commissioner directed that certain data and statements be filed prior to a hearing in this matter. A hearing was thereafter held on June 17, 1969, at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

At the annual school district election held on February 11, 1969, the Board presented to the electorate the following proposals, *inter alia,* of amounts to be raised by local taxation:

For current expenses	$5,409,642.91
For capital outlay	45,172.30

These proposals were defeated, and the Board thereafter submitted to the electorate at a special election on February 25, 1969, the following proposals which were also rejected:

For current expenses	$5,357,475.48
For capital outlay	45,172.30

Additional proposals for vocational evening schools and schools for the foreign born, totaling $7,728.83, were submitted at both elections and were subsequently certified, without change, by Council.

Thereafter the Board filed with the Council its proposed budget, and by resolution dated March 6, 1969, Council certified to the County Board of Taxation the amounts of $5,203,009.48 for current expenses, and $35,172.30 for capital outlay, to be raised by local taxation for the 1969-70 school year. Council's certification reflects a reduction of $154,466 in current expense appropriations, and $10,000 in capital outlay. In a statement accompanying its resolution, Council proposed budget reductions in current expenses in the sum of $96,666, and recommended the appropriation of an additional $25,000 from available surplus and cancellation of $32,800 of prior years' orders.

In its answer to the petition herein, Council set forth basic categories of expenditures in which it considered that "unnecessary expenses" were included in the Board's budget. In a later statement provided by direction of the Commissioner, dated June 11, 1969, Council set forth in detail the specific line items in which it proposed reductions, as summarized and set forth in the following table:

Acc't. No.	Item	Board's Budget	Council's Proposal	Am't. Of Reduction
Current Expense:				
110m	Salaries-Printing & Publ.	$ 8,000.00	$ 5,000.00	$ 3,000.00
130a	Exp.-Bd. Members	1,965.00	1,465.00	500.00
130e	Other Exp.-Legal Serv.	1,000.00	500.00	500.00
130j	Other Exp.-Admin., Bldgs.& Grounds	1,000.00	600.00	400.00
130m	Other Exp.-Printing & Publ.	6,500.00	4,400.00	2,100.00

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130n	Misc. Exp.-Admin.	2,500.00	1,500.00	1,000.00
213.1	Salaries-Teachers	3,714,644.04	3,692,978.04	21,666.00
220	Textbooks	60,989.35	57,489.35	3,500.00
230a	Library Books	17,863.00	15,863.00	2,000.00
230c	Audio-Visual Materials	10,440.00	8,440.00	2,000.00
240-1	Fine Arts-Teaching Supps.	26,190.00	24,690.00	1,500.00
250a	Misc. Supp.-Instr.	6,214.75	5,214.75	1,000.00
250c	Misc. Exp.-Instr.	8,650.00	6,150.00	2,500.00
720a	Contracted Serv.-Upkeep of Grounds	5,950.00	3,950.00	2,000.00
720b	Contracted Serv.-Repair of Bldgs.	81,175.00	46,175.00	35,000.00
720c4	Contracted Serv.-Repair of Music Ed. Equip.	2,231.00	1,831.00	400.00
720c6	Contracted Serv.-Repair of Ind. Arts Equip.	750.00	350.00	400.00
730a	Replacement of Furniture	4,882.00	2,322.00	2,500.00
730a1	Replacement of Fine Arts Equip.	5,409.00	2,909.00	2,500.00
730a3	Replacement of Educ. Equip.	7,712.10	6,212.10	1,500.00
730a6	Replacement of Kdg. Equip.	1,064.45	564.45	500.00
730b12	Replacement of Motor Veh.	4,000.00	2,500.00	1,500.00
730b13	Replacement of Bd. Secy's Office Equip.	1,000.00	500.00	500.00
740a	Other Exp.- Upkeep of Grounds	3,575.00	2,075.00	1,500.00
740b	Other Exp. - Repair of Bldgs.	13,500.00	11,800.00	1,700.00
1010	Salaries - Stud. Body Activ.	19,800.00	19,600.00	200.00
1020	Other Exp.-Stud. Body Activ.	15,490.00	13,490.00	2,000.00
1030	Exp. to Cover Ath. Deficits	4,215.00	3,415.00	800.00
1112	Salaries - Civic Activ.	10,000.00	8,000.00	2,000.00
	Total Current Expense	$4,046,649.69	$3,949,983.69	$96,666.00
Capital Outlay:				
1240	Equipment	$42,266.20	$32,266.20	$10,000.00
Total Capital Outlay	$42,266.20		$32,266.20	$10,000.00
	Appropriation from Surplus			$25,000.00
	Cancellation of Prior Years' Orders			32,800.00
	Total Reductions			$164,466.00

Petitioner charges that the reductions made by Council are arbitrary and capricious. The hearing examiner cannot so find. The evidence shows that

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Council's action, except as will be more fully set forth herein, proceeded from its conclusion that expenses for other than actual instruction, specifically administration, textbooks and supplies, maintenance, student body activities, and community services had increased too rapidly, and that Council's cuts in these areas were designed to bring expenditures down more nearly to the level of previous years. On the other hand, Council's statement of its "supporting reasons" for its proposed reductions falls far short of a showing that Council based its recommendation on evidence that appropriations by the Board in particular line items were not necessary for the maintenance and operation of a thorough and efficient system of public schools in Passaic, or were plainly excessive. The Supreme Court in *Board of Education of East Brunswick v. Township Council of East Brunswick*, 48 *N.J.* 94, 105 (1966) placed this initial obligation upon the Council. The obligation has not, with certain exceptions, been met. The hearing examiner has therefore examined the evidence offered by petitioner and makes his findings and recommendations accordingly.

110m - Salaries - Printing and Publishing. The Board employs staff to do some non-contracted printing in the schools' print shop; and bases its increase in appropriation for this purpose from $4,000 budgeted in 1968-69 to $8,000 for 1969-70. As of May 31, 1969, approximately $5,000 had been spent in this account. Although additional printing of bond issue referendum brochures is anticipated for 1969-70, the evidence is insufficient to show that an increase of 60 per cent in wage costs is required. It is recommended that $1,500 of Council's proposed $3,000 reduction be sustained, and $1,500 restored to this account.

130a - Expenses - Board Members. In 1967-68, the Board spent $1,883.31 in this account. As of May 31, 1969, over $2,700 had been spent or committed in this account. The hearing examiner finds the Board's appropriation of $1,965 for 1969-70 necessary and reasonable, and recommends restoration of the $500 cut by Council.

130e - Other Expenses - Legal Services. This account provides funds for supplies and other expenses of the Board's legal counsel. The Board has appropriated $1,000 for 1969-70, double its budget for 1968-69. Over $1,500 was spent in 1968-69, out of an adjusted budget of $2,000. The hearing examiner finds that the testimony and evidence support the need for an appropriation of $1,000, and recommends restoration of Council's $500 reduction.

130j - Other expenses - Administration of Buildings and Grounds. The Board's appropriation for supplies and other office expenses for the coordinator of building services is $235 less for 1969-70 than its budget for 1968-69. No specific justification for Council's proposed cut of $400 can be found to refute the Board's testimony as to rising costs. The hearing examiner recommends restoration of this reduction.

130m - Other Expenses - Printing and Publishing. The Board's increased appropriation from $1,100 in 1968-69 to $6,500 for 1969-70 is tied to its

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projection of a bond issue referendum for several school buildings. However, the testimony shows that these plans are purely tentative, and that an architect has not been engaged. Council proposes a reduction of $2,100 in this account. The remaining $4,400 is four times the 1968-69 budget. The hearing examiner recommends that Council's reduction be sustained.

130n - Miscellaneous Expenses - Administration. The 1968-69 budget for this account was $1,700. The Board's increase to $2,500 was defended on the basis of increased costs of teacher recruitment, and the expanded staff and services of the school district's Children's Bureau. The hearing examiner finds these increases necessary in the particular circumstances and problems of a city school district, and recommends restoration of the $1,000 proposed reduction by Council.

213.1 Salaries - Teachers. During 1968-69, the Board added 16.5 teachers not provided for in its budget for that year. Provision is made for an additional nine teachers in the 1969-70 budget. Council recommends eliminating four of the new positions, for a saving of $21,666. The net projected enrollment increase for 1969-70 is 104. The Board proposes two additional remedial reading instructors, adding a distributive education teacher and coordinators of work-study programs at the high school, a mathematics teacher at School No. 12, and providing replacements for head teachers (assistants to the principals) at four schools. The hearing examiner does not question the desirability of the four replacements of head teachers, but finds insufficient evidence to support a finding that they are essential needs in the 1969-70 budget. It is therefore recommended that Council's reduction of $21,666 be sustained.

220 - Textbooks. The spending data over a four-year period in the textbook account are as follows:

1966-67	actual	$43,908.95
1967-68	actual	50,199.14
1968-69	budgeted	54,345.96
1968-69	actual to May 31, 1969	43,313.40
1969-70	budgeted	60,989.35

Council contends that a reduction of $3,500 in this account will not impair the educational program. The Board, on the other hand, argues that the increase is needed for new materials and to meet higher costs. In light of past experience and the small net increase in enrollment, the hearing examiner finds, a budget of $57,489.35, as proposed by Council, will provide sufficient increase to meet the anticipated needs of the district. It is recommended that the $3500 reduction be undisturbed.

230a - Library Books. The Board's budget for 1968-69 was $17,196. This appropriation was increased for 1969-70 to $17,863. Council proposes a cut of $2,000. According to the testimony, the high school library has seven to eight books per pupil, which is below recommended standards. The increased appropriation for 1969-70 is minimal in an area of rapidly rising costs. It is recommended that the proposed cut of $2,000 be restored.

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230c - Audio-Visual Materials. The 1968-69 budget for this item provided $6,802.05. The 1969-70 budgeted figure is $10,440, which, the Board contends, is needed to provide materials for use in Title III equipment. Council proposes a cut of $2,000. The hearing examiner concurs, finding that the evidence offered is inadequate to support a two-thirds increase in this account. It is recommended that the $2,000 reduction be sustained.

240-1 - Fine Arts - Teaching Supplies. Council proposes a reduction of $1,500 in this account, approximately one-half of the Board's proposed increase. The Board testified that the increase is to provide materials for an enriched art program, but did not present evidence to show the need for an increase of the size proposed. It is recommended that the $1,500 reduction be sustained.

250a - Miscellaneous Supplies - Instruction. The budgeted figure for this item is $6,214.75, an increase of nearly $1,700 over the 1968-69 budget. The increase was attributed to a need for supplies for the high school reading clinic and more in-service materials. Even making allowances for an unusual expenditure in this account in 1967-68, the spending figures since 1966-67 demonstrate that the Board's 1969-70 appropriation is consistent with its needs experience. It is recommended that Council's $1,000 proposed cut be restored.

250c - Miscellaneous Expenses - Instruction. After the first budget defeat, the Board cut $3,000 from its original appropriation of $11,650 for this account. Council recommends an additional cut of $2,000. The resultant appropriation of $6,650, compared with a 1968-69 appropriation of $5,695, provides an increase of nearly $1,000. The Board proposes additional expenses for in-service training, but the testimony did not document the proposal. It is recommended that the cut be undisturbed.

700 Series - Maintenance Accounts. The specific line items in which reductions were recommended by Council are 720a, 720b, 720c4, 720c6, 730a, 730al, 730a3, 730a6, 730b12, 730b13, 740a, and 740b, and are shown in the table, *supra*, aggregating $50,000. The rationale of Council in proposing this cut is best set forth by quoting from Council's answer as it relates to this category of expenses:

> "Reduction of $50,000.00 in the Maintenance accounts. The 1969-70 budget request of $196,859.00 for Maintenance of schools represents an increase of $86,771.00 over the current, or 1968-69 Budget. This is a substantial increase and should be tempered by the reduction of $50,000.00.
>
> "In studying the 'modus operandi' of the Board of Education over the past two years, it is apparent that the Board has spent substantial sums of money in this category.
>
> "While the Board of Education has bemoaned the budget cuts effected in previous years, a review of audit reports reflects that substantial sums of money have been found in other budgetary accounts to effect transfer to the maintenance accounts.

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	Original Budget Appropriation	Revises (Sic) Appropriations	Contractual Orders	Unexpended Balances or (Excess) Expenditures
1966-67	$105,818.00	$141,350.00	$172,322.00	$(30,972.00)
1967-68	132,562.00	213,765.00	256,369.00	(42,604.00)
	$238,380.00		$428,691.00	

"The two year total above reflects that $190,311.00 was found in other budget accounts that was made available for expenditure in the maintenance accounts. Further review indicates that orders are placed at the end of the school year so that reports will not reflect surplus balances. Unpaid orders in the Current account, dating back to the 1963-64 school year were unfulfilled at June 30, 1968."

The data set forth in respondent's answer go essentially unchallenged. Additional data gathered from the Board's "1969-70 Budget" (Exhibit D, page 3) and "Commitment Report, May 31, 1969 (Exhibit E, page 4) show that for 1968-69, the Board originally appropriated $110,087.75 in all maintenance accounts, but revised its appropriations upward so that by May 31, 1969, they stood at $131,087.76.

Testimony was heard concerning each of the proposed line-item cuts in the 700 series. The hearing examiner finds no basis to question the desirability of each of the items where cuts were proposed. On the other hand, he heard no conclusive evidence that deferral of any of these items of repair or replacement, or the rearrangement of priorities with other items in the maintenance series where no cuts were proposed, would measurably affect the Board's ability to operate a thorough and efficient school system. Allowance of Council's proposed reduction of $50,000 will still provide over 30 per cent more for 1969-70 than was originally budgeted for 1968-69, and twelve per cent more than the Board's revised appropriations for 1968-69. The hearing examiner must conclude that careful ordering of maintenance priorities can be accomplished within the reduced appropriation proposed by Council, and therefore it is recommended that an aggregate reduction of $50,000 in the several maintenance items specified *supra* be sustained.

1010 - Salaries - Student Body Activities. Of a proposed budget of $19,800 for salaries in this category, Council recommends cutting $200 from an appropriation of $1,200 for coaching intra-mural athletics. Of eight salary items in the 1010 category, seven show the same or increased appropriations for 1969-70 over those for 1968-69. The appropriation for intra-mural coaching salaries alone was reduced by the Board from $3,000 in 1968-69 to $1,200 for 1969-70. The statements of Council and the testimony were devoid of any explanation for the proposed further cut of $200. The hearing examiner recommends that it be restored.

1020 - Other Expenses - Student Body Activities. Council proposed cuts ranging from $150 to $350 in seven items of "other expense" in this category,

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for an aggregate reduction of $2,000 from the Board's appropriation of $15,490. Noting that actual expenditures for 1967-68 were $10,679, Council calls for a "reappraisal" of proposed activities, but does not show how the cuts could be effected without harm to the student activities program. Council's proposed cut would provide $100 more than was provided by the 1968-69 budget. Testimony was sufficient to establish that higher costs of equipment, transportation, fees, etc. require the increase proposed by the Board. It is recommended that $2,000 be restored to this account.

1030 - Expenses to Cover Athletic Deficits. In 1967-68, the Board spent $4,302.65 in this account. It budgeted $3,305 for 1968-69, but as of May 31, 1969, none of it had been either spent or committed. Council proposes a cut of $800 from the 1969-70 appropriation of $4,215. No testimony was offered on this item. In light of prior experience, the hearing examiner finds that the need for the full amount appropriated by the Board has not been sustained, and recommends that the reduction of $800 be undisturbed.

1112 - Salaries - Civic Activities. The Board's 1969-70 appropriation for this account is $10,000, from which wages for custodians on duty for civic activities in the schools are paid. In 1966-67, $8,637.17 was spent for this purpose; in 1967-68, $3,810.45 was spent, and as of May 31, 1969, $7,792.38 had been spent. The Board asserts that the increase is necessary because of higher overtime rates that must be paid. The hearing examiner finds that higher wages require an additional appropriation over past expenditures, and recommends that the $2,000 reduction be restored.

1240 - Equipment. The Board budgeted $42,266.20 for capital outlay for equipment purchases in 1969-70, up $20,000 from 1968-69. Council proposes cuts aggregating $10,000, as follows:

	Budgeted	Cut
Equipment for Fine Arts Instruction	5,289	$1,200
Equipment for Music Instruction	7,713	3,000
Furniture	7,598	5,000
Equipment for Plant Operation	1,850	800

Council calls attention to the increase, and says that a more reasonable program of purchases is warranted. The hearing examiner finds that the testimony establishes the need for purchase of storage cabinets in the art room, the expenditure for instruments for the music program in the high school, the furnishing of art and reading rooms, and purchase of two "pickup" machines used in floor cleaning. These items are not unreasonable purchases, and have been shown to be needed for the proper effectuation of the instructional and operational program of the school system. It is accordingly recommended that $10,000 be restored to the capital outlay account.

Use of Free Balances. Council recommended that an additional appropriation of $25,000 be made from free balances, and that $32,800 be recovered by cancellation of prior years' orders and applied to current expense needs. A letter dated June 9, 1969, from the Secretary - Business Administrator of the Board indicated that the Board was prepared to make these suggested

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appropriations. However, the letter pointed out, and it was subsequently testified at the hearing, that subsequent to the adoption of the budget, negotiations with employee groups had resulted in the addition of approximately $60,000 in fringe benefits for which no provision had been made in the budget. It was further testified that the anticipated free balance, over and above the $57,800 appropriated *supra* would be approximately $15,000. The hearing examiner finds that funds are not available for the appropriation of $57,800 from surplus, and recommends the deletion of this appropriation from Council's proposed reduction in the certification to the County Board of Taxation.

The summary of the hearing examiner's recommendations as to the proposed reductions in each item is shown in the following table:

Acc't. No.	Item	Reduced By Council	Am't. Restored	Am't. Not Restored
Current Expense:				
110m	Salaries - Printing & Publ.	$ 3,000.00	$ 1,500.00	$ 1,500.00
130a	Exp.-Bd. Members	500.00	500.00	- 0 -
130e	Other Exp.- Legal Serv.	500.00	500.00	- 0 -
130j	Other Exp.-Admin., Bldgs. & Grounds	400.00	400.00	- 0 -
130m	Other Exp.- Printing & Publ.	2,100.00	- 0 -	2,100.00
130n	Misc. Exp.-Admin.	1,000.00	1,000.00	- 0 -
213.1	Salaries-Teachers	21,666.00	- 0 -	21,666.00
220	Textbooks	3,500.00	- 0 -	3,500.00
230a	Library Books	2,000.00	2,000.00	- 0 -
230c	Audio-Visual Materials	2,000.00	- 0 -	2,000.00
240-1	Fine Arts - Teaching Supps.	1,500.00	- 0 -	1,500.00
250a	Misc. Supp.-Instr.	1,000.00	1,000.00	- 0 -
250c	Misc. Exp.-Instr.	2,500.00	- 0 -	2,500.00
720a	Contracted Serv.- Upkeep of Grounds	2,000.00	- 0 -	2,000.00
720b	Contracted Serv.- Repair of Bldgs.	35,000.00	- 0 -	35,000.00
720c4	Contracted Serv.- Repair of Music Ed. Equip.	400.00	- 0 -	400.00
720c6	Contracted Serv.- Repair of Ind. Arts Equip.	400.00	- 0 -	400.00
730a	Replacement of Furniture	2,500.00	- 0 -	2,500.00
730al	Replacement of Fine Arts Equip.	2,500.00	- 0 -	2,500.00
730a3	Replacement of Educ. Equip.	1,500.00	- 0 -	1,500.00
730a6	Replacement of Kdg. Equip.	500.00	- 0 -	500.00
730b12	Replacement of Motor Veh.	1,500.00	- 0 -	1,500.00
730b13	Replacement of Bd. Secy's Off. Equip.	500.00	- 0 -	500.00

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740a	Other Exp.- Upkeep of Grounds	1,500.00	- 0 -	1,500.00
740b	Other Exp. - Repair of Bldgs.	1,700.00	- 0 -	1,700.00
1010	Salaries-Stud. Body Activ.	200.00	200.00	- 0 -
1020	Other Exp. - Stud. Body Activ.	2,000.00	2,000.00	- 0 -
1030	Exp. to Cover Ath. Deficits	800.00	- 0 -	800.00
1112	Salaries- Civic Activ.	2,000.00	2,000.00	- 0 -
	Total Current Expense	$96,666.00	$11,100.00	$85,566.00
Capital Outlay:				
1240	Equipment	$10,000.00	$10,000.00	- 0 -
Total Capital Outlay$10,000.00			$10,000.00	- 0 -
	Appropriation from Surplus (Deleted)	25,000.00	25,000.00	- 0 -
	Cancellation of Prior Years' Orders (Deleted)	32,800.00	32,800.00	- 0 -
	Grand Totals	$164,466.00	$78,900.00	$85,566.00

* * * *

The Commissioner has reviewed and considered the findings, conclusions, and recommendations of the hearing examiner as set forth above. In concurring therein, the Commissioner would underscore the necessity of a clear, precise, and specific statement of municipal governing body's "underlying determinations and supporting reasons" for its proposed reductions in a school budget. *Board of Education of East Brunswick v. Township Council of East Brunswick, supra* Absent such a statement, the hearing examiner - and thereafter the Commissioner - are deprived of the opportunity to evaluate the differing appraisals of need with respect to disputed budget items. The Commissioner understands the Court's purpose in the *East Brunswick* decision to be that the Commissioner shall be in possession of the disputed determinations of both the Board and the governing body before he can make his own determination. Without the full performance of both parties, he cannot carry out his own function as efficiently as he would desire.

The Commissioner finds and determines that the amounts certified by respondent Council to the Passaic County Board of Taxation on March 6, 1969, for the current expense and capital outlay purposes of the school district in the 1969-70 school year are insufficient to provide for the maintenance and operation of a thorough and efficient system of free public schools in the City of Passaic. He therefore directs the Municipal Council to certify to said County Board of Taxation, in addition to the amounts previously certified, the amount of $68,900.00 for current expenses and the amount of $10,000.00 for capital outlay, to be raised by local taxation for the school year 1969-70.

COMMISSIONER OF EDUCATION

February 2, 1970

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Fair Lawn Schools Custodians' Association, by its President, Richard Santillo,

Petitioner,

v.

Board of Education of the Borough of Fair Lawn, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Robert A. Pine, Esq.

For the Respondent, Maurice D. Emont, Esq.

Members of the petitioning Association are employees of the respondent Board of Education. They allege that said Board has failed to comply completely and properly with a provision for longevity adjustments adopted by that Board under date of March 2, 1967, and a part of the "Custodial, Maintenance, Grounds and Bus Driver Salary Schedule" for the 1967-68 school year. Respondent denies the allegation, asserting that such schedule was adopted within its discretionary authority, and that every provision thereof has been implemented without discrimination and in full accord with its intents and purposes.

A preliminary conference on the above matter was held in the office of the Assistant Commissioner of Education in charge of Controversies and Disputes on August 7, 1969, with counsel for both petitioner and respondent present. Agreement was then reached that at issue was the question of the interpretation of the contested Board of Education provision with regard to longevity payments - as mentioned above, and as stated hereinafter.

A hearing on this matter was held in the office of the Bergen County Superintendent of Schools at Wood-Ridge, New Jersey, October 6, 1969, before a hearing examiner appointed by the Commissioner of Education. His report follows:

Substantial agreement exists as to the facts in this case. Longevity payments were first included in salaries for the 1966-67 school year. The covering salary guide, issued under date of March 21, 1966, provided for seven increments between minimum and maximum and carried the following explanatory notation below the schedule proper:

> "2. Upon reaching their maximum salaries all employees on this salary schedule shall receive a longevity payment equal to 1% of their annual salary with an additional payment equal to 1% of their annual salary being paid every four years thereafter."

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Testimony adduced at the hearing indicated that in the 1966-67 school year every person who had attained maximum on the 1966-67 guide received one per cent of his annual salary as an addition thereto. It is noted that there was no controversy over the 1966-67 schedule or regarding the payments made thereunder. Such are described only as a matter of historical perspective in this case.

Under date of March 2, 1967, the "Custodial, Maintenance, Grounds and Bus Drivers Salary Schedule for 1967-68" was released with explanatory notes attached. Note 2a was identical with Note 2 on the 1966-67 guide as quoted above; but 2b was added, and reads as follows:

> "2b. All employees at maximum or reaching maximum during the 1967-68 Fiscal Year shall receive a longevity adjustment retroactive to the date a maximum salary was first attained. The rate of the adjustment shall be equal to 1% of their 1967-68 salary for each four years they have been at maximum."

The purpose of 2b was to make retroactive the adjustments for longevity of service as requested by representatives of the Custodians' Association. The evidence shows that during negotiations or discussions between the Association and the appropriate Board committee prior to the adoption of Note 2b, no request had been made or proposal offered that retroactive longevity payments be based on attainment of maximum salary in either the employee's present position or some previous position. The Association proposed, *inter alia*, that in preparation of the 1967-68 budget, the Board should provide for "(f)ull credit on longevity on years of service." The Board Secretary testified that in preparing its budget, the Board had in fact provided funds to make longevity payments retroactive to the date of the employee's attainment of maximum salary in his present position. (R-2, Tr. 34) It was further shown that such meetings between the Board committees and employees, at which employees presented their salary proposals, had been customary for some years. Thereafter the Board, upon the recommendation of its committees, would make its determination of the budget appropriations for salaries for the ensuing school year. It was agreed at the hearing that the wording of 2b as given above was accepted by all parties without question until salary notices for 1967-68 were distributed in June of 1967. Disagreement then ensued and is the basis for this appeal.

Controversy arose because the salary notices mentioned *supra* provided that the longevity adjustment was retroactive to the date a maximum salary had first been attained in the present position. Some employees on this particular guide had reached a maximum in some previous positions under the Board's jurisdiction, and they had interpreted the guide provision 2b to mean that any maximum in any previous position was to be the starting point for the retroactive feature. The Board insisted, first through the Assistant Superintendent in charge of business (who was also the Board Secretary), then through the Superintendent of Schools, and eventually in meetings with representatives of the petitioning Association, that their intent had always been "to have longevity payments commence upon the attainment of maximum in a man's present position." (R-3)

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As of March 18, 1968, the Board adopted a salary schedule for custodial, maintenance, grounds and bus driver employees which provided that such employees, " * * * shall receive a longevity adjustment retroactive to the date a maximum salary was first attained *in their present position* * * *." (P-9. Emphasis added.) This provision was reaffirmed at a Board committee meeting of September 30, 1968, with the further affirmance that it would approve the accrual of years of service toward longevity payments as long as a man remained at a maximum salary regardless of his position, but that such approval would be effective only commencing with the time the longevity provision was first adopted and would not apply retroactively beyond that time. (R-4) At the same meeting the representatives of the Association noted their objection, and were advised to seek redress through the proper channels.

Petitioning Association contends that, in the absence of specific wording (as later added in the 1968-69 schedule), it is justified in asking that the Commissioner interpret note 2b, as approved on March 2, 1967, in its favor, and require respondent Board to compensate its members who qualify. Respondent Board contends that interpretation of a salary-schedule provision falls within its discretionary powers, and that its intent with regard to Note 2b is implicit in its budgetary work sheets, in its failure to provide the dollar differential required, and in its repeated statements of intent.

Counsel for petitioner called to the attention of the Commissioner three cases having some relevance to this matter. The first of these, *Ross v. Board of Education of Rahway*, decided by the Commissioner, February 19, 1968, deals with the denial of an increment under the Board's salary guide on the basis of an unexpressed, but assertedly long-practiced, rule limiting the size of the increment that will be paid in any year. The Commissioner held that such a rule should have been clearly set forth in the salary policy so that all might know of its existence. The second case, *Neptune Education Association v. Board of Education of Neptune Township*, decided by the Commissioner, January 14, 1969, involved the interpretation of a clause in the Board's salary policy, wherein the Commissioner held that the Board could not interpret the policy in contradiction of the clearly expressed language of the policy. The third case, *Newark Publishers' Association v. Newark Typographical Union*, 22 *N.J.* 423 (1956), is one in which the Court was called upon to construe the meaning of a word in a labor contract. In so doing, the Court said, at page 426:

> " * * * We seek for the intention of the parties; and to this end the writing is to have a reasonable interpretation. * * * Words and phrases are not to be isolated but related to the context and the contractual scheme as a whole, and given the meaning that comports with the probable intent and purpose; and thus the literal sense of terms may be qualified by the context. * * * "

The Commissioner has reviewed and considered the report of the hearing examiner as set forth above. There is ample evidence that the respondent Board deliberated at some length over the entire question of longevity payments. It decided, first, upon the approval of such payments for the 1966-67 year; second, upon the making of longevity payments retroactive in the 1967-68 year; and

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third, upon the interpretation of Note 2b of the salary schedule to be followed by its fiscal officers in preparation of the 1967-68 budget. This budget, approved by the district voters, then became the Board's guide in allocation of expenditures.

The issue to be decided by the Commissioner arises, therefore, from the conflicting interpretations placed upon Note 2b of the salary schedule for the school year 1967-68. Where the language of a rule such as the one in question is subject to conflicting meanings, recourse may be had to evidence which demonstrates the intent of the rule-makers. *In re Public Service Coordinated Transport v. Super Service Bus Co.,* 882 *N.J. Super.* 371, 375 (*App. Div.* 1964), *State v. Congdon,* 76 *N.J. Super.* 493, 500 (App. Div. 1962). In this case, the Commissioner finds convincing evidence that the Board intended to compute retroactive longevity from the employee's attainment of maximum salary in his present position in the related facts that the budget appropriations for 1967-68 were based upon that interpretation (R-2), and only after the final approval of a budget which provided the necessary funds did the Board on March 2, 1967, formalize its salary schedule containing the contested Note 2B. There is nothing in the findings herein even to suggest that the pattern was cut to fit the cloth, or that the Board sought to accomplish anything but to expand and extend the longevity provisions previously established for 1966-67, in accordance with the expressed, but otherwise unconditioned, wishes of the petitioning Association. Nor can any meaning be found in the amendment of Note 2b for 1968-69 other than the Board's clear and deliberate effort to remove the question from the realm of controversy.

The Commissioner has considered the cases cited by counsel for petitioner. The case of *Ross v. Rahway Board of Education, supra,* is inapposite to the matter herein because it concerns itself with the non-existence of an expressed policy, rather than with the interpretation of a stated rule. The case of *Neptune Education Association v. Board of Education of Neptune Township, supra,* is also inapposite, in that the rule in question was clearly stated, and the issue was whether the Board, by a later action, could effectively change the statement by interpretation. The case of *Newark Publishers' Association v. Newark Typographical Union, supra,* is supportive of the necessity to construe the meaning of a term in the light of the total context of the rule. The Commissioner finds that in the actions of the Board herein, and in the absence of any expression by petitioners seeking a different objective in the discussions leading to the preparation of the 1967-68 budget, no intent to make longevity adjustments retroactive to attainment of maximum salary in a prior position can be found.

The Commissioner therefore holds that respondent's salary schedule for custodial, maintenance, grounds and bus driver employees for the school year 1967-68 provides for longevity adjustments based upon the employee's attainment of maximum salary in his present position. The petition of appeal is accordingly dismissed.

COMMISSIONER OF EDUCATION

February 2, 1970

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Board of Education of the Borough of Avon-By-The-Sea,

Petitioner,

v.

The Mayor and Commissioners of the Borough of Avon-By-The-Sea, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Eugene A. Johnson, Esq.

For the Respondent, Thomas J. Spinello, Esq.

Petitioner (hereinafter "Board") appeals from the action of respondent (hereinafter "Commission") certifying a lesser amount to the Monmouth County Board of Taxation to be raised by local taxation for the current expenses of the school district for 1969-70 than the amount twice submitted to and twice rejected by the voters of the school district. Petitioner alleges that respondent's action was arbitrary and capricious, and that the amount certified will be insufficient to maintain a thorough and efficient system of public schools in the district. Respondent denies the allegations and asserts that even after the reductions it proposes, sufficient funds remain to operate and maintain a thorough and efficient school system.

A hearing in this matter was held at the State Department of Education, Trenton, on June 19, 1969, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

At the annual school district election held on February 11, 1969, the Board submitted to the electorate a proposal to raise by local taxation the amount of $270,101 for the current expenses of the district in 1969-70. The proposal was rejected, and was resubmitted at a special election on February 25, 1969, when it was again rejected. Thereafter, on February 26, the Board and the Commission consulted. On March 4 the Board transmitted the budget to the Commission, which, on March 12, certified to the County Board of Taxation the amount of $232,609.50 to be rasied for current expenses, a reduction of $37,491.50 from the amount proposed by the Board.

The hearing examiner does not find evidence to support the allegation that the Commission acted arbitrarily or capriciously. Its certification was accomplished within the ten days allocated, and after consultation with the Board the Commission reduced the appropriations in certain items, serving a copy of its proposed reductions upon the Board. The answer to the petition herein sets forth the underlying reasons of the Commission for its proposed reductions. *Cf. Board of Education of East Brunswick v. Township Council of*

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East Brunswick, 49 *N.J.* 94, 105 (1966). The statement of reasons offer no indication of arbitrariness or capriciousness.

The reductions proposed by the Commission apply to eight line items of the current expense budget and total $38,191.50. The amount of $700 was added by the Commission to another line item, on the basis of one of its reductions, so that the net reduction totals $37,491.50, as shown in the following table:

Acc't. No.	Item	Board's Budget	Comm's. Proposal	Am't. of Change
110B	Salary-Bd. Sec'y.	$ 3,900.00	$ 3,000.00	$- 900.00
211	Salary-Principal	13,915.00	13,323.50	- 591.50
213	Salaries-Teachers	111,200.00	87,400.00	-23,800.00
220	Textbooks	9,300.00	6,000.00	- 3,300.00
230	Libr. and A-V Materials	2,600.00	2,000.00	- 600.00
520	Transp.-Contr. & Pub. Carr.	15,000.00	12,000.00	- 3,000.00
620	Contr. Services-Operation	2,000.00	1,000.00	- 1,000.00
870	Tuition	96,000.00	91,000.00	- 5,000.00
1010	Salaries-Student Activities	300.00	1,000.00	+ 700.00
		Net Change (Reduction)		-$37,491.50

The findings, conclusions and recommendations of the hearing examiner as to each of the proposed changes are as follows:

110b-Salary-Board Secretary. The Board Secretary is a part-time employee, although he testified that he is engaged in Board work five to six hours daily, six days each week, in addition to attendance at all regular and special meetings of the Board, numbering 21 in 1968-69. He maintains his office in his home, and receives no reimbursement therefor. It was testified that the Board had intended to make the position full-time, at a salary of $6,000, but had decided instead to increase the Secretary's salary from $2,700 to $3,900. The Commission offered testimony that its proposed salary of $3,000 is comparable with those in certain nearby communities, and states in its answer that the $300 salary increase it proposes should be comparable with that given other municipal employees. On the weight of evidence, the hearing examiner finds that the Board's proposed increase is justified by the duties performed by the Secretary in office space provided by him at his own expense. It is accordingly recommended that the $900 cut from this item be restored.

211-Salary-Principal. The school district does not have a Superintendent. Its highest ranking administrator is the principal, who took that position in 1965 at a salary of $9,350. His salary in 1968-69 was $12,523. The Board's budget for 1969-70 provided a salary of $13,915. The Commission regards the increase as "extraordinary" and without justification in light of salaries paid for similar school districts in the area and proposes a salary of $13,323.50. The principal testified that the proposed 1969-70 salary was computed on the basis of fifteen per cent over the top salary paid to a teacher on the salary guide ($11,000) plus an adjustment for an additional month's employment in the school year, a computational practice utilized since 1965. While there is no statutory basis or

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standard practice in establishing relationships between administrators' and teachers' salaries, the hearing examiner finds the relationship practiced here at least reasonable in the light of the responsibilities and duties of the principal of this district, and therefore recommends restoration of $591.50 cut from this item.

213-Salaries-Teachers. The 1969-70 budget figure proposed by the Board included funds for the "possible" hiring of two more classroom teachers in case increased enrollment warrants, for the employment of a full-time physical education teacher, and for increasing the services of a part-time reading teacher to full time. The Commission opposes all of these increases in staff, and recommends eliminating $23,800 from this item. The testimony revealed that the Board "may need" to hire two more classroom teachers to accommodate increased enrollment, but no substantial data were offered to support that need. The estimated enrollment for 1968-69 was 240; at the time of the hearing the enrollment for grades K-8 was given as 260, with the peak enrollment during the year reaching 265. It was testified that variations in enrollment occur from October to May because the school district is in a seashore resort community. However, the testimony supports the Commission's testimony that the need for two teachers is speculative. The hearing examiner therefore finds that the need has not been established and recommends sustaining $13,000 of the cut based upon the representation that the teachers would be hired at the beginning salary for teachers on the salary guide. On the other hand, the hearing examiner finds that the need for a physical education teacher in the district has been demonstrated. Present physical education instruction, as well as coaching in several sports, is being done by classroom teachers. While the Commission described the proposal for a physical education teacher as "vague and nebulous", the testimony shows that the Avon district is the only one in Monmouth County without a part- or full-time teacher in this subject. The hearing examiner recommends that the funds for this purpose be restored. Likewise, it was testified that approximately 40 pupils needing reading instruction in 1968-69 could not be helped on the basis of the half-time reading instruction provided. While the Commission asserts that the need was not supported by sufficient reasons, the hearing examiner finds that the testimony adduced at the hearing supports the need and recommends the restoration of funds testified to amount to $4,150, to increase reading instruction from half-time to full-time. To recapitulate this item, it is recommended that of the $23,800 proposed reduction, $13,000 be sustained and $10,800 restored.

220-Textbooks. Spending data on this item are as follows:

1967-68	actual	$2,876.00
1968-69	budgeted	3,500.00
1968-69	actual to May 31, 1969	3,081.92
1969-70	budgeted	9,300.00

The Commission recommends reducing the 1969-70 appropriation by $3,300 to $6,000. The testimony offered by the Board was that because of under-expenditures in previous years (for example, $1.22 per pupil in 1967-68), serious shortages and deficiencies, particularly in music, science and reading, had accumulated. The Board's proposal would provide, it was testified, for an

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expenditure of approximately $37 per pupil. The Commission's proposal, based on an enrollment of 250, would provide $24 per pupil. The hearing examiner finds that the Commission's appropriation will provide funds for significant improvement of the existing deficiencies, and recommends that the reduction of $3,300 be sustained.

230-Library and Audio-Visual Materials. Spending data on this item are as follows:

1967-68	actual	$ 581.62
1968-69	budgeted	1,400.00
1968-69	actual to May 31, 1969	516.40
1969-70	budgeted	2,600.00

The Commission recommends reducing this item by $600 to $2,000. The Commission states that over recent years expenditures in this account were approximately $600 per year, and that no substantial basis was given for the increase. The testimony of the Board was that additional audio-visual materials were needed to update present materials, and additional library purchases to augment the present classroom collections averaging five to six books per pupil. No data were given to support the substantial increase appropriated by the Board, in light of the low level of spending of the 1968-69 budget. It is recommended that since the $2,000 proposed by the Commission will increase last year's budget by over 40 per cent, the proposed reduction of $600 be sustained.

520-Transportation-Contracted and Public Carriers. The 1968-69 budget for transportation was $7,000. Testimony showed that actual expenditures for the year would total $10,058. The $15,000 appropriation by the Board is unsupported by substantial data, except that in connection with the tuition item (870, below), it was testified that originally it was projected that 82 pupils would be sent to high schools outside the district and that the projection had been revised downward to 74. The Commission reduced the transportation item by $3,000 to $12,000. The Board Secretary testified that he believed this amount, a 20 per cent increase over 1968-69, would be adequate. Absent substantial evidence supporting the need for the increase proposed by the Board, and in light of the testimony and the Commission's analysis of costs, the hearing examiner recommends that the reduction of $3,000 be undisturbed.

620-Contracted Services-Operation. Spending data on this item are as follows:

1967-68	actual	$ -0-
1968-69	budgeted	900.00
1968-69	actual to May 31, 1969	128.50
1969-70	budgeted	2,000.00

The Commission noting 1968-69 actual expenditures, and asserting that no information was given to support the Board's 1969-70 proposal, recommends reducing this item by half, to $1,000. At the hearing testimony was offered to show that the $2,000 was needed to provide waxing, window-washing, and

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furniture-moving services. Past expenditures do not warrant an increase of the size proposed by the Board, absent more definitive data. It is recommended that the Commission's reduction of $1,000 be sustained.

870-Tuition. The Board's budget of $96,000 was based on a projection of 82 pupils in receiving high schools, and three pupils sent to special education facilities in other districts. The Commission's reduction of $5,000 is computed on a projection of 77 high school pupils and three special education pupils. To its estimated need amounting to $86,350, the Commission added $4,650 to provide an appropriation of $91,000. It was testified by the Board's witness that in view of the revised high school enrollment projection downward to 74, the Commission's appropriation should be adequate. The hearing examiner so finds, and recommends that the Commission's reduction of $5,000 be sustained.

1010-Salaries-Student Activities. For 1968-69 the Board budgeted $1,000 in this account. In anticipation of employing a physical education teacher for 1969-70, it reduced this appropriation to $300 for 1969-70. The Commission, opposing the employment of the teacher, restored $700 to this item. It is stipulated that such a restoration is valid only if the Commissioner does not approve restoration in the 213 account for the physical education teacher. Since the hearing examiner has recommended that funds be restored for such a teacher, he now recommends that the $700 added appropriation be eliminated.

The amounts recommended to be restored to the budget, and the reductions to be sustained, are summarized as follows:

Acc't. No.	Item	Comm's. Change	Am't. Restored	Am't. Not Restored
110b	Salary-Bd. Sec'y.	$- 900.00	$ 900.00	$ -0-
211	Salary-Principal	- 591.50	591.50	-0-
213	Salaries-Teachers	-23,800.00	10,800.00	13,000.00
220	Textbooks	- 3,300.00	-0-	3,300.00
230	Libr. & A-V Materials	- 600.00	-0-	600.00
520	Transp.-Contr. & Pub. Carr.	- 3,000.00	-0-	3,000.00
620	Contr. Services-Operation	- 1,000.00	-0-	1,000.00
870	Tuition	- 5,000.00	-0-	5,000.00
1010	Salaries-Stud. Activities	+ 700.00	-700.00	-0-
Totals		-$37,491.50	$11,591.50	$25,900.00

* * * *

The Commissioner has reviewed and considered the findings, conclusions, and recommendations of the hearing examiner. The Commissioner observes that in certain areas of expenditure, particularly textbooks and library and audio -visual materials, inadequate levels of purchase and replacement in past years have created cumulative deficiencies. While he commends the Board and its administration for their desire to remedy these deficiencies as rapidly as possible, he concurs with the recommendations that increases be so designed that some of the remedy can be spread out over a period of more than one budget year.

The Commissioner finds and determines that the amount certified by respondent to be raised by local taxation for current expenses for 1969-70 is

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insufficient for the maintenance and operation of a thorough and efficient system of public schools in Avon-by-the-Sea. He therefore directs the Mayor and Commissioners of the Borough of Avon-by-the-Sea to certify to the Monmouth County Board of Taxation, in addition to the amount previously certified, the amount of $11,591.50 to be raised by local taxation for the current expenses of the school district for the school year 1969-70.

COMMISSIONER OF EDUCATION

February 2, 1970

Samuel A. Christiano,

Petitioner,

v.

Board of Education Employees' Pension Fund Of Essex County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For tne Petitioner, *Pro Se*

For the Respondent, Richard H. Cashion, Esq.

Petitioner, an attorney-at-law of West Orange, appeals from a decision of respondent denying him service credit in the Board of Education Employees' Pension Fund of Essex County for the period from February 1, 1958 to July 31, 1968. Respondent asserts that petitioner is not entitled to such credit under the terms of the statutes governing the Fund, and further asserts that the Commissioner lacks jurisdiction to decide this matter.

The case is submitted on the facts as set forth in the pleadings, schedules attached thereto, and affidavits, and is argued in briefs of counsel.

There is no essential dispute as to the facts. Petitioner has, since February 1, 1958, been appointed and reappointed annually by the Board of Education of West Orange as its Board attorney. From his first appointment to July 31, 1968, the relationship was conducted on a fee basis, with petitioner charging for services when and as rendered. The amounts varied accordingly each year, ranging in size from $2,749.80 in 1961-62 to $7,144.06 in 1967-68. On August 1, 1968, the relationship was placed on a salaried basis, with an annual salary of $5,750. On that date petitioner applied to respondent for membership in its pension fund, and also requested the right to purchase prior service credit, to cover the period since February 1, 1958. Respondent accepted his request for membership as of August 1, but denied the request for prior service credit on the

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ground that petitioner, before that date, had not been an employee of the Board of Education of West Orange, but had been an independent contractor. Petitioner is appealing to the Commissioner for an order requiring respondent to grant prior service credit for the period from February 1, 1958, to July 31, 1968, on payment of the proper contributory sums by petitioner and the West Orange Board of Education but without charge to petitioner for the period from February 1, 1958, to June 26, 1962, because he is an honorably discharged veteran entitled by law to such credit. *N.J.S.A.* 18A:66-103.

On January 29, 1969, a conference between petitioner and counsel for respondent was held in the office of the Assistant Commissioner in charge of Controversies and Disputes. It was then agreed that the following two issues existed for determination:

1. Does the Commissioner of Education have jurisdiction in this matter under provisions of *N.J.S.A.* 18A:6-9?
2. Did petitioner's employment as board attorney by the West Orange Board of Education prior to August 1, 1968, constitute an office, position or employment, with respect to prior service credit, under the provisions of the statutes governing respondent's pension fund (*N.J.S.A.* 18A:66-94 *et seq.*)?

I.

The first question to be determined is the Commissioner's jurisdiction in the matter at issue. Petitioner contends that the Board of Education Employees' Pension Fund of Essex County clearly falls within the meaning and authority of *N.J.S.A.* 18A:66-94 *et seq.*, and as such is a part of school law. Hence, he contends, disputes concerning it come within the purview of the Commissioner. *N.J.S.A.* 18A:6-9.

Respondent contends that the Board of Education Employees' Pension Fund of Essex County is a separate corporation, incorporated in 1929, and not a part of the school laws but under the supervision of its elected trustees; and that nothing in the statutes (*N.J.S.A.* 18A:66-94 *et seq.*) gives the Commissioner jurisdiction. Both parties cite decisions which they allege support their respective contentions and deny those of the other party. Respondent in particular cites the case of *Board of Trustees of the Teachers Pension and Annuity Fund of the State of New Jersey* v. *LaTronica, et al.*, 81 *N.J. Super.* 461 (*App. Div.* 1963). In this case the Commissioner, on September 14, 1961, rendered a decision against the Board of Trustees concerning the amount of pension payments due to the respondents. 1961-62 *S.L.D.* 67. Upon appeal to the State Board of Education, the Commissioner's decision was upheld, including his right of jurisdiction in the issue. 1963 *S.L.D.* 252. However, upon further appeal to the Appellate Division of Superior Court, this question of jurisdiction was reversed by the Court, which held that the controversy did not arise under the school laws. The Court noted that in 1955 the Legislature had transferred the Teachers Pension and Annuity Fund to the Department of the Treasury, within a newly-created Division of

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Pensions, "to which will be transferred all of the existing State Pension Agencies." (*L.* 1955, *c.* 70, *Par.* 2; *N.J.S.A.* 52:18A-96). Respondent in the present issue relies upon this decision in claiming that the Commissioner does not have jurisdiction.

The Commissioner distinguishes the present case from that of *LaTronica.* In that case, the Court held that the Teachers Pension and Annuity Fund and "all of the existing State Pension Agencies" had, since 1955, been under the Department of the Treasury, and appeals from the decisions of such State agencies were to be taken directly to the Appellate Division of Superior Court. In the present case, however, respondent is not, and never was, a "State Pension Agency." It is a county pension fund, and was not transferred to the Treasury Department in 1955. This is shown by the fact that *N.J.S.A.* 18A:66-94, 95 refers specifically to "Pension funds of school employees in first-class counties," and states that each such fund "is continued and shall be governed under this article." As a matter of fact, respondent itself states in its brief that it was not affected by the act of 1955 and is not included within the Treasury Department's Division of Pensions. It is clear that respondent comes within the meaning of *N.J.S.A.* 18A:66-94 and hence falls within the general jurisdisction of the Commissioner as provided in *N.J.S.A.* 18A:6-9.

The Commissioner therefore holds that his jurisdiction extends to the issue here in dispute, as coming under school law.

II.

The second question at issue is whether petitioner held an office, position or employment under the West Orange Board of Education prior to August 1, 1968, such as would entitle him to prior service credit in respondent's pension fund. Petitioner contends that he held either an office, a position or employment under the By-laws of the West Orange Board of Education from February 1, 1958, which state that, "an attorney-at-law shall be appointed annually by the Board of Education." He contends therefore that he is eligible for membership in respondent pension fund, with the further right to purchase prior service credit.

Respondent contends that petitioner, prior to August 1, 1968, was not an employee of the Board, nor did he hold an office or position under its authority; but that he was an independent contractor, charging for services as requested and rendered; and that not until August 1, 1968, when he was employed on an annual salary basis, did he become an employee of the Board. At that time, respondent claims, he became eligible for membership in the pension fund, but not before that time. Respondent notes in support of its contention that petitioner made no effort to join the pension fund during the previous ten years, but only on the date when he became a salaried employee of the Board. Respondent contends that as an independent contractor on a fee basis, petitioner was not subject to the control of an employer as a salaried employee is; and that only employees contributing to the fund a percentage of their salaries (*N.J.S.A.* 18A:66-101) are eligible for membership.

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The Commissioner finds substance in the contentions of respondent. Boards of Education may designate an individual as their attorney without placing him in the category of an employee, just as they may appoint an architect, a builder or a psychologist, for instance, to perform certain specialized services for a fee. The distinction between an annual salary and a fee for services rendered is a real one. In the first instance the Board retains direction and control of the employee's time and efforts, as may be stipulated in the contract; in the latter, the Board merely agrees to pay the contractor's fee for special services he may be asked to render. It is in fact conceivable that he may be asked to render none at all, and hence would not be entitled to any remuneration. This situation, in fact, occurred during the first appointment of petitioner, from February 1, 1958, to June 30, 1958, when he received no remuneration. In such a case it would not be possible to consider him an employee.

On the facts presented it is apparent that it was in such a capacity that petitioner served the Board of Education of West Orange during the period prior to August 1, 1968. His remuneration from the Board varied considerably from one year to another, depending in part at least on the services requested of him, and probably in part on his professional rates. These are not characteristic of an employer-employee relationship.

The Commissioner must, therefore, conclude, and he so holds, that petitioner did not hold either an office, a position or employment with the Board of Education of West Orange during the period prior to August 1, 1968. He therefore denies petitioner's appeal to overrule the action of respondent in denying prior-service credit.

COMMISSIONER OF EDUCATION

February 6, 1970

Pending before State Board of Education.

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Board of Education of the Borough of Haledon,

Petitioner,

v.

Mayor and Council of the Borough of Haledon, Passaic County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Dominic Cavaliere, Esq.

For the Respondent, James V. Segreto, Esq.

Petitioner, the Board of Education of the Borough of Haledon (hereinafter "Board") appeals from an action of the Mayor and Council of that Borough (hereinafter "Council") certifying to the Passaic County Board of Taxation a lesser amount of money to be raised by local taxation for the current expenses of the school district for the school year 1969-70 than the amount submitted to and rejected by the electorate at a special school election on February 25, 1969. The Board charges that the Council's determination was arbitrary and capricious, and that the amount so certified by Council, together with other revenues, will be insufficient to enable the Board to operate and maintain a thorough and efficient system of public schools in the district. Council, in its answer, neither affirms nor denies petitioner's allegations, except that it denies that the Board of Education is unable to provide an adequate system of education for the pupils of the school district under the amount certified by the Mayor and Council.

A hearing in this matter was held on July 28 and October 9, 1969, at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

At the annual school district election held on February 11, 1969, the Board submitted to the voters a proposal to raise by local taxation for the current expenses of the school district the sum of $406,853. No other taxation proposal was submitted. The voters rejected the proposal, and thereafter the Board reconsidered its budget and eliminated items in the total amount of $20,000. It then resubmitted, at a special election on February 25, 1969, the reduced amount of $386,853. This proposal was likewise rejected.

Thereafter, the Board on February 27 transmitted its budget to the Mayor and Council, requesting at the same time an opportunity to meet with the municipal governing body concerning the budget. Such a meeting was held on March 7. Subsequent thereto, at a date not discernible from the testimony or evidence, Council certified to the County Board of Taxation the amount of $331,853 for current expenses, which represents a further reduction of $55,000

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in the amount thought necessary and originally appropriated by the Board. The Board makes the unrefuted charge that it learned of Council's action through the press, and thereafter verified the report through direct communication with the Board of Taxation. In any event, the Board by letter to the Mayor (P-2) requested formal notification as well as Council's "recommendations as to where these cuts should be made." The Mayor's reply (P-3) states that "under the law the governing body is not permitted to make line-item reductions. Their only authority is to certify a gross amount." The petition herein followed.

In response to the petition, the Commissioner directed respondent to file its answer, stating further:

> "In accordance with the directive of the New Jersey Supreme Court in the case of *East Brunswick Board of Education v. East Brunswick Township Council*, 48 *N.J.* 94 (1966), you are directed to include in your Answer a detailed statement setting forth the governing body's underlying determinations and supporting reasons for its action to reduce the budget of the Board of Education."

Respondent's answer, with respect to the foregoing directive, points to the sharply rising school tax levy since 1964-65, the corresponding increase in the current expense budget, a comparison of per capita pupil costs in Haledon with the Passaic County average, the "dramatic increases" in salary costs over the past three years for which "there does not appear to be any justification," and therefore a general recommendation for reductions cutting across the whole spectrum of current expenses. The answer concludes:

> "Based upon its analysis of the budgets of the past several years; based upon the capacity of the community and in the exercise of its discretion, the Board of Council determined that the school budget could be reduced and that the budget in its reduced amount is sufficient to maintain a thorough and efficient system of free public schools in the Borough of Haledon."

At a conference of the parties held under the direction of the Assistant Commissioner in charge of Controversies and Disputes at Trenton on May 23, 1969, both parties were directed to file further information found to be necessary for the proper hearing in the matter. Council being directed to file a more specific statement of its "underlying determinations and supporting reasons." Council thereafter filed a statement entitled "Information Submitted by Governing Body," which set forth Council's appropriations in the categories established by the Commissioner for publication of school budgets (*N.J.S.A.* 18A:22-8), but did not show which items of the budget should be reduced, or for what reasons. For example, in the category of Salaries for Administration are included the salaries of the Superintendent and his clerks, the Board Secretary and clerical staff, the custodian of school moneys, and others whose functions are concerned solely with the administration of the school district. In its budget advertisement, the Board shows a total for this item in the amount of $31,200.

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Council's statement shows a reduction to $29,500, but makes no statement as to which of the salaries can be reduced, or for what reason.

Further, the Council's statement restates and enlarges the comparison of per capita pupil costs, but offers no evidence that any inquiry had been made into reasons for differences in such costs. Moreover, on the basis of a report submitted by its municipal auditor who had examined the books of the school district, Council's statement alleges "gross irregularities" resulting from interaccount transfers, a current expense deficit of $3,435.33 for the 1967-68 school year, "a deliberate attempt by the School Board to deplete the current expense account of surplus" by a transfer of $29,076.33 of interest income to the debt service account, and the payment of the principal of bond anticipation notes rather than extending them at a favorable interest rate.

The hearing examiner finds, in the first place, that Council has failed to fulfill the obligation imposed upon it under the mandate of the Supreme Court in the *East Brunswick* case, *supra*, to submit either to petitioner, or later for the guidance and consideration of the Commissioner in the appeal herein a "detailed statement setting forth the governing body's underlying determinations and supporting reasons." (*Id.*, at page 105) The hearing examiner likewise finds nothing in the testimony and evidence offered at the hearing which fills the void.

On the other hand, the Board supplied evidence and testimony which showed, in sum, that the increases in its 1969-70 budget over its expenditures for the same items in 1967-68 and 1968-69 were accounted for by:

(1) Salary increases for the professional staff resulting from a salary schedule adopted by a resolution which authorized formal approval of a negotiated agreement with the Haledon Education Association incorporating such a schedule on December 18, 1968, and which therefore became binding upon the Board and obligated the Board, the municipal governing body, and the Commissioner to provide in the budget sufficient funds to implement the schedule. (*N.J.S.A.* 18A:29-4.1) (P-4) See also P-6 for nurse's salary schedule.

(2) Salary increases to other personnel based upon salary schedules adopted by the Board prior to the adoption of the budget. (P-6) The hearing examiner finds the salaries provided by such schedules to be reasonable and necessary.

(3) The employment of an additional teacher for grade three, a teacher of the deaf (for one Haledon pupil and additional tuition pupils), a learning disabilities teacher whose salary replaces funds previously supplied under ESEA, a library clerk, teacher aides to provide duty-free lunch periods for teachers, and an additional custodian to staff a newly-opened school building. The hearing examiner finds all new positions necessary for a thorough and efficient school system.

(4) Expenses incidental to the moving and stocking of equipment and supplies in a newly-opened school building.

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(5) An increase of about $3,000 in tuition costs, where there is no showing of excessive anticipation of the number of pupils whose tuition must be paid.

(6) Expenses, including fixed charges, resulting from the operation of an additional building.

(7) Expenses to alter facilities in an older building resulting from occupation of a new building plus essential repairs to the two older buildings (one over 70 years old, the other 38 years old).

(8) An increase from $10 to $13 per pupil for textbooks, the increase to make possible a uniform social studies series, one step of a planned program of replacement in several subject areas.

(9) Other increases in line items offset by decreases in other line items in comparison with 1968-69 expenditures.

The hearing examiner finds the increases justified, and in some instances mandated by relevant statutory requirements. For those reasons, if no others existed, the hearing examiner recommends restoration of the entire $55,000 from the Board's revised budget calling for a local tax levy of $386,853.

But an additional reason appears for setting aside Council's reduction. Council asserted in its answer that it had not been provided with the Board's "work sheets" used in preparation of its budget. The Board asserted, however, that these work materials, providing detail about the separate line items of the budget, had been provided to the Mayor and Council at a conference meeting in January, prior to the adoption of the budget, and the Mayor so testified at the hearing. Subsequent to the first defeat of the budget, Council met four or five times, and just prior to the special election a four-page pamphlet was issued in the name of, and paid for by the Mayor and six Councilmen, as "officials," calling upon the electorate to defeat the budget. (P-5) The pamphlet recites details of increases in school costs over recent years. It states, in part:

A DEFEAT OF THE SCHOOL BUDGET
ON TUESDAY, FEBRUARY 25, 1969
WILL RESULT IN A DIRECT SAVINGS
OF YOUR TAX DOLLARS.

and elsewhere:

"* * * now that the people of Haledon have defeated the budget, it is the duty of all the public officials to obey the wishes of the people of Haledon.***"

and elsewhere:

"For some reason there are those who are trying to embarrass this administration by causing taxes to sky-rocket. We are determined to prevent this. $75,000.00 can be cut from the budget. If the voters of

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Haledon reject the budget, we will cut the budget by that amount."

In considering the Board's charge that Council acted arbitrarily and capriciously, the hearing examiner reviewed the clear and unmistakable directions of the Court to the municipal governing body in *Board of Education of East Brunswick v. East Brunswick Township Council, supra,* at page 105:

> " * * * The governing body may, of course, seek to effect savings which will not impair the educational process. *But its determinations must be independent ones properly related to educational considerations rather than voter reactions.* In every step it must act conscientiously, reasonably, and with full regard for the State's educational standards and its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community.* * * " (Emphasis added.)

Council disavows the pamphlet, *supra*, as not an official document. The hearing examiner finds this defense without real merit. It was issued in the name of the Mayor and six Councilmen, with their titles affixed. It bears the notation:

"Paid by the Named Officials"

Thus the document has the imprimatur of officialdom just as surely as if it had been formally authorized at a Council meeting. Whether it had any effect upon the outcome of the election cannot be measured and is in any event immaterial. What it does indicate, and the hearing examiner so finds, is that (1) Council's determinations were not independent ones, but were inextricably related to voter reactions; and (2) Council's determinations were made not after consultation with the Board following the second rejection at the polls (*N.J.S.A.* 18A:22-37), but even before the second election took place, and were conditioned upon the voters' defeat of the Board's proposal.

In *East Brunswick*, *supra*, the Court directed the Commissioner "to determine the strict issue of arbitrariness." (*Id.*, at page 107) The hearing examiner finds upon the evidence that Council herein acted arbitrarily in making its determination, and recommends that for this reason its determination be set aside.

Finally, as to Council's allegations of "gross irregularities," the hearing examiner finds the charges unsupported by the facts. There is no question that at the close of the school year 1967-68 there was a deficit of $3,435.33. While in fact *N.J.S.A.* 2A:135-5 prohibits board members from incurring obligations in excess of appropriations, the statute concludes with this statement:

> "Nothing contained in this section shall be construed to prevent any board of Education from keeping open the public schools."

In any event, the demonstration of a 1967-68 deficit has no relevance to

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the budget for the 1969-70 school year. With regard to the transfer of $29,076.33 from the current expense account to the debt service account, it was testified that the custodian of school moneys had incorrectly deposited a check for that amount to the credit of the current expense account, and that the Board's resolution to transfer the money was to correct the error. Finally, there was no showing that the Board's decision to pay the principal of temporary notes instead of extending them is in violation of the Board's discretionary power to do so.

* * * *

The Commissioner has considered the findings, conclusions, and recommendations of the hearing examiner as set forth in his report, and concurs fully therein. The Commissioner accordingly finds that the amount of $331,853 certified to the Passaic County Board of Taxation by the Mayor and Council of the Borough of Haledon was fixed in an arbitrary manner, inconsistent with the principles laid down in *Board of Education of East Brunswick v. Township Council of East Brunswick, supra.* He further finds that the amount so certified is insufficient to provide for a thorough and efficient system of public schools in the Borough of Haledon. He therefore directs the Mayor and Council of said Borough to certify to the Passaic County Board of Taxation the additional amount of $55,000 to be raised by local taxation for the current expenses of the school district of the Borough of Haledon.

COMMISSIONER OF EDUCATION

February 13, 1970

DECISION

OF THE STATE BOARD OF EDUCATION

Respondent-Appellant, the Mayor and Council of the Borough of Haledon, Passaic County, appeals from a decision of the Commissioner of Education of the State of New Jersey, dated February 13, 1970, in which the Commissioner, in considering the findings, conclusions and recommendations of the hearing examiner as set forth in his report, found that the amount of $331,853.00, certified to the Passaic County Board of Taxation by the Mayor and Council of the Borough of Haledon, was fixed in an arbitrary manner, that the amount so certified was insufficient to provide for a thorough and efficient system of public schools in the Borough of Haledon and directed that the Mayor and Council of the Borough of Haledon certify to the Passaic County Board of Taxation the additional amount of $55,000.00 to be raised by local taxation for the current expenses of the School District of the Borough of Haledon for the school year 1969-1970.

We affirm the decision of the Commissioner for the reasons expressed in his decision of February 13, 1970, with the exception that the amount to be certified by the Mayor and Council of the Borough of Haledon to the Passaic County Board of Taxation shall be an amount of $54,500.00, a reduction of

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$500.00, which was admittedly over-anticipated by the Board of Education of the Borough of Haledon. The decision is affirmed in each and every other respect, based on the fact that the Respondent-Appellant, Mayor and Council of the Borough of Haledon, Passaic County, have, despite their opportunity to do so, failed "to submit either to Petitioner, or later for the guidance and consideration of the Commissioner in the appeal herein, a 'detailed statement setting forth the governing body's underlying determinations and supporting reasons' (*East Brunswick Board of Education v. East Brunswick Council,* 48 *N.J.* 94 (1966), (at Page 105))," which would justify their action.

December 2, 1970

Pending before Superior Court, Appellate Division.

In The Matter of the Annual School Election Held in the Sterling Regional High School District, Camden County.

COMMISSIONER OF EDUCATION

Decision

The announced results of the annual school election held February 3, 1970, in the Sterling Regional High School District, Camden County, on the question of the appropriation of $856,151.24 for current expenses for the 1970-71 school year were as follows:

	AT POLLS	ABSENTEE	TOTAL
YES	197	-0-	197
NO	198	-0-	198

Pursuant to a request made by Richard C. Schramm, Esq., in the name of the Board of Education, an authorized representative of the Assistant Commissioner of Education in charge of Controversies and Disputes checked the tally of the votes cast on the voting machines on this question. The recheck was held at the voting machine depot of the Camden County Board of Elections, Camden, on February 18, 1970.

The authorized representative reports that the recheck of the voting machines confirmed the results previously announced.

The Commissioner finds and determines that the question of the appropriation of $856,151.24 for current expenses for the 1970-71 school year failed of approval by the voters of the Sterling Regional High School District, Camden County, at the annual school election on February 3, 1970.

COMMISSIONER OF EDUCATION

February 20, 1970

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In The Matter of the Annual School Election Held in the School District of the Township of Middletown, Monmouth County.

COMMISSIONER OF EDUCATION

Decision

The announced results of the annual school election held February 10, 1970, in the school district of the Township of Middletown, Monmouth County, on the question of the appropriation of $8,865,601.00 for current expenses for the 1970-71 school year were as follows:

	AT POLLS	ABSENTEE	TOTAL
YES	1578	7	1585
NO	1698	2	1700

Pursuant to a request made by Peter P. Kalac, Esq., in the name of the Board of Education, an authorized representative of the Commissioner of Education checked the tally of the votes cast on the voting machines on this question. The recheck was held at the voting machine warehouse of the Monmouth County Board of Elections, Freehold, on February 20, 1970.

The Commissioner's representative reports that the recheck of the voting machine totals showed that an error had been made in the tally and that the corrected results are as follows:

	AT POLLS	ABSENTEE	TOTAL
YES	1678	7	1685
NO	1698	2	1700

This correction made no change in the outcome of the election.

The Commissioner finds and determines that the question of the appropriation of $8,865,601.00 for current expenses for the 1970-71 school year failed of approval by the voters of the Middletown Township School District, Monmouth County, at the annual school election on February 10, 1970.

COMMISSIONER OF EDUCATION

February 27, 1970

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In The Matter of the Annual School Election Held in the School District of the City of Pleasantville, Atlantic County.

COMMISSIONER OF EDUCATION

Decision

The announced results of the annual school election held February 10, 1970, in the school district of the City of Pleasantville, Atlantic County, on the question of the appropriation of $1,093,195.00 for current expenses for the 1970-71 school year were as follows:

	AT POLLS	ABSENTEE	TOTAL
YES	134	0	134
NO	160	0	160

Pursuant to a request made by Edward W. Champion, Esq. in the name of the Board of Education, an authorized representative of the Commissioner of Education checked the tally of the votes cast on the voting machines on this question. The recheck was held at the voting machine warehouse of the Atlantic County Board of Elections, Northfield, on February 24, 1970.

The Commissioner's representative reports that the recheck of the voting machines confirmed the results previously announced.

The Commissioner finds and determines that the question of the appropriation of $1,093,195.00 for current expenses for the 1970-71 school year failed of approval by the voters of the school district of the City of Pleasantville, Atlantic County, at the annual school election on February 10, 1970.

COMMISSIONER OF EDUCATION

February 27, 1970

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In The Matter of the Annual School Election Held in the School District of Deerfield Township, Cumberland County.

COMMISSIONER OF EDUCATION

Decision

The announced results of the voting for three members of the Board of Education, Deerfield Township, Cumberland County, for full terms of three years each at the annual election on February 10, 1970, were as follows:

Cosmo Paladino	131
Joseph Mariano	127
Willis Doughty	129
Frank Brago	143
Abe Cotler	152
Walter Butterfield	131

Pursuant to a letter dated February 12, 1970, from candidate Paladino, the Commissioner of Education directed that the ballots cast for Board members be recounted. Such a recount was conducted on February 26, 1970, at the office of the Cumberland County Superintendent of Schools, Bridgeton, by an authorized representative of the Commissioner.

At the conclusion of the recount, with all but four ballots counted, the tally stood:

Cosmo Paladino	131
Joseph Mariano	127
William Doughty	127
Frank Brago	143
Abe Cotler	152
Walter Butterfield	131

The four ballots reserved for determination all fall into a single category, as follows:

Exhibit A – votes cast for more than three candidates. Since only three candidates were to be elected, it was agreed that these ballots could not be counted for any candidate.

The Commissioner finds and determines that Abe Cotler and Frank Brago were elected at the annual school election on February 10, 1970, to seats in the Deerfield Township Board of Education for full terms of three years each. There was a failure to elect a third member to one vacant seat on the Board. The Cumberland County Superintendent of Schools is therefore authorized under the provisions of *N.J.S.A.* 18A:12-15, and is hereby directed, to appoint from among the residents of the school district of Deerfield Township a citizen who

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holds the qualifications for membership to a seat on the Board of Education, who shall serve until the organization meeting following the next annual school election.

COMMISSIONER OF EDUCATION

March 5, 1970

In The Matter of the Annual School Election Held in the School District of the Township of Medford, Burlington County.

COMMISSIONER OF EDUCATION

Decision

The announced results of the balloting for candidates for membership on the Board of Education for three full terms of three years at the annual school election held February 10, 1970, in the School district of the Township of Medford, Burlington County, were as follows:

	AT POLLS	ABSENTEE	TOTAL
William G. Bisignano	358	0	358
Kenneth S. Collins	327	2	329
Richard L. O'Neal	322	2	324
Hazel I. Townsend	320	0	320
Irving R. Norton	306	0	306
A. Lois Graham	280	2	282

Pursuant to a letter request dated February 11, 1970, from candidate Townsend, and at the direction of the Commissioner of Education, a recount of the ballots cast for the candidates whose names appeared on the ballot was conducted by the Assistant Commissioner of Education in charge of Controversies and Disputes on February 25, 1970, in the office of the Burlington County Superintendent of Schools. At the conclusion of the recount of the uncontested ballots with seven ballots referred for determination, the tally was as follows:

	AT POLLS	ABSENTEE	TOTAL
William G. Bisignano	355	-	355
Kenneth S. Collins	326	2	328
Richard L. O'Neal	322	2	324
Hazel I. Townsend	315	0	315
Irving R. Norton	303	0	303
A. Lois Graham	277	2	279

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There being no necessity to determine the seven referred ballots, since in any case they could not alter the result, they were left undetermined.

The Commissioner finds and determines that William G. Bisignao, Kenneth S. Collins and Richard L. O'Neal were elected on February 10, 1970, to seats on the Medford Township Board of Education for full terms of three years each.

COMMISSIONER OF EDUCATION

March 5, 1970

In The Matter of the Annual School Election Held in the School District of the Borough of Bogota, Bergen County.

COMMISSIONER OF EDUCATION

Decision

The announced results of the balloting at the annual school election held February 10, 1970, in the school district of the Borough of Bogota, Bergen County, for three members of the Board of Education for full terms of three years and for the proposed appropriations for current expense and capital outlay for 1970-71, were as follows:

	AT POLLS	ABSENTEE	TOTAL
George F. Hawley	466	2	468
William H.Norton	452	2	454
Joseph Labriola, Jr.	453	0	453
Argeiw J. Aimette	436	2	438
Anthony F. Culmone	427	0	427
Gerald A. Martino	410	0	410
Alice E. Smith	389	0	389
CURRENT EXPENSE			
YES	493	0	493
NO	475	2	477
CAPITAL OUTLAY			
YES	528	2	530
NO	449	0	449

Pursuant to letter requests from Argeiw J. Aimette and A. E. Pastorini, dated February 14, 1970, and February 15, 1970, respectively, the Commissioner of Education directed an authorized representative to conduct a recheck of the totals on the voting machines used in this election. The recheck was made at the warehouse of the Bergen County Board of Elections in Carlstadt on March 3, 1970.

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The Commissioner's representative reports that the announced tallies above were confirmed.

* * * *

The Commissioner finds and determines that George F. Hawley, William H. Norton, and Joseph Labriola, Jr. were elected to full terms of three years on the Bogota Borough of Education and that the proposed appropriations for current expense and capital outlay for 1970-71, were approved by the voters at the annual school election on February 10, 1970.

COMMISSIONER OF EDUCATION

March 9, 1970

In The Matter of the Annual School Election Held in the School District of the Township of Voorhees, Camden County.

COMMISSIONER OF EDUCATION

Decision

The announced results of the balloting for three members of the board of education for full terms of three years at the annual school election held February 10, 1970, in the Township of Voorhees, Camden County, were as follows:

	AT POLLS	ABSENTEE	TOTAL
Edward T. Hamilton	434	0	434
Basil H. Blair	387	1	388
Robert W. Braid	370	0	370
James L. Curran	370	1	371
Richard M. Williams, Sr.	324	1	325

Pursuant to a letter request dated February 12, 1970, from candidate Braid, a recount of the votes cast for candidates Curran and Braid was conducted by an authorized representative of the Commissioner of Education at the office of the Camden County Superintendent of Schools in Pennsauken on February 24, 1970.

The Commissioner's representative reports that at the conclusion of the recount of the uncontested ballots, with four ballots referred to the Commissioner for his determination, the tally stood as follows:

	AT POLLS	ABSENTEE	TOTAL
Robert W. Braid	365	0	365
James L. Curran	365	1	366

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* * * *

The Commissioner makes the following determination with respect to the four ballots referred to him:

Exhibit A – 1 ballot on which the cross (x) marks made by the voter in the squares to the left of the names of two of the candidates and the votes for Proposals No. 1 and No. 2 are made with blue ink, but the cross (x) mark in the square in front of the name of candidate Braid is made with black pencil.

It is the Commissioner's judgment that the black pencil mark conforms with the statutes (*R.S.* 19:15-27 and *N.J.S.A.* 18A:14-55), that the blue ink marks are valid under the provisions of *R.S.* 19:16-4 and that the only basis for rejecting this ballot would be to find that it was so marked by the voter for the purpose of identifying his ballot. The Commissioner concludes, however, that, although one mark is made with black pencil and the other marks with blue ink, distinguishing his ballot was not the intent of the voter and that the ballot is valid under the authority of *R.S.* 19:16-4, *supra*, which reads in part as follows:

> "* * * No ballot which shall have either on its face or back, any marks, sign, erasure, designation or device whatsoever other than is permitted by this act by which said ballot can be distinguished from another ballot, shall be declared null and void, unless the board canvassing the ballots, or the board or officer conducting the recount thereof, shall be satisfied that the placing of said mark, sign, erasure, designation or device upon the ballot was intended to identify or distinguish said ballot; * * *."

This ballot will, therefore, be counted for candidate Braid.

Exhibit B – 1 ballot on which the cross (x) marks made by the voter in the square to the left of candidate Curran's name is erased and the check (✓) mark before candidate Braid's name is embellished with an additional line.

It is the Commissioner's judgment that the vote for candidate Braid must be counted. Although the mark is crudely made, it is substantially that required by *R.S.* 19:16-3g, which provides in part as follows:

> "If the mark for any candidate or public question is substantially a cross x, plus + or check ✓ and is substantially within the square, it shall be counted for the candidate or for or against the public question, as the case may be * * *."

Such marks as these are not uncommon and are obviously the result of careless marking, infirmity, poor vision or visibility or some other cause rather than to attempt to distinguish the ballot. The mark is substantially a check (✓), is substantially within the square and clearly was not made for an improper purpose. See *In the Matter of the Special School Election in the Township of Tewksbury, Hunterdon County*, 1939-49 *S.L.D.* 96; *In the Matter of the Annual School Election in the Borough of Watchung, Somerset County*, 1960-61 *S.L.D.* 170; *In the Matter of the Annual School Election in the Township of Randolph, Morris County*, 1965 *S.L.D.* 66.

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The mark before the name of Mr. Curran, while not entirely obliterated, is an obvious erasure and as such cannot be counted. One vote will, therefore, be added to the tally for candidate Braid.

Exhibit C – 1 ballot on which the cross (x) mark in the square before candidate's Braid's name is roughly made and is embellished with additional lines. Similarly made marks appear in the squares before Proposals No. 1 and No. 2. In the Commissioner's judgment the cross (x) mark before candidate Braid's name, although imperfectly and carelessly made, meets the test of substantiality required by *R.S.* 19:16-3g, *supra.* The Commissioner also finds no basis for assuming that the mark was made in order to identify the ballot or for other improper purpose. *R.S.* 19:16-4, *supra* See also *In the Matter of the Special School Election in the Township of Tewksbury, supra.*

The Commissioner finds that the vote for candidate Braid is valid and will be added to the tally.

Exhibit D – 1 ballot on which the marks made by the voter in the squares to the left of the names of two of the candidates voted for are clearly check (✓) marks, but the mark in the square in front of the name of candidate Braid appears at first glance to consist of a single, straight diagonal line running from the center of the printed square to the upper right thereof and beyond. Previous decisions of the Commissioner and the Courts have held that a single straight diagonal line cannot be counted as a vote since the mark is not substantially a cross (x) plus (+) or check (✓) as required by *R.S.* 19:16-3g, *supra. Petition of Wade* 39 *N.J. Super.* 520 (*App. Div.* 1956), 121 A. 2*d* 552 (1956); *In the Matter of the Annual School Election Held in the Township of Stafford, Ocean County,* 1968 *S.L.D.* 59 In the case of *Keogh Dwyer* 45 *N.J.* 117 (1965), however, the Supreme Court held that where the mark in question is adequate to meet the test set forth in sub-section *g* of *R.S.* 19:16-3, *supra*, it is to be counted. Close examination of the mark for candidate Braid on this ballot indicates enough variation in the line at its lower end to be construed as a semblance of a check. It is the Commissioner's judgment, therefore, that this mark meets the requirements of the statute and will be counted. One vote will, therefore, be added to the tally for candidate Braid. See *In the Matter of the Annual School Election Held in the School District of the Borough of Bradley Beach, Monmouth County,* decided by the Commissioner of Education, March 26, 1969.

When the votes in Exhibits A, B, C, and D are added to the previous totals, the results stand as follows:

	Uncontested	Exhibits A B C D	Absentee	Total
Robert W. Braid	365	1 1 1 1	0	369
James L. Curran	365		1	366

The Commissioner finds and determines that Edward T. Hamilton, Basil H.

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Blair and Robert W. Braid were elected at the annual school election on February 10, 1970, to seats on the Voorhees Township Board of Education for full terms of three years each.

COMMISSIONER OF EDUCATION

March 10, 1970

DECISION
OF THE STATE BOARD OF EDUCATION

There being a dispute as to the completeness of the record, this matter is remanded to the Commissioner of Education for resolution by him.

November 4, 1970

Pending before Commissioner of Education on Remand.

In The Matter of the Annual School Election Held in the School District of the Borough of Rockleigh, Bergen County.

COMMISSIONER OF EDUCATION

Decision

The announced results of the balloting for two members of the Board of Education for full terms of three years at the annual school election held in the school district of the Borough of Rockleigh, Bergen County, on February 10, 1970, were as follows:

	AT POLLS	ABSENTEE	TOTAL
Bernice Kershaw	15	0	15
Grace Moser	24	0	24
John Price	14	0	14

Pursuant to a letter request dated February 16, 1970, from Mrs. John Price, and at the direction of the Commissioner of Education, a recount of the votes cast was conducted by the Assistant Commissioner of Education in charge of Controversies and Disputes at the office of the Bergen County Superintendent of Schools in Wood-Ridge on March 3, 1970.

Candidate Kershaw filed a nominating petition prior to the election, and her name appeared on the ballot. The votes received by candidates Moser and Price were irregular ballots cast by writing in their names on the lines provided for such purpose.

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The recount confirmed the election of candidates Kershaw and Moser.

The Commissioner finds and determines that Bernice Kershaw and Grace Moser were elected February 10, 1970, to seats on the Rockleigh Borough Board of Education for full terms of three years.

COMMISSIONER OF EDUCATION

March 12, 1970

In The Matter of the Annual School Election Held in the School District of the Township of Mahwah, Bergen County.
COMMISSIONER OF EDUCATION

Decision

The announced results of the balloting for three candidates for full terms of three years on the Board of Education of the School District of the Township of Mahwah, Bergen County, at the annual school election held February 10, 1970, were as follows:

	AT POLLS	ABSENTEE	TOTAL
William F. DeChard	598	2	600
Morton Swickle	517	2	519
Terry D. Haspe	498	0	498
Edythe H. Glasgow	458	2	460
Elizabeth Laguzza	163	0	163

Candidates DeChard, Swickle, Haspe and Glasgow filed nominating petitions prior to the election, and their names appeared on the ballot on the voting machines. The votes received by Mrs. Elizabeth Laguzza were irregular ballots cast by writing in her name on the paper rolls of the voting machines. Two other candidates received four (4) and one (1) write-in votes respectively.

A recount of the votes cast for candidate Laguzza, authorized by the Commissioner of Education pursuant to a letter request from Mrs. Laguzza, and conducted by the Assistant Commissioner in charge of the Division of Controversies and Disputes at the office of the Bergen County Superintendent of Schools, Wood-Ridge, on March 3, 1970, produced no change in the outcome of the election previously announced.

The Commissioner finds and determines that William F. DeChard, Morton Swickle and Terry D. Haspe were elected at the annual school election on February 10, 1970, to seats on the Mahwah Township Board of Education for full terms of three years each.

COMMISSIONER OF EDUCATION

March 12, 1970

You are viewing an archived copy from the New Jersey State Library.

Board of Education of the Township of Saddle Brook,

Petitioner,

v.

Mayor and Township Committee of the Township of Saddle Brook, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, George J. Sokalski, Esq.

For the Respondent, William D. Gargone, Esq.

Petitioner (hereinafter "Board") appeals from an action of respondent (hereinafter "Committee") pursuant to *N.J.S.A.* 18A:22-37, certifying to the County Board of Taxation a lesser amount of appropriations for school purposes for the 1969-1970 school year than the amount proposed by the Board in its budget which was twice rejected by the voters. The facts of the matter were educed at hearings conducted at the State Department of Education, Trenton, on August 13, 26; November 7, 17, 25; and December 5, and 18, 1969, before a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

At the annual school election on February 11, 1969, the voters rejected the Board's proposal to raise $2,143,608.49 for current expenses and $27,660.00 for capital outlay for the ensuing school year. The budget was submitted again at a second referendum pursuant to *N.J.S.A.* 18A:22-36 in the same amount and again failed to gain approval. The budget was then submitted to the Township Committee pursuant to *N.J.S.A.* 18A:22-37 for its determination of the amount of funds required to maintain a thorough and efficient school system. On March 4, 1969, the Board met in consultation with the Township Committee to discuss the school budget. The Committee met thereafter and adopted a resolution certifying the amount of tax levy for current expenses at $2,020,958.49, a reduction of $122,650.00, and for capital outlay at $3,000.00, a reduction of $24,660.00, to the Bergen County Board of Taxation for the 1969-70 school year. The petitioner filed with the office of Assistant Commissioner in charge of Controversies and Disputes an explanation of each account in which the Committee had suggested reductions to support its appeal for restoration to the original amount. The Township Committee also filed with the Assistant Commissioner a detailed listing of the reductions that were made and an explanation of how these amounts were decided upon. These documents were reviewed by the hearing examiner and were found to be in substantial agreement with regard to amounts. A summary of the figures is as follows:

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Acc't. No.	Item	Board's Budget	Committee's Proposal	Am't. Of Reduction
Current Expense:				
J212	Curric. Coordinator	$14,100.00	$ -0-	$14,100.00
J213A	Additional Staff Requirements	40,800.00	6,800.00	34,000.00
J213A	Teacher Aides	6,000.00	-0-	6,000.00
J213A	Ass't. Principal-Cambridge School	7,500.00	-0-	7,500.00
J213	Substitute Teachers	26,000.00	20,000.00	6,000.00
J213	Extra Pay for Services	7,500.00	5,210.00	2,290.00
J214C	Salary-Social Worker	6,300.00	5,540.00	760.00
J240	Teaching Supplies	63,075.00	57,075.00	6,000.00
J250C	Pilot Program	1,900.00	-0-	1,900.00
J410A	Salary-Additional School Nurse	5,800.00	-0-	5,800.00
J410A	Salary Increase-School Nurses	2,100.00	1,500.00	600.00
J610A	Salary-Add'l. Janitor	5,325.00	-0-	5,325.00
J610A	Summer Help-Maintenance	2,100.00	-0-	2,100.00
J640	Utilities	27,000.00	25,500.00	1,500.00
J720A	Upkeep of Grounds	4,900.00	400.00	4,500.00
J720B	Repair of Buildings	6,000.00	1,000.00	5,000.00
J720C	Repair of Equipment	2,500.00	2,000.00	500.00
J730A	Replacement of Instructional Equip.	16,069.00	10,069.00	6,000.00
J730B	Replacement of Non-Instructional Equip.	7,175.00	500.00	6,675.00
J740B	Repair of Bldgs.	7,500.00	3,000.00	4,500.00
J740C	Repair of Equipment	3,000.00	2,400.00	600.00
J1111	Community Services	2,500.00	1,500.00	1,000.00
	Total Current Expense	$265,144.00	$142,494.00	$122,650.00
Capital Outlay:				
L1220	Sites	$ 500.00	$ -0-	$ 500.00
L1240	Equipment	24,160.00	-0-	24,160.00
	Total Capital Outlay	$ 24,660.00	$ -0-	$ 24,660.00

The Board contends that the Committee's action was arbitrary and capricious and that the sum provided will not yield funds sufficient for the operation of a thorough and efficient system of schools within the district. The Township Committee denies that its action was arbitrary and capiricious and asserts its allocation provides sufficient funds to conduct a thorough and efficient school system. The Committee further contends that its allocation provides for an increase in funds for educational purposes in the 1969-1970 budget over the previous budget for the year 1968-1969.

Testimony supporting the Board's contention that its proposed budget appropriations are necessary to support a program of thorough and efficient instruction was offered by the Superintendent of Schools. The school district's

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auditor testified regarding the financial condition of the district, and two board members offered testimony on behalf of the proposed budget. The Mayor of record offered testimony regarding the respondent's position on the reduction and on the school district's financial condition in general. A school board member offered testimony in support of the reductions made by the Township Committee.

The Committee moved that the petition be dismissed and offered many reasons in support. It contends that the Superintendent of Schools was an improper witness to provide testimony on the proposed budget and that only responsible officials elected by law for the document should provide such testimony. (Tr. p.3) It further contends that the surplus of $9,388 in the auditor's report for the school year 1968-1969 is misleading when viewed only in the context of the 1968-1969 budget. It is the Committee's contention that the Board eliminated a $21,385.99 deficit from the 1967-1968 school year by economies effected in the 1968-1969 budget. They maintain that in reality the 1968-1969 budget produced sums amounting to $30,733 in excess of what was needed to maintain the school system for 1968-1969. The Committee further contends that the Board's practice of diverting money from accounts to meet this deficit and other contingencies renders a decision based on line items moot. *Board of Education of East Brunswick v. Township Council of East Brunswick*, 1967 *S.L.D.* 163. Moreover, the Committee argues, when a budget is twice defeated by the voters of a municipality, negotiated agreements reached under Chapter 303 are null and void. The Committee objected to the hearing of testimony on capital outlay and contends that allocations made by the Committee for capital outlay are not subject to appeal.

Petitioner argues that the economies effected in the 1969-1970 budget were necessary to maintain the fiscal integrity of the district, and the decision to divert line items for this purpose was not only difficult but has created a situation whereby the district requires the requested budgetary funds to overcome the programmatic problems engendered by the 1968-1969 austerity program. They maintain that Chapter 303 requires a Board to bargain in good faith and to honor their agreements with the bargaining unit.

The hearing examiner does not find evidence to support the allegation that the Committee acted arbitrarily or capriciously. Its certification was accomplished within the statutory provisions and after consultation with the Board. The answer to the petition sets forth the underlying reasons for its proposed reductions. *Board of Education of East Brunswick v. Township Council of East Brunswick*, 49 *N.J.* 104 (1966) While their statement of reasons offers no indication of arbitrariness or capriciousness, testimony reveals a sharp cleavage between the thinking of the Board and the Committee. Before undertaking an analysis of the line items in question, the hearing examiner feels constrained to cite the language of the Commissioner in *Board of Education v. Morris Township Committee*, 1967 *S.L.D.*, 116.

"The Commissioner believes that his function in these appeals is to protect the school children of the district and to insure that their rights to an

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adequate educational program will not be impaired in a contest between two agencies of government. It is conceivable that a local governing body, even with the best of intentions, could so impair a school program by a drastic reduction in the school tax levy that the children would run the risk of irreparable harm to their education. It is to prevent such an occurrence and to see that the interests of children are protected, that the Commissioner is vested with the power to intervene in such a case. The Commissioner, therefore, does not view his role in these cases as that of an arbiter between the board and the governing body. He conceives his duty to be to the school children, and his function one of insuring that their educational welfare is not impaired by reason of insufficient appropriations for the maintenance of an adequate school program in terms of minimum educational standards and requirements."

The findings and recommendations of the hearing examiner with respect to each of the proposed reductions are as follows:

J-212 – Curriculum Coordinator. The Board's budget provides $14,100 salary for the position of curriculum coordinator. The Committee states that this position was newly created in 1968, and that it was vacant for a substantial part of that school year; therefore, in essence, this is an entirely new position and as such should be deferred until such time as the Board has a more favorable economic posture. The Board explains that the person holding the position of curriculum coordinator resigned during the year, and the position was not staffed with a replacement due to the difficulty of finding one during the school year, and points to the existence of an interim audit report that revealed a pending deficit indicating the need for drastic economy. The Board indicates that its ratio of professional staff members to pupils is one of the lowest in Bergen County, and that this position is needed in order to provide planning and management capability necessary to maintain a thorough and efficient school. The hearing examiner is impressed with the need for a person whose mission it is to function to a district-wide basis to coordinate the activities and the instructional program of a cohesive unit known as curriculum. In previous times perhaps such a position would be considered merely a desirable improvement. Today, however, it can be considered a necessity.

Testimony reveals that the Board has some latitude in making management decisions regarding the allocation of funds, and an analysis of the professional staff members under contract with the Saddle Brook Board of Education indicates the possibility of a surplus for discretionary use. Realism dictates then that this information, coupled with the timing of this decision, renders moot the need for the entire $14,100. It is therefore recommended that $7,000 cut from this item be restored.

J-213 – Additional Staff – Salary. The testimony shows the following development of this salary item:

A. *Social Studies* (2). Petitioner plans to institute a tenth-grade course in world history for all students. It contends that such a course is necessary due to

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the increasing need for understanding of world problems by all citizens. The Committee maintains that although this course may be desirable, it is not critical at this time. The hearing examiner believes that while the establishment of such a course would certainly add a worthwhile dimension to the curriculum, he cannot find that such an addition, however desirable, is essential. It is recommended that the $13,600 reduction in this item be sustained.

B. *Driver Education* (1). The Committee contends that two full-time driver education teachers are presently employed, and the addition of a third is not necessary. It further contends that driver education is not a mandatory subject, and is not necessary for an adequate school system. Petitioner argues that only one full-time driver education teacher is employed and maintains that two are necessary. The hearing examiner finds that an analysis of existing staffing reveals one driver education teacher. The hearing examiner further finds that the inclusion of driver education in the school program is well recognized in this State and is especially important in this highly urbanized area. It is recommended that the reduction of $6,800 for this position be restored.

C. *Elementary Guidance* (1). The petitioner proposes to add a guidance counselor to its staff to service the upper elementary grades. The Committee contends that the guidance staff of four for 1,073 students in the high school could be called upon to provide this service without the creation of a new position. The hearing examiner finds that the extension of guidance services to the elementary school would require additional staffing in order not to overburden the present staff in the high school thereby weakening their effectiveness. The hearing examiner concurs with the Board that the creation of such a position is highly desirable and that the increasing complexity of the decisions facing upper level elementary youngsters makes a planned program of guidance an important consideration for a school district. He cannot find, however, the lack of such a program would preclude an adequate program of education. It is recommended that the $6,800 reduction be sustained.

D. *Elementary Vocal* (1). The Board maintains that an additional elementary vocal teacher is needed because present staffing does not permit service to the five elementary schools, grades 1-6. At present, grades 1 and 2 have been eliminated entirely from the music program leaving 36 sections in four different schools for one teacher. The Committee makes no comment regarding this position, but comments instead on the fact that the Board had not listed its staff requirements in any priority sense. Consequently, the Committee infers that whichever position is most vulnerable according to the judgment of the Board should be eliminated. The hearing examiner cannot find in this position an adequate response to the stated need by the Board. Since the Saddle Brook School System offers a vocal music program in the elementary schools, and since this program has gained acceptance in the community, the elimination of grades one and two and the minimum service available to the remaining grades runs the risk of making the program a fiction. Many rewards of vocal music lie in the affective domain and are difficult to assess. The elimination of this proposed position could render the entire program vulnerable and thus strike a blow at an essential part of an elementary program. It is recommended that the $6,800

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reduction in this item be restored.

J-213 – Teacher Aides. The Board asserts that the decision to provide teacher aides was part of a negotiated agreement with the teachers' bargaining unit. The Committee contends that volunteer aides have been used in the past and that although $3,000 was budgeted for this purpose in 1968-69, none were employed. The hearing examiner cannot find testimony with respect to the number of aides required by the negotiated agreement and finds some merit in the suggestion to use volunteers. However, volunteers cannot offer guaranteed compliance within a negotiated agreement, and, therefore, it is recommended that $3,000 of the $6,000 reduction be restored to provide a nucleus of paid aides to be supplemented by volunteers who can be relied upon to maintain continuity within the program.

J-213 – Assistant Principal – Cambridge School. The Board maintains that there is a need to employ a full-time person to assist the principal who serves as an administrator for an elementary school and a three-room satellite unit. This unit, the Coolidge School, has three classrooms and a "head teacher." The Board explains that the 839 students in the two buildings plus the presence of most of the district's special teachers present a supervisory burden which prevents the present administrator from providing many of the services necessary to an efficient school system. The Committee contends that the provision for the position was made in the 1968-69 budget and was not staffed at that time. It reasons that since the position had not been filled, it is not necessary. The hearing examiner is impressed with the Board's testimony in this matter and considers that adequate supervision for a school unit of this size and complexity requires two full-time professionals. It is recommended that the reduction of $7,500 be restored.

J-213 – Substitute Teachers. The Committee recommends a reduction of $6,000 in this item. It contends that the 1968-69 budget appropriated $14,500 for this item with a projected expenditure adjusted to $20,000. The Committee avows that the suggested appropriation for 1969-70 for $26,000 is a $6,000 addition over the adjusted figure for 1968-69. The Committee further asserts that the Board should attempt to reduce absenteeism among teachers rather than encourage same by providing for greater amounts for substitutes. In addition, it avers, substitutes to replace teachers for workshops and field trips may be desirable, but not necessary to the educational system. The Board maintains that it was underbudgeted for the 1968-69 year in this item. An inspection of the audit report reveals contractual orders in this item for $32,945.88. The hearing examiner concurs with the Committee's statement regarding the use of substitutes to replace teachers for workshops and field trips. However, underbudgeting in the past has not affected teacher absenteeism which is not a function of the school budget, but rather a matter of state law and local conditions. It is recommended that the $6,000 cut in this item be restored.

J-213 – Extra Pay for Services. The Committee maintains that department chairmen have received a general increase in pay as classroom teachers, and the

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proposed $150 increase would in effect be double compensation. The Board argues that an increase from $400 to $550 in extra pay for department heads is for the services they render in this capacity and not necessarily as teachers. The hearing examiner is impressed with the testimony that this proposed increase was not part of a negotiated agreement, and as such was clearly remuneration for managerial and supervisory duty. The high school depends to a great extent on the excellence and expertise of its department heads to make available new information to the members of the department under their supervision. One cannot realistically expect a high school principal to have competence in all the various subjects taught in the modern high school, and consequently the reliance on the subject matter specialist is heavy. It is recommended that the $2,290 reduction be restored.

J-214C – Salary – Social Worker. The Committee contends that the increase of $1,260 for a three-day week is too great. The Committee asserts that it is not bound by any salary guide adopted since the budget has twice been rejected by the voters, and, therefore, the salary proposed by the Board is not mandatory in accordance with the salary guide. The Board maintains that the social worker's salary is based on the teachers' salary guide and that it must be paid in accordance with that guide. The hearing examiner recommends that the salary agreement made by the Saddle Brook Board with the social worker in question be honored pursuant to *N.J.S.A.* 18A:29-4.1 and that a $760 reduction be restored.

J-240 - Teaching Supplies. The Board contends that supplies have been underbudgeted in the district for the past several years, and that the district's requirements in this category have been examined carefully to ensure adequate supplies and to compensate for inflationary costs in this area. The Committee maintains that the actual expenditures in elementary supplies in 1968-69 was under $27,500 while the 1969-70 budget seeks to appropriate $32,670. In teaching supplies for the secondary school, the $30,405 greatly exceeds the amounts spent in this area in 1968-69. An analysis of the audit reveals that the Committee is correct in its assertions and that the elimination of $6,000 would still provide adequate funds for this purpose. The hearing examiner finds that the Board retains $14,489.30 more in this account than it expended in 1968-69 for contractual orders, after the reduction of $6,000 by the Committee, and recommends that the reduction of $6,000 by the Committee be sustained.

J-250C – IBM Pilot Program. The Committee contends that a program of instruction for key punch operators can be obtained free of charge from IBM. In addition, the Committee states that the State and Federal governments have withdrawn their support from this activity, and, therefore, it is not a needed or necessary program. The Board maintains that this program was instituted with Federal money as a pilot project with a three-year phase-out budget. The program has proven popular and 90 students have enrolled for the 1969-70 school year. The hearing examiner finds that there is apparent confusion as to the nature of a pilot program on the part of the Committee. A pilot program is introduced with the aid of Federal money in the hopes that the course offering

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will gain community acceptance and support. The withdrawal of funds in this instance was planned and was not an expression of lack of faith in the program by State or Federal officials. It seems essential, especially in the area of vocational education, that the programs that have gained acceptance achieve a sense of continuity and not be subject to the vagaries of intermittent funding. Consequently it is recommended that the $1,900 cut in this item be restored.

J-410A – Salary – School Nurse. The Committee maintains that an additional nurse is not needed at this time. It further contends that there has not been an increase in school enrollment from the school year 1968-69, and, therefore, no increased burden on the medical staff is apparent. The Board argues that while the present ratio of students to nurses is 1:1107, which figure is marginally in excess of the State recommended ratio, the problem of nursing service is complicated by the fact that three nurses must cover six schools. The addition of another nurse would provide an adequate ratio and enable adequate service to all the schools involved. The hearing examiner concurs with the Board with respect to the desirability of a full range of nursing services to the students. However, desirability is not the criteria involved herein. Based on the evidence and testimony, the hearing examiner cannot recommend that the position of school nurse is essential to the maintenance of an adequate system in Saddle Brook. It is recommended that the $5,800 reduction in this item be sustained.

J-410A – Salary Increase – School Nurse. The Committee recommends a reduction of $300 in the proposed increase for each nurse. The Board requests a restoration of $600 to honor the salary guide which represents an $800 increase due two nurses. The hearing examiner recommends a restoration of $600 to provide sufficient funds for the Board to honor its salary commitments.

J–610A – Additional Janitor. Respondent states that the physical plant of the school system has not been increased over last year, thus there should be no corresponding need for an additional janitor. The Board explains that additional staff (one member) is needed to develop a work schedule which shall enable them to attract and maintain personnel in a highly competitive market. The hearing examiner concurs with the Board that the maintenance of a highly motivated custodial staff is essential for the efficient operation of a school system. It has not been clearly shown, however, that the reduction of $5,325 for an additional janitor will adversely affect the school's program to such a degree that the Commissioner's interference is required. It is recommended that the $5,325 reduction be sustained.

J-610A – Summer Help – Maintenance. The Committee contends that the County of Bergen and State of New Jersey can provide summer help to the petitioner without cost, and that this service should be utilized. The Board explains that this $2,100 item is needed to provide an additional staff of young people to do the maintenance chores incident to a summer clean-up program and to prepare the schools for the following academic year. The hearing examiner recognizes the need for additional staff to refurbish the buildings during a vacation period. The Board has not shown evidence of attempting to utilize the summer help mentioned by the Committee, and the Committee has been vague

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regarding the exact nature of this help and its relevance to the school situation. Therefore, the hearing examiner recommends that $1,000 be restored in this item.

J-640 – Utilities. The Committee states that the Board has requested $2,450 more than it spent in 1968-69. The Board admits to this but maintains that it had been the recipient of $1,500 for overcharges from the utility company and that this figure supplemented the budgetary appropriation in this area. The hearing examiner accepts this explanation and concedes that a slight increase in the cost of utilities makes the requested appropriation a realistic estimate. It is recommended that the $1,500 in this reduction be restored.

J–720A – Upkeep of Grounds – Removal of Blacktop. The Committee submits that the work included in this budgetary item could be performed by the Department of Public Works in the municipality without any additional costs or increase in the school budget. The Board contends that the pavement of the driveways and parking areas at the five schools is in deplorable condition and must have attention immediately. Also included in this account are funds necessary to maintain an adequate and safe play and sports area for the Township schools. The hearing examiner supports the Committee's concept of sharing resources, and agrees that if the Township has the equipment to conduct a program of improvement, and is willing to do so, the sensible course of action would be to use such a resource. There are, however, conditions which arise from time to time on a school campus which require immediate remediation by the Board. To be totally dependent on the Township Department of Public Works which, due to heavy job commitments of its own, might not have the resources to be immediately responsive, could create a situation whereby inconvenient and even hazardous conditions on a school playground and parking areas could go unattended. Accordingly, the hearing examiner recommends that $2,000 of the $4,500 reduction be restored to the Board in the hope that adequate provision for Township-Board cooperation can be developed whereby the Township can provide the services necessary to pave the areas in question.

J–720B – Repair of Buildings. The Committee states that the Board expended $700 of its appropriated $2,500 in the school year 1968-69. The Committee argues that if the Board could defer these repair items during that year, it could continue to defer them for 1969-70. The Board submits that its failure to use budgetary funds in this line item was a result of the necessity to divert funds to eliminate a budget deficit for 1968-69. It further contends that the failure to expend funds in this area has resulted in a greater need for repairs to the buildings. The Committee introduced evidence to indicate that past expenditures for upkeep in this item amount to $1,401 annually. The hearing examiner recommends that $1,000 of the $5,000 be restored to provide appropriations for the normal upkeep at a slightly higher rate than that indicated by the Township Committee.

J–720C – Repair of Equipment. The Committee's reduction of $500 was based upon actual expenditures for the year 1967-68. Thus, the Committee

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allowed the Board an appropriation in 1969-70 amounting to an increase of approximately $400. The hearing examiner recommends that the reduction be sustained.

J–730A – Replacement of Instructional Equipment. The Committee cut $6,000 from the Board's $16,069 budgetary appropriation. The Committee based its cut and reduction on the Board's adjusted appropriation of $3,500 in this item for 1968-69. Actually the Board expended merely $920.66 in 1968-69 for the replacement of equipment. The Board contends, as it had previously, that the austerity required to maintain fiscal integrity resulted in diverting funds from much needed instructional equipment. They claim that the $6,000 removed from this account would prevent the purchase of pianos in three of the elementary schools presently served by the music teacher. The pianos now in the elementary schools are antiquated and in need of repair and lack the flexibility necessary to support an elementary vocal program. The hearing examiner recognizes the need for pianos to support the vocal teacher who cannot be expected to rely on her voice continually to provide enthusiasm and motivate the children, and who needs to use a piano to create the excitement of, and for, music that is so essential to a good music program. The contention of the Committee that the increase in this budgetary item represents what could be considered a quantum leap from the previous year's expenditure is understandable. However, when viewed in context with the district's needs, the Board's desire to provide these facilities is also understandable. It is recommended that $3,000 of the $6,000 be restored to start the acquisition of pianos in support of the elementary vocal music program.

J–730B – Replacement of Non-Instructional Equipment. The Committee states that the Board failed to provide an adequate explanation for no increase in this item in the 1968-69 budget to $7,175 in the 1969-70 budget. In addition, the Committee maintains that this item represents appropriations for non-educational items. The Board argues that much of its equipment is old and obsolete, and indicates a desire to replace such items as cafeteria tables, faculty room furniture, typewriters and stage curtains. The hearing examiner concludes that the Board's request for non-instructional equipment is not excessive in terms of current educational standards and that its purchase would provide valuable technical and esthetic aids for the teachers and professional personnel. The hearing examiner cannot find, however, that the lack of this equipment will be so deleterious as to render the school program inadequate. It is recommended that the reduction of $6,675 be sustained.

J–740B – Repair of Buildings. The Committee submits that the Board's budget request of $7,500 is an increase of $4,500 over the adjusted budget figure for 1968-69 and that the Board has failed to make adequate explanaiton for this increase. The Board argues that an increase in vandalism in the district has created the necessity for the increase in this item. The Board further maintains that one of the reasons for the seemingly large increase in this account is that previously some of the costs which should have been charged to this account were charged to J–650A – Custodial Supplies. An examination of the

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previous year's budget and audit report reveals this assertion to be a correct and reasonable explanation for an increase. It is recommended that $2,700 be restored to this item.

J–740C – Repair of Equipment. The Committee argues that the Board has failed to set forth any explanation for the increase in this account. It further contends that an examination of the Board's previous budgets provides an experience factor which would indicate a spending level of $600 below that which the Board appropriated. The Board avows that a small contingency fund is needed in this account as a hedge against emergency breakdowns. Although the hearing examiner concurs that this is a prudent course of action, it cannot be stated that such funds are needed in this case to maintain an adequate system of education. It is recommended that a $600 reduction be sustained.

J–1111 – Community Services. The Committee contends that the Board has provided these services in the past for $1,500 and that the Board has failed to explain the need for an additional $1,000. The Board establishes that there has been an increase of usage of the school by community organizations and that these funds are needed to provide salaries for custodians on duty for this purpose. The hearing examiner wishes to commend the Board for its actions in opening the schools to community use and considers community use of school facilities to be an important service. However, it cannot be said that these funds are needed to provide an adequate system of education. Therefore, the hearing examiner recommends that the $1,000 reduction in this item be sustained.

L–1200 – Capital Outlay Series. The Committee bases its reduction of $24,660 in this account on the availability of funds to the Board from L-1230 in which account they contend the Board will have a $22,364.89 balance. The Board has received voter approval of $60,000 for fire detection equipment, and has received bids in the sum of $37,635.11 for the installation of such equipment. The Committee further contends that many of the items requested by the Board are deferrable and have no direct bearing on education. The Board argues that the cumulative effect of seven budget defeats in the past ten years has impeded maintenance on existing equipment, and has prevented acquisition of new equipment on a gradual basis. Consequently, the need to supply teachers with the tools indicated on an itemized list is real and urgent. The hearing examiner, after reviewing the list of equipment submitted by the Board, is impressed by the judgment of the Board as to the need for equipment to provide the instructional staff with the tools necessary for education. He concedes that a $60,000 line item for fire detection equipment does exist in the budget and that, therefore, the reasoning of the Committee that a $22,000 surplus exists in that line item appears sound. However, the $60,000 has apparently received voter approval as a separate question and as such there is some confusion regarding the possible diverting of this surplus to other accounts. Therefore, the hearing examiner recommends the restoration of $12,330 in the capital outlay account to enable the Board to purchase equipment on a priority basis.

The recommendations of the hearing examiner for restoring or sustaining part or all of the Committee's proposed reductions are shown as follows:

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Acc't. No.	Item	Am't Of Reduction	Am't. Restored	Am't. Not Restored
Current Expense:				
J212	Curric. Coordinator	$14,100.00	$ 7,000.00	$ 7,100.00
J213A	Additional Staff Requirements	34,000.00	13,600.00	20,400.00
J213A	Teacher Aides	6,000.00	3,000.00	3,000.00
J213A	Ass't. Principal-Cambridge School	7,500.00	7,500.00	-0-
J213	Substitute Teachers	6,000.00	6,000.00	-0-
J213	Extra Pay for Services	2,290.00	2,290.00	-0-
J214C	Salary-Social Worker	760.00	760.00	-0-
J240	Teaching Supplies	6,000.00	-0-	6,000.00
J250C	Pilot Program	1,900.00	1,900.00	-0-
J410A	Salary-Additional School Nurse	5,800.00	-0-	5,800.00
J410A	Salary Increase-School Nurses	600.00	600.00	-0-
J610A	Salary-Add'l. Janitor	5,325.00	-0-	5,325.00
J610A	Summer Help-Maintenance	2,100.00	1,000.00	1,100.00
J640	Utilities	1,500.00	1,500.00	-0-
J720A	Upkeep of Grounds	4,500.00	2,000.00	2,500.00
J720B	Repair of Buildings	5,000.00	1,000.00	4,000.00
J720C	Repair of Equipment	500.00	-0-	500.00
J730A	Replacement of Instructional Equip.	6,000.00	3,000.00	3,000.00
J730B	Replacement of Non-Instructional Equip.	6,675.00	-0-	6,675.00
J740B	Repair of Buildings	4,500.00	2,700.00	1,800.00
J740C	Repair of Equipment	600.00	-0-	600.00
J1111	Community Services	1,000.00	-0-	1,000.00
	Total Current Expense	$122,650.00	$53,850.00	$68,800.00
Capital Outlay:				
L1220	Sites	$ 500.00	$ -0-	$ 500.00
L1240	Equipment	24,160.00	12,330.00	11,830.00
	Total Capital Outlay	$24,660.00	$12,330.00	$12,330.00
Certified to Board of Taxation			$66,180.00	

* * * *

The Commissioner has reviewed the findings and recommendations of the hearing examiner as set forth herein. It is to be observed that the length of this hearing is an indication of the polarization of viewpoint which had occurred in this community regarding the allocation of resources for school purposes. The Commissioner concurs with the hearing examiner in finding that the Township Committee did not act in an arbitrary or capricious manner in reducing the Board's budget. The concern expressed by the Township Committee regarding diverting of funds is genuine. It is difficult to reconcile such action with municipal accounting practices which do not permit exceeding of budgetary line items. The Board, however, was faced with a series of defeats which made long-term planning difficult, and it apparently drifted into the practice of

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patching up an inadequate budget by juggling existing accounts. Such practice, while permitted within the statutes, does not provide a sound base for decision making and, in effect, develops an atmosphere of crisis spending which is always more costly, both in terms of productivity and actual expenditures, than is a program of planned sequential growth.

The Commissioner finds and determines that an additional $66,180.00 is necessary for the maintenance and operation of a thorough and efficient system of public schools in the Township of Saddle Brook for the 1969-70 school year. He directs, therefore, that an additional sum of $53,850 for Current Expense and an additional sum of $12,330 for Capital Outlay for a total sum of $66,180, be added to the earlier certification made to the Bergen County Board of Taxation and raised for the school purposes of the district for the 1969-70 school year.

COMMISSIONER OF EDUCATION

March 12, 1970

John N. Ruggiero,

Petitioner,

v.

Board of Education of the Greater Egg Harbor Regional School District, Atlantic County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, John N. Ruggiero, *Pro Se*

For the Respondent, Champion & Champion (Edward W. Champion, Esq. of Counsel)

Petitioner is a teacher who, after three years of employment in respondent's school system, was not reappointed. He alleges that the Board's failure to reappoint him was an act of reprisal for his work as a teacher-organization officer, and that such failure was an arbitrary and capricious action. Respondent denies that its failure to reemploy petitioner was improper and moves to dismiss the petition on the grounds that there is no decision of respondent from which petitioner can appeal.

Oral argument on respondent's motion for dismissal was heard by a hearing examiner appointed by the Commissioner of Education in Trenton on December 12, 1969. Counsel for respondent submitted a brief in support of the motion. The report of the hearing examiner is as follows:

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The undisputed facts of the matter are that petitioner was employed under contract as a teacher in respondent's school system for the school years 1966-67, 1967-68 and 1968-69. The third annual contract was fulfilled by both parties but expired by its terms on June 30, 1969. No new employment contract was offered to petitioner at that time. A petition of appeal subsequently was filed with the Commissioner of Education.

In support of its motion to dismiss the appeal, respondent maintains that since petitioner had not fulfilled the precise conditions required for tenure status and was a probationary employee, he is not entitled to a hearing with respect to why he was not offered a new contract, and cites the cases of *Taylor and Ozmon v. Paterson State College*, 1966 *S.L.D.* 33, *Amorosa v. Board of Education of Bayonne*, 1966 *S.L.D.* 214, *Ruch v. Greater Egg Harbor Regional High School District*, 1968 *S.L.D.* 7 in support of this contention. Respondent also deals with petitioner's statement that failure to renew the contract of petitioner for a fourth year was an act of reprisal, but maintains that the bare allegation of "reprisal" is not followed by any "situation as to how the reprisal was worked out."

Petitioner, on the other hand, in the petition of appeal and in the hearing on the motion, contends that reprisal was taken against him in the form of a non-renewal of contract, and that this alleged reprisal was evidenced by three principal actions summarized as follows:

(a) He was the only teacher in his department to receive an evaluation report for the 1968-69 school year.

(b) He was never observed by anyone in these years of teaching for respondent.

(c) He was the only non-tenure teacher refused a contract who was not evaluated according to the procedure set forth in respondent's "Supervision Criteria for Observation and Evaluation."

Petitioner further contends that these alleged actions were proof that he was treated differently from his peers, or in other words that he was discriminated against, and that these alleged "discriminatory acts" should be joined with the proscribed "race, creed and color," and brought to light. The primary reason for the board's alleged discrimination against him is said by petitioner to be the fact that he had been an officer of the teachers' association and a member of the organization's executive committee.

The Commissioner has reviewed and considered the arguments of the parties with respect to respondent's motion for dismissal of the petition herein.

It has been repeatedly held by the Courts and by the Commissioner that until a school board employee has attained the legislative status of tenure, he has no entitlement to employment beyond the term of whatever contract or agreement was entered into. Renewal of a contract, or the issuance of a contract for a succeeding year, for a non-tenure teacher, is a matter lying wholly within

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the discretion of the Board. *Zimmerman v. Newark Board of Education*, 38 *N.J.* 65 (1962); *Ruch v. Greater Egg Harbor Regional High School District, supra; Donaldson v. Board of Education of North Wildwood*, decision of the Commissioner, August 21, 1969.

In the *Zimmerman* decision the Court said that the "historically prevalent view is expressed by *People v. Chicago*, 278 *Ill.* 318. 116 *N.E.* 158, 160 (1917) as follows:

> "A new contract must be made each year with such teacher as (the board) desires to retain in its employ. No person has a right to demand that he or she shall be employed as a teacher. The board has the absolute right to decline to employ or to reemploy any applicant for any reason whatever or for no reason at all. The board is responsible for its action only to the people of the city from whom through the mayor the members have received their appointments. * * * Questions of policy are solely for the determination of the board, and when they have once been determined by it, the courts will not inquire into their propriety."

The Court went on to observe that certain statutory limitations, such as illegal discrimination and tenure, have been placed upon the employment powers of boards of education but:

> "Except as provided by the above limitation, or by contract, the Board has the right to employ and discharge its employees as it sees fit." *Ibid.* at 71

In the case of *Parker v. Board of Education of Prince George's County*, 237 *F. Supp.* 222, 228 (*D.C. Md.* 1965) the Court said:

> " * * * unless there is a statute to the contrary, probationary teachers' contracts may be terminated by the school authorities at the end of any contract year prior to the time tenure is gained, with or without cause and without a hearing." (at p. 227)

In the instant case both parties fulfilled their obligation under three contracts, and there was no action to continue the employment for a fourth academic year. The Commissioner has previously held that there is no statute or rule which requires a board of education to take some formal action with regard to the nonrenewal of a probationary contract which has expired. *Ruch v. Greater Egg Harbor Regional Board of Education, supra* Since this is so, and absent any allegation of any statutorily proscribed action on the part of the Board of Education, the Commissioner has no power to substitute his discretion for that of the Board.

Petitioner's case rests solely on a series of allegations made by petitioner as to why he was not offered a contract for the 1969-70 school year, but prior decisions of the Courts and the Commissioner have held that mere allegations do not create a right to contract employment. In *Clarence Edmond v. Board of*

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Education of the Shore Regional High School District, decision of the Commissioner, February 21, 1969, the petitioner claimed that the Board's decision not to re-hire him was frivolous, capricious and arbitrary and he asserted a claim to a hearing in order that he might prove the allegation. The decision held, in part, that, "Such naked allegations, unsupported in any way, are not sufficient to create an issue and establish a right which does not otherwise exist. *U.S. Pipe and Foundry Co. v. American Arbitration Association*, 67 *N.J. Super.* 384 *(App. Div.* 1961) To hold otherwise would open the door to any dismissed employee to enforce his demand for a hearing, despite the clear ruling of the Courts that such an entitlement does not exist, by the mere device of pleading arbitrary or unreasonable action by his employer. What cannot be done directly cannot be accomplished by indirection. *Sastokas v. Freehold*, 134 *N.J.L.* 305, 307, (Sup. Ct. 1946)

Since the decision to issue contracts or to refrain from issuing contracts is a decision of a board of education alone to make, there is no basis for action by the Commissioner in this instance. The contract of petitioner expired by its terms in June of 1969, and there was no violation of any of its provisions by either petitioner or respondent.

The Commissioner finds no cause for action and respondent's motion to dismiss the appeal will therefore be granted.

The petition herein is dismissed.

COMMISSIONER OF EDUCATION

March 17, 1970

In The Matter of the Annual School Election Held in the School District of the Borough of Spring Lake, Monmouth County.

COMMISSIONER OF EDUCATION

Decision

The announced results of the balloting for two seats on the Board of Education for full terms of three years at the annual school election held February 10, 1970, in the school district of the Borough of Spring Lake, Monmouth County, were as follows:

	AT POLLS	ABSENTEE	TOTAL
Richard J. Fay	233	2	235
Walter W. Thermann	173	1	174
Dr. M. Cannon	160	4	164

Pursuant to a letter request dated February 12, 1970, from Dr. Marilyn Cannon, the Commissioner of Education directed the Assistant Commissioner in

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charge of Controversies and Disputes to conduct a recount of the votes cast for candidate Cannon at the office of the Monmouth County Superintendent of Schools, Freehold, on February 27, 1970.

Candidates Fay and Thermann filed nominating petitions prior to the election, and their names appeared on the ballot on the voting machines. The votes received by candidate Cannon were irregular ballots cast by writing in her name on the paper roll under the slots provided for such purpose on the voting machines.

Examination of the paper rolls reveals that irregular ballots were cast at the two designated polling places and that the name of Dr. M. Cannon (and sixteen (16) other variations) was written in at various lines on the rolls.

The names of candidates Fay and Thermann appeared on the ballot on each machine at levers 1 and 2 and opposite write-in slots 1 and 2 respectively. To cast a vote for a person whose name did not appear on the ballot, the voter had to open one of the first two slots opposite the names of the candidates which appeared on the ballot and write in the names of the person for whom the ballot was to be cast. Votes written in on other lines must be ruled invalid. "An irregular ballot must be cast in its appropriate place on the machine or it shall be void and not counted." *N.J.S.A.* 19:49-5 See also *Application for Recheck of Irregular Ballots, Borough of South River*, 26 *N.J. Super.* 357 (*Law Div.* 1953).

In conducting the recount, therefore, only single votes appearing on lines one or two were counted; twenty-six votes written in on other lines were voided. Such votes cannot be counted for the reason that the voter could have voted for more than two persons to be elected. All variations of the name of candidate Cannon written on lines one and two were counted since the spelling or designation of given name or use of initials were sufficiently clear to reveal the intent of the voter. See also 29 *Corpus Juris Secundum* §180. The result of the recount tallied exactly with the report of the election officials previously announced.

The Commissioner finds and determines that Richard J. Fay and Walter W. Thermann were elected to seats on the Spring Lake Borough Board of Education at the annual school election on February 10, 1970, for full terms of three years each.

COMMISSIONER OF EDUCATION

March 17, 1970

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In The Matter of the Annual School Election Held In The School District of the Township of Washington, Morris County.

COMMISSIONER OF EDUCATION

Decision

At the annual school election held in the School District of the Township of Washington, Morris County, on February 10, 1970, three members were to be elected to the Board of Education for full terms of three years each, and one member was to be elected for an unexpired term of one year. Only two candidates filed nominating petitions for the three-year terms. The announced results of the tally of votes for them were as follows:

Martin J. Grogan	229
Richard E. Barto	221

The names of eleven other citizens were written in as personal choice candidates for the third vacant seat for the three-year term. Two candidates led all others by a wide margin, but the announced result was a tie as follows:

Stephen Dean	59
William Koehler	59

Pursuant to a letter request received from candidate Stephen Dean on February 19, 1970, the Commissioner of Education ordered a recount of the votes cast. The recount, which was confined to a check of the votes cast for candidates Dean and Koehler for a three-year term was conducted by an authorized representative on March 2, 1970, at the office of the Morris County Superintendent of Schools in Morris Plains. The Commissioner's representative reports as follows:

At the conclusion of the recount, the tally stood:

Stephen Dean	58
William Koehler	60

The Commissioner finds and determines that Martin J. Grogan, Richard E. Barto and William Koehler were elected at the annual school election on February 10, 1970, to seats on the Washington Township, Morris County, Board of Education for full terms of three years each.

COMMISSIONER OF EDUCATION

March 17, 1970

You are viewing an archived copy from the New Jersey State Library.

Board of Education of the City of Jersey City, Et Al.

Petitioner,

v.

Board of School Estimate of the School District of the City of Jersey City, Hudson County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

Attorney for the Petitioner, Sydney I. Turtz, Esq.

Attorney for the Respondent, Louis P. Caroselli, Esq.

Petitioner, the Board of Education of the school district of Jersey City, appeals from an action of the Board of School Estimate rejecting the budget submitted by the Board of Education and certifying to the Mayor and Council a reduced amount for the school purposes of the district to be raised by local taxes. Petitioner alleges that it is impossible to maintain the thorough and efficient system of public schools mandated by the State Constitution or to provide suitable educational facilities and programs as required by law (*N.J.S.A.* 18A:33-1) within the limit of the appropriations approved by the Board of School Estimate. It prays the Commissioner to determine that the subject resolution adopted by the Board of School Estimate is arbitrary and capricious, to declare the amount of monies certified to the Mayor and Council to be insufficient and to order corrective action or in the alternative fix the school budget on his own motion.

The testimony and documentary evidence educed at a hearing before the Assistant Commissioner in charge of the Division of Controversies and Disputes at the State Department of Education, Trenton, on March 23, 1970, disclose the following factual situation:

The City of Jersey City is organized as a Type I school district (*N.J.S.A.* 18A:9-2). As provided by statute (*N.J.S.A.* 18A:22-7) the Board of Education prepared its school budget for the 1970-71 school year and delivered it to the Board of School Estimate. The total amount which the Board of Education estimated to be necessary is $28,670,227 of which $20,327,768 is to be raised by local taxation and $8,289,639 is anticipated from State aid and other sources.

On February 11, 1970, a public hearing on the school budget was held by the Board of School Estimate. At the conclusion of the hearing, the Board of School Estimate acted to reject the amount of $20,327,768 of appropriations requested by the Board of Education and adopted a resolution whereby it

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determined that the total amount necessary for school purposes for the 1970-71 school year to be raised locally should be $6,629,750. The vote on the resolution was 3-2, with the Mayor and two Council members voting in favor and the two members of the Board of Education opposing the reduction. Thereafter the required certification of the action of the Board of School Estimate was prepared and delivered to the Mayor and Council. Because the school district of Jersey City raises its school appropriations on a calendar-year basis the certification determined the amount to be raised for the period from

January 1, 1970 to June 30, 1970 as $9,165,000 (one-half of the $18,331,000 approved previously on February 14, 1969) and an amount of $3,314,875 (one-half of the $6,629,750 currently determined) for the July 1 - December 31, 1970 period.

Petitioner contends that the school district requires the total amount of $20,327,768 of local funds and that it is impossible to provide the facilities, equipment and educational program necessary for the operation of a thorough and efficient system of public schools within the amount of funds certified to be appropriated by the Board of School Estimate.

Subsequently, on March 19, 1970, the Board of Education filed a Supplemental Petition. It recites the occurrence of a strike of its teaching staff from February 9 to March 5, 1970, and the negotiations which took place and culminated in a contract between the Board of Education and the Jersey City Education Association, representing the teachers, entered into on March 4. The Board determined such agreement requires an increase in the amount of money estimated in the budget previously submitted to the extent of $4,640,725. The Board of Education thereafter prepared a supplemental budget in the amount of $4,640,725 and served a copy upon each member of the Board of School Estimate on March 12. No action had been taken by the Board of School Estimate on the supplemental request at the time of the hearing of this case. The Board of Education asks the Commissioner to include this supplementary amount in whatever determination is made of this appeal.

The hearing in this case was divided into two phases, the first part concerning itself with the original budget submitted by the Board of Education, followed by consideration of the supplemental appropriation requested.

Respondents called upon the Mayor and one councilman to testify with respect to the reasons underlying the action of the Board of School Estimate to reduce the school budget by more than $13,000,000. In this testimony they cited the critical problems facing large cities and their increasing inability to provide ever more costly services with shrinking tax resources. The Mayor testified that Jersey City has been forced to institute a 100% assessment program this year and, with rising costs of all services, faces the prospect of an effective residential tax rate of $80 per $1000 of true value. Such a load, respondents opined, is more than the taxpayers can bear. As a result they say Council is in the position of having to consider the essentiality of the services it is asked to

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provide, eliminating or reducing those which can be spared or postponed to a time when the City is in less dire financial straits. While the Council places a high value on education, respondents assert, first priority must be assigned to safety, health, and welfare services such as police and fire protection, water supply, sewage disposal, medical and nursing care, and the like. The cost of these essential services, the Mayor and Council contend, leaves only sufficient funds for a "caretaker" budget for the schools. The amount certified, therefore, is intended to provide sufficient funds to insure the maintenance of the physical plant of the school district but does not contemplate the funding of any school program for the 1970-71 year. According to the Mayor, the decision not to fund the schools for the next year was not taken frivolously or lightly but was dictated by serious doubt that the taxpayers of Jersey City can support even a basic services budget and Council's conclusion that education is the only service that can be deferred or delayed without potential loss of life.

Respondents call attention to litigation which they have instituted in Superior Court seeking to compel the State to assume a greater proportion of the financial burden of public education. They ask the Commissioner to defer action on the appeal herein until such time as the Court action is completed and more meaningful participation by the State in the financing of the schools may be realized thereby. Finally, the Mayor and Council contend that it is the duty of the Commissioner to advise the Governor and the Legislature with respect to the critical problems of education and to suggest their remediation. They urge, therefore, that the Commissioner "direct the Legislature" to provide adequate funds.

The Commissioner is constrained to note that he has consistently and assiduously called attention to the plight of the cities and the urgent need to deal constructively with the problems they face. Because of his knowledge and conviction, he entertains great sympathy for the Mayor and Council in the difficult tasks they are called upon to perform for the people they represent. But such sympathy cannot obscure the fact that the Commissioner has an overriding responsibility to the children and youth of this State. As a constitutional officer who has sworn to uphold the laws of New Jersey and to perform the duties of his office to the best of his ability, "his primary responsibility is to make certain that the terms and policies of the School Laws are being faithfully effectuated." *Laba v. Newark Board of Education*, 23 *N.J.* 364, 382 (1957)

The Commissioner of Education's role and function has been clearly set forth in the case of *Elizabeth Board of Education v. Elizabeth City Council*, decided by the New Jersey Supreme Court March 17, 1970:

> "The Constitution, Art. VIII, sec. IV, par. 1, mandates that '[t]he Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.' The legislature has implemented the mandate administratively and financially by providing for local school districts with taxing power, with overall

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> supervisory and control authority in the State Board of Education, *N.J.S.A.* 18A:4-10, and in the Commissioner as the chief executive and administrative officer having general charge and supervision of the work of the department of education and as the official agent of the state board for all purposes, *N.J.S.A.* 18A:4-22. Thus it is the duty of the Commissioner to see to it that every district provides a thorough and efficient school system. This necessarily includes adequate physical facilities and educational materials, proper curriculum and staff and sufficient funds."

A similarly definitive statement of the Commissioner's duties and function was uttered by the Court in *East Brunswick Board of Education v. East Brunswick Township Council*, 48 *N.J.* 104, 106 (1966) with particular reference to budget appeals:

> " * * * His function is admittedly to sit as a reviewing body which, however, is charged with the overriding responsibility of seeing to it that the mandate for a thorough and efficient system of free public schools is being carried out. See *Laba v. Newark Board of Education, supra*, 23 *N.J.*, at *pp.* 381-82; *In re Masiello, supra*, 25 *N.J.*, at *p.* 606; *Booker v. Board of Education, Plainfield, supra*, 45 *N.J.*, at *p.* 177."

And at page 107:

> " * * * the Commissioner in deciding the budget dispute here before him, will be called upon to determine * * * whether the State's educational policies are being properly fulfilled. Thus, if he finds that the budget fixed by the governing body is insufficient to enable compliance with mandatory legislative and administrative educational requirements or is insufficient to meet minimum educational standards for the mandated 'thorough and efficient' East Brunswick school system, he will direct appropriate corrective action by the governing body to fix the budget on his own within the limits originally proposed by the board of education."

Local school districts are required by statute to furnish "suitable educational facilities including proper school buildings and furniture and equipment, * * * and courses of study suited to the ages and attainments of all pupils * * *." *N.J.S.A.* 18A:33-1 Nowhere can there be found any option or alternative with respect to such requirement, and there is a complete absence of authority to close the public schools except by the local board of education for reasons of health. *N.J.S.A.* 18A:40-12 Even an excess of expenditures over appropriations does not permit the closing of schools. *Cf.R.S.* 2A:135-5. Therefore, the intent of the Mayor and Council to close the Jersey City public schools for the year 1970-71 or any part thereof disregards the law and cannot be sustained. The Commissioner cannot permit the public schools of Jersey City to be closed. Accordingly he must deny the pleas of respondents and must determine the funds required to provide an adequate educational program for the school district.

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School officials testifying for the Board of Education disclosed that the budget submitted to the Board of School Estimate had already been trimmed of many of the requests emanating from the schools. They stated that the Board made a determination to hold increases in the budget over the current year's operation to a maximum of $2,500,000 and included only those items of expenditure within such limit which could not be eliminated or deferred.

Examination of the budget delivered to the Board of School Estimate reveals that the increase over last year amounts to $2,500,000, and that $1,500,000 of that sum is made necessary to meet salary adjustments negotiated a year ago in February 1969 and by normal increments called for in the salary schedule previously adopted. Major elements of the remaining $1,000,000 of increase are $227,000 for additional teachers required to keep pace with an average enrollment increase of 700-1000 pupils per year; $84,000 for additional janitors to staff a new high school, much larger than the one replaced; and $400,000 to extend the health insurance program to cover the families of employees. The remainder is made up of some 70-odd smaller expenditures.

Both the Mayor and Councilman admitted under questioning that the budget was not excessive in terms of the needs of the school system. While they expressed a belief that close examination might disclose items of expenditure that could be eliminated or reduced without major harm to the school system, they conceded that any such curtailment would be of minor significance with respect to the financial plight of the municipality. In their opinion, the only valid corrective measure rests not on a considered reduction of the school budget but in a complete moratorium on all school operations, other than maintenance, for the next year. As has been stated, the Commissioner rejects any such remedy, which would wreak immeasurable and irreparable harm in the lives of thousands of children and would ignore the school laws.

The Commissioner has examined the financial data of the school district including records of past expenditures, the current year's operations, and the estimated costs for the ensuing year. He concludes that the increase of $2,500,000 is a modest one, in the circumstances, and is required to operate an adequate system of public schools in the district. Neither the Board of School Estimate nor the Mayor and Council have indicated items of expenditure which they consider excessive and unwarranted, nor does the Commissioner find any such. He, therefore, finds and determines that the budget as submitted by the Board of Education to the Board of School Estimate is necessary to the maintenance and support of a thorough and efficient system of public schools in the City of Jersey City.

Next to be considered is the supplemental petition of the Board of Education, which seeks an additional appropriation of $4,640,725 to meet the costs of an agreement negotiated with the Jersey City Education Association since delivery of the original budget.

Petitioner delivered its original budget to the Board of School Estimate in

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early February and the action to reject it and substitute a "caretaker" budget was taken on February 11. The strike of the school employees commenced February 9 and concluded on March 5 when negotiations resulted in an agreement between the Board of Education and the Jersey City Education Association. Thereafter the Board prepared its supplemental budget to meet the unanticipated costs of its settlement with its employees and served it on members of the Board of School Estimate on March 12, 1970. At the time of the hearing herein the Board of School Estimate had not been called into session to consider the supplemental budget.

The Commissioner deems consideration by him of this supplemental budget at this posture to be premature. Admittedly the Board of School Estimate has not met to consider and act upon the request. Such action should precede any consideration or action by the Commissioner. While the Board of Education may assume that the Board of School Estimate and the Mayor and Council will reject the supplemental request, judging from their action with respect to the basic budget, such an inference cannot provide a valid substitute for the action required by law. Nor is it a proper function of the Commissioner to usurp the power of the Board of School Estimate or the municipal governing body or to intervene before they have had opportunity to perform the duties accorded them by law. In any case, the Commissioner holds that the Board of School Estimate and the Mayor and Council should have the opportunity accorded them by law to act in this matter. The Commissioner will decline, therefore, at this time, to rule on the matter of the supplemental budget. Determination of the supplemental budget request is remanded to the Board of School Estimate for appropriate action. The Mayor is directed to call a meeting of the Board of School Estimate in accordance with the rules of the State Board of Education to consider and act upon the supplemental budget which has been served upon each of its members. The Commissioner will retain jurisdiction in this phase of the matter pending completion of the action called for.

In summary, the Commissioner finds and determines that an amount of $20,327,768 is required to maintain a thorough and efficient school system in the City of Jersey City during the 1970-71 school year and such amount is to be certified to the Hudson County Board of Taxation as the amount of appropriations necessary for the school purposes of the district. The Commissioner further remands the supplemental budget request to the Board of School Estimate for appropriate action and retains jurisdiction over this aspect of this matter until such action is accomplished.

COMMISSIONER OF EDUCATION

March 24, 1970

You are viewing an archived copy from the New Jersey State Library.

Board of Education of the City of Jersey City,

Petitioner,

v.

Board of School Estimate of the School District of the City of Jersey City, Hudson County,

Respondent.

COMMISSIONER OF EDUCATION

Decision On Supplemental Appeal

Attorney for the Petitioner, Sydney I. Turtz, Esq.

Attorney for the Respondent, Louis P. Caroselli, Esq.

The decision herein is addressed to the supplemental appeal filed by the Jersey City Board of Education concerning the appropriation of funds in addition to those estimated in the annual school budget. As such it supplements and completes the prior decision in this case promulgated March 24, 1970.

The budget prepared by the Jersey City Board of Education for the 1970-71 school year and submitted to the Board of School Estimate called for an appropriation of $20,327,768 from local tax resources. That amount was reduced to $6,629,750 and the Board appealed to the Commissioner to order the amount to be raised. In a supplemental appeal filed by the Board of education, one week later, an additional appropriation of $4,640,725 was asked to be ordered in order to provide the funds required to underwrite a negotiated agreement with the employees of the school district.

In a decision dated March 24, 1970, the Commissioner ordered certification of the full amount of $20,327,768 estimated to be required in the annual school budget. The matter of the supplemental appropriation of $4,640,725 was deemed to be presented prematurely for the reason that the Board of School Estimate had taken no action on it. It was accordingly remanded for further consideration by the appropriate local agencies with jurisdiction retained by the Commissioner.

By letter dated June 18, 1970, counsel for petitioner notified the Commissioner that the Board of School Estimate met on June 9, 1970, considered the supplemental appropriation of $4,640,725 and rejected it by a vote of 3 to 2. The Commissioner accepted counsel's letter as constituting adequate notice that petitioner wished to press its supplementary appeal. Counsel for respondent filed a letter memorandum with respect to the issue. By letter dated July 17, the Commissioner notified both parties that he deemed the record of the previous hearing supplemented by the memorandum of counsel to be sufficient and that further hearings or submissions were unnecessary.

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The facts basic to this issue are not contested. Petitioner adopted its budget for the 1970-71 school year on January 29, 1970. On February 9 the Jersey City Education Association instituted a strike against the school system which resulted in a complete closing of the schools. Thereafter petitioner and the N.J.E.A. conducted negotiations which culminated in an agreement on March 4, 1970. Petitioner urges that the terms of the agreement will require expenditures over and above those anticipated in its annual budget to an extent of $4,640,725. The Board of School Estimate by its action on June 9, rejected an additional appropriation of such amount. Petitioner prays the Commissioner to over-ride the refusal of the Board of School Estimate to certify the sum requested and to order that it be raised.

The Commissioner has already been called upon to rule on a similar issue raised by the Newark Board of Education. In a decision dated July 16, 1970, the Commissioner noted that the question of appropriations over and above those called for in the annual school budget was considered in the case of *Newark Teachers' Association v. Newark Board of Education* 108 *N.J. Super.* 34 (*Law Div.* 1969), and the Court held that the raising of such additional funds is controlled by statute.

The Commissioner therefore reiterates herein his determination in the *Newark* case as follows:

> "Petitioner seeks a supplementary appropriation therefore over and above its annual budget estimates.
>
> "Such a request is beyond the scope of the Commissioner's authority. While the Courts have clearly established the power of the Commissioner to hear and decide appeals from alleged excessive reductions made by municipal governing bodies of annual school budgets, he finds no such authority with respect to supplemental appropriations. The law on the question of supplemental appropriations has been clearly set forth in *Newark Teachers' Association v. Newark Board of Education*, 108 *N.J. Super.* 34, *(Law Div.* 1969). In that case the Board of Education completed a salary agreement with its teachers in August and certified the amount needed to the Board of School Estimate. That body refused to endorse the appropriation, whereupon the Teachers' Association filed suit. In deciding the issue the Court observed that there is no statutory provision permitting a board of education to amend its annual budget after it has been approved. It noted that 'additional funds may be requested and appropriated only under *N.J.S.A.* 18A:22-21 to 23.' "

In the instant matter petitioner prepared and submitted its estimate of funds needed for the 1970-71 school year in the form of its annual budget. The amounts requested were subsequently drastically curtailed by the Board of School Estimate and the Mayor and Council, and on appeal were reinstated by the Commissioner of Education under the authority vested in him as enunciated in *East Brunswick Board of Education v. East Brunswick Township Council*, 48 *N.J.* 94 (1966).

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After adoption and submission of its budget, however, the Board of Education determined that an additional amount of $4,640,725 would be required to implement certain agreements it had entered into with its staff. Such additional appropriations were rejected by the Board of School Estimate. The Board of Education now appeals to the Commissioner of Education to over-ride such rejection and order the funds to be certified and raised. In the Commissioner's judgment, however, such action would exceed the scope of his authority. In his view the circumstances in this case are similar in all material respects to the conditions present in the *Newark Teachers' Association* case, *supra*, and are controlled thereby. The Commissioner finds, therefore, that the matter of supplemental appropriations rests with the Board of School Estimate and the Municipal Governing Body and is beyond the scope of his authority to determine the adequacy of annual school budget appropriations.

The appeal herein is accordingly dismissed.

COMMISSIONER OF EDUCATION

August 5, 1970

Edwin Frieman, Joseph Benvent and Emanuel Morgan,

Petitioners,

v.

Board of Education of the Borough of Haworth, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Dominick P. Preziosi, Esq.

For the Respondent, Parsekian and Ferro (Michael J. Ferro, Jr., Esq. of Counsel)

Petitioners are residents of the Borough of Haworth, Bergen County, who contend that respondent Board of Education has acted contrary to law in refusing to transport petitioners' children to and from school. Respondent denies that its action is illegal and maintains that the children of petitioners are not entitled to transportation under its rules or the laws of the State of New Jersey.

At a conference of the parties held at the State Department of Education Offices on May 13, 1969, it was agreed the matter would be submitted on the pleadings and briefs of counsel. The report of the hearing examiner follows:

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There is substantial agreement on the basic facts of the matter; namely, that the children of petitioners live approximately 1½ miles from the Haworth Elementary School, that passage to the School is via Sunset Avenue through a generally wooded area, and that the speed limit on such road is 40 miles per hour. It is also agreed that petitioners appeared personally at a hearing of the Haworth Board of Education conducted on September 5, 1968, and demanded that transportation be provided for their children along Sunset Avenue to the School, but that the Board refused to supply the requested service.

In support of the contention that refusal to supply such transportation was illegal, petitioners cite *N.J.S.A.* 18A:33-1 which provides that each school district must provide schools "convenient of access," or, if not, that transportation for pupils residing "remote" from them must be provided according to the terms of *N.J.S.A.* 18A:39-1. Petitioners contend that the words "convenient of access" and "remote," give color and meaning to one another and that both statutes, taken together, evince a legislative purpose requiring the transportation of pupils who are not conveniently located or are remote from school facilities. Petitioners further contend that *N.J.S.A.* 18A:39-1.2 makes special note of safety reasons as a basis for transporting pupils in a regional school district, and maintain that the combined effect of the statutes, in this instance, is to prove legislative intent to mandate pupil transportation for students living a distance from school who must proceed to it over roadways without sidewalks, and in contention with fast-moving traffic. Finally, it is noted by petitioners that a school bus presently travels the length of Sunset Avenue, passing petitioners' residences, and could, without imposition on the Board, readily provide such transportation.

Respondent maintains that the decision to deny transportation for petitioners' children was made within the guidelines of its policy, which provides that transportation will be authorized "for only those pupils who reside two or more miles from the schoolhouse," and that this policy is in conformity with the law. Respondent states that this policy had been implemented fairly and uniformly. Moreover, respondent alleges, if it were to transport petitioners' children, it would lose State Aid and would be forced to pick up all students along this route, or routes of similar distance, or suffer a charge of discriminatory treatment.

There was no testimony of petitioners that the transportation policy had been administered in a discriminatory manner, or that any student of the district had been transported to school for a distance under two miles.

The pertinent statutes in this matter are *N.J.S.A.* 18A:39-1 and 18A:39-1.1. The former says in part:

> "Whenever in any district there are pupils residing remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of such pupils to and from school, * * *."

The latter reads in part as follows:

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"In addition to the provision of transportation for pupils living remote from any school house, * * * the board of education of any district may provide, * * * for the transportation of other pupils to and from school.

"The cost of transporting pupils pursuant to this section shall not be included in calculating the amount of state aid for transportation of pupils."

The key word in the first statute, *ante,* is the word "remote." The meaning of this word has been interpreted uniformly in numerous decisions in conformity with a resolution of the State Board of Education which reads as follows:

"The words 'remote from the schoolhouse' should mean 2½ miles or more for high school pupils and 2 miles or more for elementary pupils, except for pupils suffering from physical or organic defects. State aid for shorter distances for the sole reasons of traffic hazards should not be given, inasmuch as traffic hazards are a local responsibility."

The second statute quoted, *ante,* simply sets forth the power of a board of education to decide to transport students a distance less than that classified as "remote" if it wishes to do so at its own expense. The definition of "remote" has served as a guideline in many decisions of the Commissioner over the years.

In *Schrenk v. Ridgewood Board of Education,* 1960-61 *S.L.D.* 185, 186, the Commissioner found as follows:

"There have been numerous appeals arising out of the interpretation of remoteness by local boards of education. In a series of decisions extending over a long period of time, a board of education has never been reversed for refusing transportation to an unhandicapped pupil residing within two miles of a schoolhouse in the case of elementary pupils and within two and one-half miles where high school pupils are concerned."

See also *Livingston v. Board of Education of Bernards Township,* 1965 *S.L.D.* 29; *Read v. Roxbury Township Board of Education,* 1938 *S.L.D.* 763, 765; *Iden v. West Orange Board of Education,* 1959-60 *S.L.D.* 96.

The most recent decision in this matter, *William G. Locker, et al. v. Board of Education of the Township of Monroe,* decided by the Commissioner of Education, December 24, 1969, reaffirmed the basic right of the board of education to operate a transportation system in conformity with the State Board of Education's resolution, *supra,* which defined or interpreted the word "remote." This decision also held that traffic hazards or safety considerations did not create a claim to transportation to and from school.

Finally, it must be noted that *N.J.S.A.* 18A:39-1.2, cited by petitioner, has no application herein. This statute applies to the provision of transportation

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to and from a regional high school, whereas the request of petitioner is for transportation to an elementary school. Furthermore, 18A:39-1.2 applies to the initiation of an action by a municipality, not a board of education, to provide transportation. It reads as follows:

> "Whenever the governing body of a municipality, which is a constituent district of a regional school district, finds that for safety reasons it is desirable to provide transportation to and from a regional school for pupils living within the municipality, other than those living remote from the school * * * the governing body and the board of education of the regional district are authorized to enter into contract under the terms of which the regional board shall provide such transportation at the expense of the municipality * * *."

The hearing examiner finds that the respondent in this case acted clearly within the scope of statutory requirements and that its decision to refuse transportation to the children of petitioners was one it was empowered to make as a lawful exercise of its discretionary authority.

He recommends that the petition be dismissed.

The Commissioner has reviewed the report of the hearing examiner as set forth above, and can find no evidence that the respondent acted in any way contrary to law with regard to school bus transportation in the given area of Haworth or in the district as a whole. A refusal of respondent to provide transportation where alleged hazards exist in violation of an established policy to transport only those students living two miles or more from a school was a proper exercise of its discretionary authority. As stated best in *Schrenk v. Board of Education of Ridgewood*, 1960-61 *S.L.D.* 185 (at page 187):

> "The provision for safe conditions of travel is a municipal function. A board of education is limited to educational functions. It can provide instruction in safety in order to inculcate habits of safety. It is not within its authority to enforce traffic laws, to provide sidewalks, traffic lights, crossing guards, police patrols, overpasses, etc., to meet the requirements of safe travel for school children * * *."

Since the respondent has operated a transportation system for all students of the Haworth School, Bergen County, proper to the scope of its discretionary authority, since no evidence of bad faith or discriminatory treatment is a part of the record, and since provisions for safe travel is not a board function, the Commissioner must find for respondent. In the present case, therefore, the Commissioner must refuse to interfere. The petition is accordingly dismissed.

COMMISSIONER OF EDUCATION

March 26, 1970

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William R. Gibson,

Petitioner,

v.

Board of Education of the Borough of Collingswood, Et Al., Camden County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Stransky and Poplar (Carl D. Poplar, Esq., of Counsel)

For the Respondent, Curry, Purnell & Greene (George Purnell, Esq., of Counsel)

Petitioner, a probationary teacher in respondent's school system during the 1968-69 school year, alleges that the Board's failure to continue his employment was based on reasons which invade his constitutional rights. Respondent moves to dismiss the petition on the ground that petitioner has no cause for action. Argument on the motion was heard on May 22, 1969, at the Department of Education, Trenton, by a hearing officer assigned by the Commissioner.

Petitioner and respondent Board entered into a contract under which petitioner was to teach in respondent's schools for the period from September 1, 1968, to June 30, 1969. Respondent has made no offer to renew the contract or continue petitioner's employment beyond that date. Petitioner contends that his performance as a teacher was "above-average" and that the sole reason for non-continuation of his employment was his refusal for reasons of conscience to salute or pledge allegiance to the American flag during the daily exercise required in public schools by statute.

In his pleadings petitioner alleges that during the course of his year's employment he was evaluated twice by the principal of the school; that the first rating on December 6, 1968, resulted in an "above-average" rating; that the second evaluation erroneously downgraded his teaching abilities because of his refusal to participate in the flag ceremony; and that the principal's recommendation that petitioner not be rehired for a second year was based solely on petitioner's refusal to participate in the flag salute and pledge of allegiance. Petitioner claims that his views, ideas or refusal to salute the American flag have not interfered with the proper performance of his teaching duties and are in no way related to his teaching techniques or personal or professional attributes. Failure to renew his contract for such reason as refusal to perform the flag ceremony is an encroachment upon his constitutionally protected rights, petitioner contends. Furthermore, he argues, this action and

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the evaluation made by the principal and other notations on his record have caused him irreparable harm and will seriously interfere with his opportunities for employment in other school systems. Petitioner demands that respondent be required to issue him a teaching contract for the 1969-70 school year, that his duties and responsibilities continue unaltered, that the second evaluation and any reference to his views or actions with respect to the American flag be expunged from his record, and that respondent be enjoined from referring to his views, attitudes or actions in any communication with others.

Respondent, by way of Answer, moves to dismiss the petition on the grounds that there is no cause for action. It asserts that the contract with petitioner expired by its own terms on June 30, 1969; that the terms of the contract were fulfilled by both parties; that it is under no legal obligation to renew the agreement any more than petitioner would be obliged to accept employment were it offered to him; and that, not having acquired the legislative status of tenure, petitioner has no rights to employment beyond the terms of his contract. Respondent contends that these are the only material questions of fact and they are undisputed. It points out that petitioner as a non-tenured teacher has no entitlement to a hearing on the merits of non-renewal of his employment and that his assumption that the Board failed to rehire him because of his conscientious objections to the flag ceremony is mere speculation for the reason that the Board has made no statement with respect to the considerations underlying its failure to renew. Nor, having fulfilled the terms of its agreement, can it be required to substantiate its decision not to continue the relationship. For these reasons, respondent urges, petitioner's allegations are not material to the issue herein and the only facts which are material are uncontested. It moves, therefore, for judgment on the pleadings.

The Commissioner finds that respondent's motion is in order and will be granted. It is well established that the employment of a teacher who has not acquired tenure status is a matter which lies within the exercise of the discretionary authority vested in a board of education by statute. *N.J.S.A.* 18A:11-1, 18A:27-4; *Downs v. Hoboken Board of Education*, 12 *N.J. Misc.* 345 (*Sup. Ct.* 1934) Only after tenure status has occurred is an employee whose services are discontinued entitled to charges and a hearing thereon. *N.J.S.A.* 18A:6-10 A board of education may choose to announce reasons which dictated its decision not to rehire a probationary employee, but it is under no compulsion to do so. *Zimmerman v. Newark Board of Education*, 38 *N.J.* 65, 70 (1962); *Parker v. Board of Education of Prince George's Co.*, 237 *F. Supp.* 222 (*D.C. Md.* 1965); *Schaffer v. Fair Lawn Board of Education*, decided by Commissioner of Education, September 9, 1968 Were it otherwise, the distinction between tenure and probationary status would be without difference.

In this case the Board has not taken any action to terminate or violate the terms of the contract to which both parties agreed to be bound. It in fact took no action and the agreement expired by its own terms on June 30, 1969. Thereafter no rights accrued to either party, nor has either one any further obligation to the other. No reasons have been given by respondent for its lack of action with respect to petitioner, nor is it required to detail its considerations or

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defend its action or lack thereof. *Amorosa v. Bayonne Board of Education*, 1966 *S.L.D.* 214; *Taylor v. Paterson State College*, 1966 *S.L.D.* 33; *Ruch v. Greater Egg Harbor Regional Board of Education*, N.J. Commissioner of Education, January 29, 1968, affirmed State Board of Education, May 1, 1968, affirmed Superior Court, Appellate Division, March 24, 1969.

> "The decision of the school authorities not to reemploy a teacher, principal, or superintendent is to be distinguished from a discharge of such person from his employment. Except to the extent that constitutional or statutory provisions may otherwise provide, there is no legal duty on the part of the school authorities to reemploy a teacher, principal, or superintendent after the expiration of his contract and a teacher has no right to reemployment at the end of a year even though he is qualified and no complaint or charge has been made against him, and even though during the term of his employment he has made payments to a teachers' pension fund. Further, in the absence of statutory requirements, a teacher is not entitled to a hearing, or to a statement from the school authorities for their failure or refusal to reemploy him." 78 *C.J.S.* 1061

That being so, any allegations by petitioner of the motivations underlying respondent's decision can be only conjectural and speculative. As such they do not rise to the level of material fact affording a basis for challenge and litigative action. *Cf. Amorosa, supra; Edmund v. Shore Regional District Board of Education*, decided February 21, 1969. The Commissioner finds, therefore, that the facts which are material to this petition are not in dispute and that those facts do not provide grounds for action. There being no genuine issue of material fact a motion for judgment on the pleadings is in order. *Judson v. People's Bank*, 17 *N.J.* 67 (1954); *U.S. Pipe and Foundry Co. v. American Arbitration Association*, 67 *N.J. Super.* 384 (*App. Div.* 1961)

Respondent's motion is hereby granted and the petition is dismissed.

COMMISSIONER OF EDUCATION

March 26, 1970

Decision of the State Board of Education

The decision of the Commissioner of Education of the State of New Jersey, dated March 26, 1970, is affirmed for the reasons set forth therein.

October 7, 1970

Pending before Superior Court, Appellate Division.

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In The Matter of the Tenure Hearing of Elsie Rice, School District of Plainfield, Union County.

COMMISSIONER OF EDUCATION

Decision

For the Complainant Board, King and King (Victor R. King, Esq., of Counsel)

For the Complainant Pupil, William Wright, Jr., Esq.

For the Respondent, Joseph C. Doren, Esq.

Respondent is a teacher under tenure in the public schools of Plainfield. A charge that on March 17, 1969, respondent assaulted a pupil in her class (hereinafter T-) was filed with the Board of Education by T-'s parents. After a hearing the Board of Education certified the charge to the Commissioner of Education pursuant to the provisions of the Tenure Employees Hearing Law.

A hearing in this matter was held at the Court House, Elizabeth, on November 12, 1969, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

On or about May 16, 1969, the Secretary of the Plainfield Board of Education received from counsel for T-'s parents, acting on T-'s behalf, a "Petition for Formal Hearing" in which it was charged that:

> "On or about March 17, 1969, the respondent assaulted the infant petitioner by striking him to the face and mouth. Said act was done without provocation or just cause or legal excuse, and resulted in permanent injury to the infant petitioner of a physical and psychological nature."

A formal hearing was held by the Board on June 2, 1969, under the direction of Board counsel as determiner of the law, at which both complainant and respondent were represented by counsel, and at which all witnesses (except the infant petitioner) testified under oath. No determination of fact was made by the Board, but subsequent to the hearing, the charge was certified to the Commissioner in the manner prescribed by statute. (*N.J.S.A.* 18A:6-11) At the hearing herein it was agreed to submit this matter for the Commissioner's determination on the record of the hearing before the Plainfield Board of Education augmented by closing argument of counsel and the submission in evidence (R-1) of a copy of a complaint and warrant filed in the Municipal Court of Plainfield on March 18, 1969, by T-'s mother.

The hearing examiner has carefully studied the record and makes the following findings:

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1. Complainant T- was at the time of the alleged incident a six-year-old pupil in a "Fluid 1,2" class taught by respondent.

2. In the course of the afternoon session of the class on March 17, 1969, the pupils were having a rest period, during which their heads rested on the desk tops.

3. During the rest period, respondent, in moving about the classroom, observed that T- had not followed directions in doing one of his school tasks. She directed him to accompany her to a wing of the L-shaped classroom to talk with him about his schoolwork. Respondent testified that, aware that other children in the class were becoming restless and starting to talk, she directed T- to go with her into the bathroom adjoining the classroom so that they could talk.

4. As respondent and T-entered the bathroom an incident occurred which forms the basis of the charge herein. As T- recounted the incident at the hearing, the teacher "slammed" his head against the bathroom wall (although at a later point in cross-examination T- testified both (1) that the incident happened in the classroom (Tr. 79) and (2) that the incident occurred in the bathroom (Tr. 80)). T-'s mother testified that on his arrival at home on March 17, T- had said that the teacher had struck him, causing him to fall and strike his mouth against a wastebasket, knocking out two teeth. Both the teacher and T- testified that there was no wastebasket in the bathroom. T-'s mother further testified that T- had arrived home crying and carrying with him a tooth wrapped in a tissue. She immediately telephoned the teacher, who told her that the incident had not occurred as T- had recounted it, and invited the mother to come to the school to discuss the matter. Instead, the mother called her husband, who came home shortly thereafter from his work as a school custodian. The father testified that he found his son "hysterical," with swollen lips and two front "baby" teeth missing. He said on direct testimony that he saw a "little blood" and on cross-examination that there was blood on both the upper and lower part of T-'s mouth. He testified that T- had said he struck his mouth on a wastebasket. He did not testify as to the presence of a scratch on T-'s face, which the complaint signed in Municipal Court by T-'s mother claimed to exist. It should be noted that T-'s mother is 75 percent blind, and uses Braille. T-'s father testified that T- was subsequently examined by a pediatrician and two dentists, who X-rayed T-'s mouth. No medical or dental testimony was offered, but the burden of the report given by T-'s father is that both dentists believed that the child's second teeth would come in normally.

Respondent's testimony is at sharp variance with that given by T- and his parents. She testified that the asphalt tile in the classroom is slippery, and that as T- moved from the classroom to the bathroom, he slipped. Holding the door open with her right hand, she reached with her left hand to prevent T- from falling, and as she did so, T-'s face struck her hand. T- did not fall, she testified. The intended conference was concluded, she testified, and it was not until after T- had returned to his seat and she was about to resume teaching that she heard the remark, "T- lost his teeth." The teacher testified that when T- told her that the teeth had come out in the bathroom, she and the boy searched for them and found one tooth under a sink. She wrapped the tooth in a tissue for T- to put

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under his pillow for the "tooth fairy." She also sent T- to the principal's office, as she said is customary when a child has a scratch or bump, and testified that the principal later reported that no medical attention was needed. Respondent testified that T- made no outcry, that he did not cry, and that he behaved in a normal manner for the remainder of the school day and during a 25-minute special help period which followed the close of the session.

The hearing examiner concludes that the evidence offered by complainants, with its clear inconsistencies, does not support a finding that respondent assaulted T- as charged. That an incident occurred during which T- lost at least one tooth is clear. However, the hearing examiner finds that the cause was accidental.

5. T-'s parents attach much significance to the failure of respondent or other school authorities to communicate directly and at once to them about the incident. T-'s father testified that when a note explaining the incident was not sent home, "it changed my trend of the matter when it wasn't sent home." (Tr. 49) The teacher testified that since many children in her class lose first teeth in the course of the year, she does not send notes reporting the occurrences. The hearing examiner finds no probative merit in the failure of the teacher to initiate communication with the home in this instance. It is suggested, however, that the school authorities may review or formulate policy with respect to school-home communication.

In light of the findings in this matter, it is recommended that the charge herein be dismissed.

* * * *

The Commissioner has reviewed and considered the findings, recommendations and conclusions of the hearing examiner and concurs therein. In so concurring, the Commissioner is particularly cognizant of the inadequacies which appear in the testimony of the child witness. *Cf. Palmer v. Board of Education of Audubon,* 1939-49 *S.L.D.* 183, 188. Yet, just as he is concerned that pupils be secure against fear of physical indignities at the hands of their teachers, he is likewise convinced that the evidence against a teacher in a charge of such gravity must be clear and conclusive. *In the Matter of the Tenure Hearing of Pauline Nickerson,* 1965 *S.L.D.* 130 Accordingly, the charge against respondent herein is dismissed.

The Commissioner notes with some concern the unusual procedure followed by the Board in the initial steps in this case, particularly with respect to the formal hearing held before the Board on June 2, 1969. No authority for such a hearing is found in the statutes, which place upon a local board of education only the duty to

> "* * * determine by majority vote of its full membership whether or not such charge and the evidence in support of such charge would be sufficient, if true in fact, to warrant a dismissal or a reduction in salary, in which event it shall forward such written charge to the commissioner, together with certificate of such determination." *N.J.S.A.* 18A:6-11

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A hearing such as that afforded by the Board herein, the Commissioner has said, is clearly precluded by the statute. *Sheffmaker v. Board of Education of Runnemede*, 1963 *S.L.D.* 116, 118 See also *In the Matter of the Tenure Hearing of David Fulcomer*, 93 *N.J. Super.* 404 (*App. Div.* 1967). In the instant matter, the failure of the Board to make a finding of fact rendered it possible for the Commissioner, upon agreement of counsel that the record of the hearing below was complete, to make an independent determination, as determined by the Court in *Fulcomer, supra.* But the procedure of the Board represents such a departure from the contemplated by the Tenure Employees Hearing Act that the Commissioner is constrained to caution this Board and other boards to adhere closely to the procedures set forth in the Act lest errors be introduced, in less fortunate circumstances than those herein, which might unduly complicate the entire process.

COMMISSIONER OF EDUCATION

March 26, 1970

Consolidated Citizens Organization, Inc.,

Petitioner,

v.

Board of Education of the Township of Neptune, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Vincent Zarate

For the Respondent, Stout, O'Hagen, DeVito & Hertz (Sidney Hertz, Esq., of Counsel)

On September 2, 1969, the Consolidated Citizens Organization, Inc., comprising a group of citizens of Neptune Township, filed a petition before the Commissioner of Education asking that the Neptune Township Board of Education be directed to cease all proceedings leading to the conversion of its Whitesville School into an administrative facility, and to place before the voters at a special election the question whether such conversion shall take place. On September 10 a motion for interim relief was filed with the Commissioner asking that he order the Board of Education to desist from making any alterations or other changes in said school until the Commissioner had made a determination on the petition of appeal.

On September 26 a hearing was held on the motion for interim relief at the State Department of Education, Trenton, before a hearing examiner

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appointed by the Commissioner. The report of the hearing examiner is as follows:

Petitioner asks that respondent be restrained from performing or contracting for any alteration work on the Whitesville School until the Commissioner has ruled on the request for a special election. It argues that unless there is such restraint, respondent may bind itself by contractual obligations to the point that the whole question of building alteration will have become moot, and petitioner will be without recourse. Respondent contends that what the Board contemplates is simply the execution of the final phase of a three-year plan which had been approved by the Commissioner on June 16, 1967, and that until the present time petitioner had offered no objection to it.

The plan referred to by respondent was the result of a decision by the Commissioner in 1966 (*Elliot v. Board of Education of Neptune Township,* 1966 *S.L.D.* 52, affirmed by the State Board of Education, 54, affirmed 94 *N.J. Super.* 400 (*App. Div.* 1967)), requiring respondent to submit for his approval a plan for the correction or alleviation of racial imbalance in its elementary schools. Such a plan was submitted in a document dated May 16, 1967, and entitled, "The Three-Phase Plan Alleviating Racial Imbalance." By letter dated June 16, 1967, the Acting Commissioner of Education notified respondent of his approval of the plan as complying with the Commissioner's directive. One aspect of the plan, described as a part of Phase Three to be accomplished in the 1969-70 school year, provides for the use of the Whitesville School for two kindergarten sections and for three groups of pupils needing special programs of education. In addition, the building is to be used for special services offices and administrative offices of the district. These offices heretofore occupied rented quarters in various locations in the district. In the plan submitted by respondent to the Commissioner, the purpose was described as follows:

> "The centralization of the Administrative Offices of the school system under *the 3-Phase Plan p. -87* in the Whitesville School building provides for a long-needed organizational move which will serve to increase the efficiency of the operational details of the school system and represent an economy move. The present facilities are located in three separate offices."

In the spring of 1969 respondent accordingly took steps to plan for the conversion of the building for the indicated purposes, by obtaining estimates of cost, etc. Petitioner thereupon, at a regular meeting of the Board on July 30, appealed to the Board to reconsider its plan as being too costly, and urged respondent to submit the plan to a special election of the voters of the district. The Board did not accede to these requests. A public meeting was held on the question on August 19, at which petitioner presented a petition signed by a number of voters again urging reconsideration and a public referendum. Respondent again stated that it had discussed the problem further, but saw no satisfactory alternative to its plan nor reason to hold a special election on it. Petitioner thereupon filed its petition of appeal with the Commissioner, and

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shortly thereafter the motion for interim relief.

Petitioner alleges that respondent estimates that the cost of converting the Whitesville School will be at least $20,000; that at a public meeting on August 19, 1969, petitioner presented respondent with a petition bearing the signatures of 133 legal voters requesting a special election on the question whether the conversion should be made; and that "this petition was flatly refused consideration by the Board." Petitioner alleges that Phases One and Two of the three-phase plan have achieved an appropriate racial balance in the Township, and yet respondent "arbitrarily, capriciously and unreasonably has refused to amend its plan to abandon the Whitesville School or even to reconsider its action." It further contends that respondent is planning a use for the school not prescribed under *N.J.S.A.* 18A:20-34, and that the Board's announced plan is expensive and wasteful. It holds that respondent should be required to put the question of the use of the school to the voters at a special election.

Respondent contends that its proposed action is entirely within the scope of the three-year plan approved by the Commissioner in June 1967, and made public at that time; that its current budget was adopted and approved with this move in mind, since it contains no funds for further rental of administrative office space; and that the renovation work being planned for the school is by no means irreparable should a further change in the use of the building be decided upon at some future time. Respondent further contends that it is not obligated under *N.J.S.A.* 18A:14-3 to hold a special election upon receipt of a petition, but that the statute is permissive only.

*   *   *   *

The Commissioner has read and carefully considered the report of the hearing examiner and the arguments of each party. He cannot find that petitioner has alleged that any material change has taken place since the Commissioner approved the plan in 1967 to justify a modification of the plan to convert the Whitesville School. Therefore the motion for interim relief is dismissed.

The Commissioner further finds that nothing appears in the petition of appeal or in respondent's answer which raises any issue of material fact. Even if the truth of all the factual allegations in the petition be assumed, the petition presents no basis for intervention by the Commissioner. In the first place, there is no allegation that the Board is proceeding contrary to the plan previously approved by the Commissioner, nor is there allegation that the Board is acting otherwise than to achieve the salutary objectives which such plan was designed to achieve. With respect to petitioner's demand that respondent submit to public referendum the question of altering the physical characteristics or the purpose of the Whitesville School (assuming that respondent could alter any part of its Three-Phase Plan without prior approval of the Commissioner), it is well settled that when a petition seeking a referendum is presented by 50 or more legal voters of the district (*N.J. S.A.* 18A:14-3), it is discretionary with the board whether it will call such election. *Fournabai v. Board of Education of Emerson*, 1959-60 *S.L.D.* 41 Finally, it is also discretionary with a board of education

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whether it will open or reopen a matter for discussion, listen to objections from the public, or poll its members on the rejection of a petition for a referendum. Board of education members are elected or appointed to perform duties and exercise powers which are prescribed by the statutes. One of these duties is to provide suitable school facilities for the pupils of the district. *N.J.S.A.* 18A:33-1 The Board herein is in exercise of that duty. While a board may be, as petitioner charges, "insensitive, unaware, and indifferent," unless it is shown that the board has acted unlawfully or in clear abuse of its discretionary powers, the Commissioner may not intervene. *Boult and Harris v. Board of Education of Passaic*, 1939-49 *S.L.D.* 7, 13, affirmed State Board of Education 15, 135 *N.J.L.* 329 (*Sup. Ct.* 1947), 136 *N.J.L.* 521 (*E. & A.* 1948) There is no such allegation here.

The Commissioner, therefore, on his own motion, determines that absent any dispute as to any material fact, and for the reasons set forth *supra*, no justiciable issue is presented by the petition of appeal herein. He accordingly directs the dismissal of both the motion for interim relief and the petition of appeal.

COMMISSIONER OF EDUCATION

March 26, 1970

In The Matter of the Annual School Election Held In The School District Of The Township of Pittsgrove, Salem County.

COMMISSIONER OF EDUCATION

Decision

Pursuant to a complaint filed by Mrs. P. Chamberlain, President of the Pittsgrove Township Citizens Association, the Commissioner of Education ordered an inquiry into an alleged violation of the statutes in the conduct of the annual school election held February 10, 1970, in the School District of Pittsgrove Township. The inquiry was conducted by a hearing officer assigned by the Commissioner and was held in the office of the Salem County Superintendent of Schools in Salem County on March 17, 1970.

The election itself was not contested, but petitioners claim very few signatures of the 558 voters casting ballots were compared with those in the signature copy register as required by law. Petitioners ask that the Commissioner direct the election officials in the future to check all voter signatures against the signature copy register. They claim that this is a continuing violation and say that they asked the election officials "last year" to be sure that the signature copy register was checked against the voters' signatures this year.

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The relevant statue is *N.J.S.A.* 18A:14-51, which reads as follows:

> "After the voter shall have so signed and before an official ballot shall be given to him, one of the election officers shall compare the signature made in the poll list with the signature theretofore made by the voter in the signature copy register, and if the signature thus written in the poll list is the same or sufficiently similar to the signature copy register, the voter shall be eligible to receive a ballot."

The chairman of the election and the President of the Board of Education, who testified on behalf of the Board, do not deny the charge made by petitioners, but claim they have *always* proceeded in the current manner because of the small district they represent and the assurance that they know every voter. The chairman said he knew for certain that "fewer than one per cent" of the votes cast could be invalid, thus having no effect on the election. This attitude was affirmed by the President of the Board of Education who asserted he knows "98 per cent of the voters" in the community.

The hearing examiner made a random comparison of poll list signatures against the signature copy registers and discovered no irregularities.

* * * *

The Commissioner has reviewed the report of the hearing officer. There can be no question that the election officials were in violation of *N.J.S.A.* 18A:14-51, by not checking voters' signatures on the poll list against the signature copy register. The Commissioner finds no basis to conclude that there was any intent of fraud or deception of the public, and in no way questions the honesty or intent of the election officials. However, this does not relieve the officials of their legal responsibility and duty to follow the mandates of the statutes in every respect.

As he has observed before, the Commissioner takes the position that school elections are no less important than other elections and they are to be conducted with careful regard and strict compliance with every requirement of law. *In re Annual School Election in Palisades Park*, 1963 *S.L.D.* 99 While it may be true that the election officials may know every voter, it does not necessarily follow that they know that each such voter is properly registered and eligible to vote. In any case, it is not within the discretion of the election officials to decide which laws they must follow and which they may disregard.

The Commissioner concludes that the election officials failed to comply with the procedures established by law for use of the signature copy registers. He finds no sufficient grounds for challenging the election results and they will stand as announced. In all future elections, the election officials are directed to follow all the statutory requirements of the laws governing school elections, including use of the signature copy register as set forth in the statutes.

COMMISSIONER OF EDUCATION

April 1, 1970

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In The Matter of the Annual School Election Held In The Township Of Delaware, Hunterdon County.

COMMISSIONER OF EDUCATION

Decision

At the annual school election held in the School District of the Township of Delaware, Hunterdon County, on February 10, 1970, three members were to be elected to the Board of Education for full terms of three years each. The announced results of the tally of votes were as follows:

	AT POLLS	ABSENTEE	TOTAL
Siegfried Braun	202	5	207
Edward B. Snyder, Jr.	206	1	207
Harold C. Pyatt	231	1	232
Harold Wischner	216	5	221
Orville R. Emery	329	5	334

The names of two other citizens were written in as personal choice votes.

Pursuant to a letter request from Mrs. Robert L. Niece, dated February 16, 1970 the Commissioner of Education ordered an authorized representative to conduct an inquiry with regard to the conduct of the election or a recount of the ballots cast if, in the opinion of the representative, this was deemed necessary. The inquiry, and subsequent recount, were conducted on March 12, 1970, at the office of the Hunterdon County Superintendent of Schools in Flemington. The report of the Commissioner's representative is as follows:

Testimony by the complainant was to the effect that some voters signed the poll list at a given number but were given a ballot with a differently numbered coupon; that the ballots themselves, not just the coupons, were numbered; and that the paper on which the ballots were printed was not completely opaque as required by statute.

It was clear from an examination of the poll list that, although names and addresses were recorded in sequential fashion, the errors with regard to the numbering of the names cast doubt on the correctness of the announced total of ballots. The number of names in the poll list totaled 425. However, the Report of Proceedings contains these notations:

Number of ballots counted was	426
Number of ballots cast was	425
Number of ballots void was	1

Because of the slight discrepancy in the poll list and the doubt cast on the accuracy of the total count at the polls, it was decided to do a complete recount of the ballots for candidates for a three-year term.

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At the conclusion of the recount it was determined that the total ballot figures should have read:

Number of ballots counted was	425
Number of ballots cast was	424
Number of ballots void was	1

The one ballot listed by election officials as void was returned to the officials by one voter with the words, "I made a mistake, may I have another ballot?" A ballot was given to her, and the original was marked by officials as void. It was this ballot which apparently caused the error of one in the numbering of the poll list and in the Report of Proceedings.

The Commissioner's representative confirms that the paper on which the ballots was printed was not completely opaque, and it was, therefore, possible to see the printing, and the recorded vote, from the reverse side under some conditions. He further confirms that the body of the ballots did contain numbers in one corner, apparently as the result of efforts by election officials to get some uniformity between numbering on the ballots and numbers on the poll list.

The numbering system of the poll list was further complicated, according to testimony of election officials, because it was discovered midway through the voting that the coupons were not in sequentially numbered order as they were received from the printer. This discovery, coupled with the void ballot, was the cause of the confusion, which was compounded by the sheer numbers of people who paused or gathered at or near the ballot box and the central table, before or after voting, for social conversation or for other reasons.

Two further alleged discrepancies were called to the attention of the Commissioner. First, there was an allegation that the tally as announced in the newspaper differed from the official tally because it did not contain the vote of absentee voters. It was the testimony of the Secretary of the Board of Education that this tally had not been received at the time the polls closed on February 10 and thus could not be included at that time. Secondly, there was an allegation that the signature copy register had not been opened to check registration and signatures. No testimony was offered on this point.

There remains the matter of the recount tally. This was announced as follows at the conclusion of the recount, with ten ballots reserved for further examination and determination:

	AT POLLS	ABSENTEE	TOTAL
Siegfried Braun	197	5	202
Edward B. Snyder, Jr.	203	1	204
Harold C. Pyatt	228	1	229
Harold Wischner	210	5	215
Orville R. Emery	324	5	329

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Andrew Leon	5	0	5
Floyd Evans	1	0	1

When the total vote at the end of the tally, *ante*, supplemented by the absentee vote, is considered, it is evident that no further consideration need be given to the ten ballots which were reserved for decision because they could not affect the outcome of the election.

*   *   *   *

The Commissioner has considered the report of his representative in this inquiry and taken note of the allegation that confusion existed at the polling place because persons who had voted lingered near the ballot box or near the table where other voters were preparing to secure ballots. It is a reasonable inference that this confusion, when added to the other technical problems of election officials, was a contributory cause of the discrepancies noted by the representative in his report. Certainly it is in order for the election officials to address themselves to this problem in the future, to insure that elections provide a proper chance for persons to vote and the election officials are able to give full attention to their lawful tasks.

The statute pertinent to the reported inadequacy of the paper in the ballot is *N.J.S.A.* 18A:14-33, which reads as follows:

> "The paper ballot shall be printed on plain white paper uniform in size and quality and of such thickness that the printing thereon cannot be distinguished from the back of the paper, and without any mark, device, or figure on the front or back thereof except as provided for in this article."

Since the paper was not of the required thickness, this matter must be brought to the attention of the Board of Education, which has the responsibility to secure proper ballots. The election officials are also cautioned against placing numbers or any other markings on the ballots other than the numbering customarily placed on the reverse side during the tallying after the polls are closed.

The evidences of irregularity, brought to light by this inquiry, while not in any way condoned by the Commissioner, do not warrant setting aside the election. It is well established that elections are to be given effect whenever possible. *Love v. Board of Chosen Freeholders of Hudson County*, 35 *N.J.L.* 269 (*Sup. Ct.* 1871); *In re Wene*, 26 *N.J. Super.* 363 (*Law Division* 1953), affirmed 13 *N.J.* 185 (1953) There is no showing that any of the irregularities resulted in the casting or tallying of improper votes. Nor has it been shown that the will of the people was illegally suppressed and not fairly determined by reason of these irregularities. *In re Wene, supra* Absent such proofs the election must be held to be valid and its results conclusive.

The Commissioner finds and determines that Orville R. Emery, Harold C. Pyatt, and Harold Wischner were each elected to seats on the Delaware Township, Hunterdon County, Board of Education for full terms of three years.

COMMISSIONER OF EDUCATION

April 20, 1970

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In The Matter Of The Annual School Election Held In The Township Of Fredon, Sussex County.

COMMISSIONER OF EDUCATION

Decision

The announced results of the balloting for members of the Board of Education for one full term of three years and for one unexpired term of two years at the annual school election held on February 10, 1970, in the school district of the Township of Fredon, Sussex County, were as follows:

For Full Term of Three Years	
Maxine Crisman	135
For Two-Year Term	
J. Budd Hunt	92
Ralph Meola	92

Pursuant to a letter request received from candidate Meola on February 16, 1970, the Commissioner of Education directed the Assistant Commissioner in charge of Controversies and Disputes to arrange a recount of the votes cast. The recount was conducted, by direction of the Assistant Commissioner, by a hearing examiner on March 4, 1970, at the office of the Sussex County Superintendent of Schools in Newton.

The recount was confined to a check of the votes cast for candidates Hunt and Meola for an unexpired two-year term. At its conclusion, with 63 ballots reserved for determination, the tally stood as follows:

H. Budd Hunt	65
Ralph Meola	70

Examination of the 63 ballots reserved indicates that they may be grouped into 11 categories lettered A to K. Of these category K is the largest, comprising 41 ballots. None of these ballots are printed but are hand-written on various-sized pieces of paper and with a variety of writings appearing thereon. Informal testimony of election officials and candidates present for the recount disclosed that there was confusion at the polling place on the night of the election when the supply of imprinted ballots was exhausted. There was an initial attempt to handwrite five ballots which were reasonable facsimiles of the imprinted ballot, but the attempt met frustration because of the press of the large numbers of voters, and the last 36 ballots cast were merely names and lines on a slip of paper. No designation of term of office, or even an indication that the ballot was cast for a member of the Board of Education in the Township of Fredon, appeared on these ballots.

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One other irregularity noted by the hearing examiner was the omission from the Report of Proceedings of the name of Frank Meola who received two personal-choice votes for a two-year term.

The Commissioner has carefully considered the report of the hearing examiner and noted particularly the 41 hand-made "ballots" which comprise Exhibit K. These ballots are described as follows:

> *Exhibit K* – Forty-one hand-made ballots divided as follows into sub-categories:
>
> 1. Five ballots made in a fashion resembling the imprinted ballot and with spaces headed "For three-year term" or "For two-year term." On these five ballots the name of Ralph Meola is written on four of the five ballots and is in each case preceded by a proper check. On these same five ballots the name of H. Budd Hunt is written on four of the five ballots labeled for a two-year term but is preceded in only two of these instances by a check mark in the box drawn in to the left of the name.
>
> 2. Thirty-six ballots of various-sized rectangular slips of paper divided into three or four sections by rudely drawn horizontal lines but with no marking of any kind to specify that the sections represent votes cast for persons for two or three-year terms.

The law recognizes in *N.J.S.A.* 18A:14-38 that there may be occasions when the prepared imprinted supply of ballots may be exhausted and provides as follows:

> "If the supply of ballots shall be exhausted before the polls are closed, *unofficial ballots, made as nearly as possible in the form of the official ballot* and approved by the election officials of the polling district may be used. The mode and manner of voting such unofficial ballots, shall, nevertheless, in all respects conform as nearly as possible to the mode and manner of voting herein prescribed." (Emphasis supplied.)

It is clear that the last 36 "ballots" cast by voters of Fredon Township on February 10, 1970, are not made "as nearly as possible" in the form of the official ballot and that in fact they bear little or no resemblance to it. The so-called ballots in this group are so roughly made that it is impossible to determine for whom the vote was cast and for what term. They are, in fact, not acceptable substitutes for legal ballots and cannot be counted as such. The Commissioner finds that the ballots in *Exhibit K* cannot be counted.

It is well established that elections are to be given effect whenever possible. *Love v. Board of Freeholders*, 35 *N.J.L.* 269 (*Sup. Ct.* 1871); *Stone v. Wyckoff*, 102 *N.J. Super.* 26 (*App. Div.* 1968) It is equally clear that irregularities and deviations from election laws by election officials provide insufficent grounds for voiding an election if the will of the people has been fairly expressed and determined. *Petition of Clee*, 119 *N.J.L.* 310 (*Sup. Ct.*

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1938); *In re Livingston*, 83 *N.J. Super.* 98 (*App. Div.* 1964) Only when the deviations from authorized procedure are so gross as to produce illegal votes which would not have been cast or to defeat legal votes which would have been counted so as to have made it impossible to determine the will of the people will the election be set aside. *In re Wene*, 26 *N.J. Super.* 363, 383:

> "The rule in our State is firmly established that if any irregularity or any other deviation from the election law by the election officials is to be adjudged to have the effect of invalidating a vote or an election, where the statute does not so expressly provide, there must be a connection between such irregularity and the result of the election; that is, the irregularity must be the producing cause of illegal votes which would not have been cast or of defeating legal votes which would have been counted, had the irregularity not taken place, and to an extent to challenge or change the result of the election; or it must be shown that the irregularity in some other way influenced the election so as to have prepressed a full and free expression of the popular will.* * *"

In this case, there can be no question that the candidate for the three-year term, Maxine Crisman, was the choice of the voters for such office. However, no such clear mandate can be found for either of the two leading candidates for the two-year term. The use of a large number of improper ballots from which the intent of the voter cannot be fairly determined certainly has defeated the casting of a sufficient number of legal votes to affect the outcome of the election with respect to the two-year term. There is no way in this case to determine who would have been elected had proper ballots been provided. Either of the two candidates could have been elected if it were possible to determine for whom the improper ballots were cast. In such case the election must be set aside. *In re Application of Dorgan*, 44 *N.J.* 440 (1965) The Commissioner finds, therefore, that in this election the will of the voters was suppressed and cannot be fairly determined. Under such circumstances there is no alternative but to set the election aside with respect to the two-year term and to declare a failure to elect, and the Commissioner so finds.

The Commissioner cannot condone and deplores the failure of the Board of Education of the Township of Fredon to supply enough properly imprinted ballots for the use of voters at the school election of February 10, 1970, and the subsequent failure of the election officials to make an effort to supply reasonable substitutes for the official ballots when the supply of ballots was exhausted. He further deplores the failure to record two votes for Frank Meola and observes that this failure could have been critical if, in all other respects, the votes for the two candidates for a two-year term were properly recorded.

Having reached the decision with regard to the ballots reserved in *Exhibit K*, there is no further need to consider Exhibits A through I.

The Commissioner finds and determines that Maxine Crisman was elected at the annual school election on February 10, 1970, in the Township of Fredon,

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Sussex County, for a three-year term, but that there was a failure to elect a candidate to the two-year unexpired term. The Sussex County Superintendent of Schools is directed to appoint a qualified citizen to such office in conformity with the provisions of *N.J.S.A.* 18A:12-15 to serve until the organization meeting following the next regular school election in February 1971.

COMMISSIONER OF EDUCATION

April 22, 1970

James J. Opeken,

Petitioner,

v.

Board of Education of the Township of Jefferson, Morris County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Harbaugh and Collester (Donald G. Collester, Jr., Esq., of Counsel)

For the Respondent, Maraziti & Maraziti (Joseph J. Maraziti, Jr., Esq., of Counsel)

Petitioner in this matter alleges that he has been improperly denied employment in a position in respondent's school district in which he holds tenure, and further that he has been denied an employment increment to which he is entitled pursuant to respondent's salary schedule. Respondent denies that petitioner has any tenure rights to the position which he claims, and further denies that the denial of a salary increment was in any way improper.

A hearing in this matter was conducted on October 10, 1968, and March 14, 1969, at the office of the County Superintendent of Schools, Morris Plains, by a hearing examiner appointed by the Commissioner. Memoranda of counsel were filed subsequent to the hearing. The report of the hearing examiner is as follows:

Testimony and argument were heard concerning petitioner's employment, the nature of the position to which petition lays claim, and the employment and duties of the employee appointed to the contested position. The hearing examiner sustained respondent's objection to the hearing of testimony on the determinations of respondent with respect to the denial of a salary increment, and petitioner has moved for an order requiring the taking of such testimony.

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In December 1959 petitioner was appointed principal of one of respondent's elementary schools. Beginning July 1, 1960, he served as Acting Superintendent of Schools for a two-year period ending June 30, 1962. On July 1, 1962, he was appointed Assistant Superintendent of Schools at a salary of $700 per year, both the duties and the salary being supplemental to those of the principalship in which he continued to serve. He was reappointed Assistant Superintendent July 1, 1963, at the same salary, and continued to serve in both the Assistant Superintendency and the principalship until July 13, 1964, when the Board abolished the position of Assistant Superintendent effective as of July 1, 1964, for reasons of economy. Petitioner thereafter continued his employment in the principalship.

On March 30, 1967, the Board created the position of Assistant Superintendent in Charge of Business and, on April 17 following, appointed to that position and elected as Secretary of the Board, the former high school principal in the district, at an annual salary of $14,000. The incumbent was reappointed to the position for the school year beginning July 1, 1967, at the same salary.

The testimony establishes that petitioner's duties as Assistant Superintendent were essentially those of administration of buildings and grounds and chairmanship of a group working on curriculum. He also served in an *ad hoc* capacity as assigned by the Superintendent, and assisted the Superintendent in various functions as the Superintendent became acquainted with his position. Petitioner also served as a member of the Superintendent's administrative council, prepared a policy booklet, and acted on behalf of the Superintendent in his absence, as directed. During petitioner's incumbency as Assistant Superintendent, the business affairs of the district were administered by the then Secretary of the Board, who held the title of Secretary-Business Manager. It was established that petitioner held the limited certificate for school administrators, but did not at the time of his incumbency, or at the time of the hearing herein, possess the qualifications for the certificate for Assistant Superintendent in Charge of Business.

The testimony concerning the duties of the Assistant Superintendent in Charge of Business describes a position which encompasses the broad spectrum of school business activities, as set forth by the Board in creating the position (P-3):

1. Budgetary and financial planning
2. Purchasing and supply management
3. Plant planning and construction
4. School community relations
5. Personnel management in the area of school business management
6. In-service training for personnel in school business management
7. Operation and maintenance of plant
8. Transportation
9. Food services
10. Accounting and reporting
11. Insurance

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Additionally the Assistant Superintendent in Charge of Business serves on the administrative council, and serves in place of the Superintendent only in emergency, and as directed.

The hearing examiner finds that certain correspondence and memoranda sent by the present incumbent to professional and administrative staff of the schools (P-6 to P-14) were related to basic matters of business administration or in connection with the work of the Board Secretary, and do not, as petitioner asserts, establish incumbent's position as broadly that of an Assistant Superintendent having responsibility for educational as well as business matters. This is equally true of incidental participation by the incumbent in curriculum matters, in which he has no policy-making function.

The testimony establishes that incumbent, at the time of his appointment in 1967, held an administrator's certificate but not the certificate for assistant superintendent in charge of business. He testified that he completed the requirements for such certification in August 1968, and by the time of the first session of the hearing herein, had applied for the issuance of the certificate.

Respondent argues that petitioner's successive appointments as Assistant Superintendent from July 1, 1962, to June 30, 1963, and from July 1, 1963, to June 30, 1964, were insufficient to establish petitioner's tenure right to the position of Assistant Superintendent. The hearing examiner observes, however, that the Commissioner and the Courts have already determined that the *completion* of three calendar years of employment in a district is sufficient to establish tenure in the district. *Schumacher v. Board of Education of Manchester Twp.,* 1961-62 *S.L.D.* 175, affirmed as *Board of Education of Manchester Township v. Raubinger,* 78 *N.J. Super.* 90 (*App. Div.* 1963) There is no reason that such an interpretation should not similarly apply to the attainment of tenure of position after *completion* of two consecutive calendar years of employment in the position of Assistant Superintendent as provided in *R.S.* 18:13-16, as amended by *Chapter* 231, *Laws of* 1962, now *N.J.S.A.* 18A:28-5 *et seq.* The position held by petitioner was abolished by respondent on July 13, 1964, effective as of July 1, 1964. Without reaching the question of respondent's authority to make its determination retroactive in effect, it is clear that petitioner had in fact completed two calendar years in the position before the purported effective date of the abolishment of that position. The hearing examiner therefore concludes that petitioner had acquired tenure in the position of Assistant Superintendent. However, there is no evidence that his seniority status was established or that he was placed on a "preferred eligible list" as required by *R.S.* 18:13-19 (now *N.J.S.A.* 18A:28-12). The hearing examiner recommends that respondent be directed to establish petitioner's seniority status (*N.J.S.A.* 18A:28-11) and place him on such preferred eligible list as required by the statutes.

Respondent further contends that petitioner should be barred by laches from contesting in 1967 the abolishment in 1964 of the position of Assistant Superintendent. Petitioner, however, does not protest the abolishment of the

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position *per se*, but contends that respondent's reason for doing so, *i.e.* "economy," is disproved by its subsequent creation of the new position of Assistant Superintendent in Charge of Business at a salary twenty times that paid to petitioner. However, it was testified that at the time the new position was created, the incumbent Secretary-Business Manager had resigned, and the growth of the district with a much larger annual budget required the full-time services of a professionally trained person to manage the business affairs of the district. The hearing examiner accordingly concludes that petitioner did not unreasonably delay his protest when a position was created to which he believed he had a claim. The hearing examiner further finds that changed conditions in the district, over a period of nearly three years, constituted the basis for respondent's decision to create a new position which would, in part, fill a void created by a resignation, and further provide additional professional services for which the Board, in 1964, did not find a need sufficient to warrant the expenditure for salary.

In summary, the hearing examiner finds that whereas petitioner was employed as an Assistant Superintendent with very limited duties primarily in connection with buildings and grounds on a part-time basis, and at a salary supplemental to his salary as an elementary school principal, the position to which he asserts a claim is a full-time position having multiple duties covering the broad spectrum of the business management of the schools. It is the conclusion of the hearing examiner that such tenure rights as petitioner acquired as Assistant Superintendent do not extend to the position of Assistant Superintendent in Charge of Business as established by respondent, and that, in any event, petitioner cannot establish a claim to a position for which he did not, at the time the position was created, or later possess the requisite certificate qualifications.

In an amendment to the original petition of appeal, petitioner additionally asserts that he was denied a salary increment for the 1967-68 school year as provided in respondent's salary guide. He alleges that the denial of the increment followed upon the filing of the original petition of appeal herein, and was arbitrary, capricious, and unreasonable.

The Chairman of the Personnel Committee testified that the question of petitioner's increment had been considered prior to May 1967, when petitioner filed his original petition before the Commissioner. The testimony establishes further that throughout the 1966-67 school year there had been discussion between the Superintendent and the Board concerning petitioner's job performance. At a conference meeting of the Board in May 1967 and prior to the date of the filing of the original petition herein, it was agreed that petitioner's salary increment for 1967-68 would be withheld. At a meeting of the Board held on June 12, 1967, petitioner's salary for 1967-68 was fixed at the same figure that he had been paid in 1966-67. (P-15) Petitioner's allegation that thy withholding of the increment was influenced by the filing of his petition is not substantiated by the testimony presented.

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Petitioner's amended petition, claiming that the withholding of the salary increment was improper, was filed on July 7, 1967. It was agreed that further proceedings before the Commissioner with respect to the petition and amended petition would be held in abeyance while petitioner pursued grievance proceedings in accordance with respondent's grievance procedure. (P-R-1) Petitioner was afforded two meetings with the Board of Education concerning his salary increment, on March 3 and 26, 1968, at which both he and the Board were represented by counsel. Petitioner protests that witnesses were not sworn and that he had no power to subpoena witnesses for these hearing sessions. Following the hearings, in early June 1968, the Board at a conference meeting discussed their findings as developed at the hearings and agreed upon 13 grounds upon which they reaffirmed their determination to withhold petitioner's salary increment. Other facts or incidents were considered but not included as grounds for withholding the increment. A statement setting forth the 13 grounds was drafted and sent as a letter to petitioner under date of July 3, 1968. (P-17) The hearing examiner finds that this statement sets forth the conclusions reached by the Board of Education and the facts upon which the conclusions were based.

Petitioner seeks an order requiring that testimony be heard on the sufficiency and truth of some or all of the grounds asserted by the Board. He contends that the informality of the hearing afforded him denied him full opportunity to present his case before the Board. He argues that a hearing should be afforded before the Commissioner consistent with the principles set down by the Supreme Court of New Jersey *In re Masiello,* 25 *N.J.* 590, 605-607 (1958), in order that the Commissioner may determine "(1) whether the underlying facts were as those who made the evaluation claimed, and (2) whether it was unreasonable for them to conclude as they did upon those facts * * *." *Kopera v. Board of Education of West Orange,* 60 *N.J. Super.* 288, 296 (*App. Div.* 1960) Petitioner further supports his claim by reference to the conditions set forth in the statutes (*R.S.* 18:13-13.7, now *N.J.S.A.* 18A:29-14) prescribed for the withholding of a salary increment provided by the Minimum Salary Law.

Respondent, on the other hand, contends that it did not rely merely upon the Superintendent's recommendation that petitioner's salary increment be withheld for unsatisfactory performance, but in addition based its determination upon discussion and the members' personal knowledge of petitioner's performance. Reaffirmation of its decision, respondent urges, followed upon a thorough hearing before the full Board in fulfillment of its grievance procedure.

* * * *

The Commissioner has reviewed and considered the report of the hearing examiner's findings and conclusions as set forth above.

As to petitioner's claim that he had acquired tenure rights to the abolished position of Assistant Superintendent of Schools which were unlawfully invaded by the subsequent appointment of another to a newly created position of Assistant Superintendent in Charge of Business, also known as Board Secretary, the Commissioner finds and determines that such rights as petitioner had

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acquired did not entitle him to be appointed to the new position. In the first place, the testimony shows that he did not have, nor had he attained at the time of the hearing herein, the certificate qualifications which would have authorized his appointment. That the person who was appointed likewise did not at the time hold the appropriate certificate does not strengthen petitioner's claim. But in any event, the position held by Petitioner prior to its abolishment was altogether a different position from that created nearly three years later to meet changed and different needs. Such duties as the new position specifies with respect to buildings and grounds are but one element of a vastly more complex business operation for which the new position requires overall supervisory and administrative authority. Petitioner's claim to the new position must accordingly be denied. However, the Commissioner concurs in the hearing examiner's conclusion that petitioner had acquired tenure to the position of Assistant Superintendent on the completion of two calendar years of employment in that position on June 30, 1964. Therefore, as recommended, the Commissioner directs that respondent determine petitioner's seniority status and place him on a preferred eligible list as required by the statutes, *supra.*

The Commissioner further finds and determines that petitioner's salary claim as set forth in the amended petition must also be denied. The Commissioner holds that the notice and hearing provided for administering the Minimum Salary Law (*N.J.S.A.* 18A:29-14) are not applicable here, where the salaries provided under respondent's salary policy are in excess of the minimums required under the law. The Commissioner has previously held that a local salary policy must be administered without bias or prejudice (*Kopera v. Board of Education of West Orange, supra*), and that there must be a reasonable basis for the determination to withhold. *Fitzpatrick v. Board of Education of Montvale,* decided by the Commissioner January 24, 1969; *Massaro v. Board of Education of Bergenfield,* 1965 *S.L.D.* 84, affirmed State Board of Education, 1966 *S.L.D.* 243, affirmed Superior Court, Appellate Division, September 23, 1966. He has also held that where a board of education has established a procedure for determining to withhold an increment, such a procedure must be followed. *Applegate v. Board of Education of Freehold Regional School District,* decided by the Commissioner April 23, 1969 The facts show that in the instant matter the Board's original determination to withhold petitioner's increment developed from discussions held by the Board both before and after the Superintendent's recommendation that the increment be withheld. The facts further show that when petitioner invoked the procedures available to him under respondent's grievance procedure, he was afforded the hearing provided by that procedure, as well as a statement thereafter setting forth the Board's conclusions and the basis therefor. The Commissioner holds that the form of the hearing comports with the intent of the Courts *In re Masiello, Supra,* and that a hearing having been afforded, it was not intended that the Commissioner should provide what would be tantamount to a hearing *de novo.* The Commissioner further holds that the instant matter differs from *Kopera, supra,* in that the final determination of the Board herein, having been based upon hearings before it, presents a reasonable conclusion reached in the exercise of the Board's discretionary authority, and does not warrant the Commissioner's intervention. The question is not whether

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the Commissioner would reach the same conclusion to withhold petitioner's increment, but whether respondent, acting without demonstrated bias, found a reasonable basis to determine in the exercise of its discretion that petitioner's job performance did not reach that standard of quality which the Board held requisite to merit a salary increment. The Commissioner therefore denies petitioner's motion that testimony be heard on the grounds for respondent's action, and dismisses the amended petition of appeal.

COMMISSIONER OF EDUCATION

April 23, 1970

John Sousa, C. Begier, R. Brown, A. Ciano, C. Clewis, R. Cochran, P. Corcoran, R. Crooms, W. Dolan, E. Dykes, M. Eska, J. Evan, N. Fine, A. Galletta, K. Hanson, L. Hayes, W. Hooper, M. Horling, N. Krill, D. Kuber, J. Kuhlman, V. Little, I. Livingstone, A. Lundgren, E. McGowan, D. Mellinger, P. Miano, W. Morris, A. Murray, J. Naiman, G. O'Flaherty, C. Patcick, E. Pearson, H. Reiser, D. Rice, W. Ridenour, A. Rohanic, R. Schacter, S. Shanken, H. Shirley, I. Sisler, W. Smith, S. Stang, H. Steuer, L. Stuart, R. Sugalski, V. Takacs, P. Taylor, B. Trooskin, J. Valunas, E. Warga, U. Weiss, G. Wiegers, J. Wilson, E. Zuber,

Petitioners,

v.

**Board of Education of the City of Rahway,
Union County,**

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioners, Cole & Geaney (John F. Geaney, Esq., of Counsel)

For the Respondent, Magner, Abraham, Orlando & Kahn (Leo Kahn, Esq., of Counsel)

Petitioners are teaching staff members in respondent's schools, who claim that they are entitled to certain salary increments and adjustments for the school year 1966-67. They base their claim upon a decision of the Commissioner establishing the right of a fellow teaching staff member to certain salary increments and adjustments, and assert that the decision of the Commissioner is controlling in their petition of appeal. Respondent denies petitioners' claim, and asserts the equitable defense of laches.

At a conference of counsel held in this matter on August 14, 1969, at the office of the Assistant Commissioner in charge of Controversies and Disputes, it was agreed that the question of laches would be argued in briefs of counsel.

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Leave was given to add the names of Joseph Valunas, Jr., Watson Ridenour, and Harriet Mai Primack to the list of original petitioners. In a stipulation subsequently filed, counsel agreed on the salary amounts involved for each of the petitioners in this dispute with respondent, except the salary amount for C. Begier, who, respondent claims, was not receiving an increment for the 1966-67 school year, and the salary amounts for J. Kuhlman and E. Warga, who, it is asserted, were on an administrator's guide.

The circumstances of this case arise from the facts reported by the Commissioner in *Ross v. Board of Education of Rahway*, 1968 *S.L.D.* 26, affirmed State Board of Education 29. The Commissioner found that by virtue of an unwritten "policy" of respondent limiting to $600 the amount of salary increase that would be given to a teacher in any one year, notwithstanding a properly adopted and binding salary policy and schedule providng a higher increase, petitioner Ross had been improperly denied the increase due him. The Commissioner ordered that Ross be paid at the rate of $8,850 instead of $8,750 for the period from September 1 to December 31, 1966, and, because he qualified for a higher rate by virtue of earning a master's degree, at the rate of $9,600 instead of $9,050, for the remainder of that school year. It was testified at the *Ross* hearing that "more than 20 teachers * * * were compensated below their positions on the salary guide by virtue of respondent's policy of limiting increase and adjustment to an annual maximum of $600 * * *." *Id.*, at page 27

However, the Commissioner confined his order to the claim made by the sole petitioner, Ross. The Commissioner's decision was promulgated on February 19, 1968. Respondent appealed from the decision to the State Board of Education, which affirmed the Commissioner's decision without written opinion on October 9, 1968. No further appeal was taken.

Respondent does not deny that petitioner Sousa addressed a letter to the Board in January 1969, claiming a salary adjustment for the 1966-67 school year. In March 1969, respondent, on advice of counsel, denied Sousa's claim. Respondent further admits in its Answer that any claim similar to that of petitioner Sousa would have been denied for the same reasons that Sousa's claim was denied.

Respondent bases its defense of laches on its contention that the consideration of timely action by petitioners herein should refer to 1966, when the *Ross* case was instituted, not 1968, when it was decided. By their delay in filing their action, respondent asserts, petitioners have worked detriment to the respondent Board of Education. *See Elowitch v. Bayonne Board of Education*, 1967 *S.L.D.* 78, affirmed State Board of Education 86, wherein the State Board said, at page 88:

> "Implicit in the doctrine of laches is the inaction of a party with respect to a known right for an unreasonable period of time coupled with detriment to the opposing party. *Pomeroy, Equity Jurisprudence, V. II, Sec.* 419, *p.* 171-2; 27 *Am. Jur. 2nd, Sec.* 162, *p.* 701; *Atlantic City v. Civil Service*

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Commission, 3 *N.J. Super.* 57 (*App. Div.*, 1949); *Park Ridge v. Salimone*, 36 *N.J. Super.* 485 (*App. Div.*, 1955), aff'd 21 *N.J.* 28 (*Sup. Ct.* 1956) * * *."

Respondent also cites the case of *Johnston v. Board of Education of Wayne Township*, 1966 *S.L.D.* 180, affirmed Superior Court, Appellate Division, May 1, 1967. In that case petitioner claimed that he had been unlawfully removed from a position as elementary science coordinator and reassigned as a classroom teacher, thereby being denied salary increments to which he would have been entitled had he remained in the coordinator's position. The Commissioner held that petitioner's delay of nearly three years in asserting his alleged rights was unreasonable, and that to permit petitioner's claim to stand would be detrimental to the educational program of the school system. Respondent emphasizes that petitoner's claim to salary increment in the *Johnston* case was found to be unreasonably delayed, and that this decision must therefore be deemed to supersede an earlier decision in a case on which petitioners rely in their defense against laches. In that case, *Biddle v. Board of Education of Jersey City*, 1939-49 *S.L.D.* 49, reversed in part State Board of Education 51, the Commissioner had held that a delay of nearly six years in prosecuting certain salary claims constituted laches. However, in reversing the Commissioner on that point, the State Board said, in part:

> "Laches is an equitable defense and is not available in what is purely legal as differentiated from an equitable demand. The statute of limitations fixes six years as the period within which actions in the nature of actions upon contract without specialty should be brought.* * * We have been unable to find any such case which denies the right of action for a purely pecuniary demand based upon contract within the period fixed by the statute of limitations. * * *"

Respondent argues further that the Board of Education of Rahway is dependent for its funds upon the approval of the budget by the voters of the district, who have consistently over the past several years denied such approval. Further reductions in the budget by the municipal governing body, together with unanticipated expenditures and diminished State Aid, respondent avers, have placed the school district in serious financial difficulties. Allowance of the instant claims, which by the stipulation of the parties amount to $15,000, more or less, would thus work a significant financial detriment to the district, respondent asserts.

Petitioners contend that the equitable doctrine of laches may not be asserted as an affirmative defense in this matter because the action herein is cognizable at law. Petitioners point out that in the *Ross* case, which underlies the instant matter, the Commissioner held that Ross' claims were based upon a salary guide which is contractual in nature (*cf. N.J.S.A.* 18A:29-4.1), and that respondent Board was bound to pay Ross the amounts provided in its contract with him. Thus, petitioners assert, their claims are based on contract-a money claim cognizable only at law. Petitioners point to the determination of the State

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Board in *Biddle, supra*, as well as to the decisions of the Commissioner in *Harenburg v. Board of Education of Newark*, 1960-61 *S.L.D.* 142, 145; and *Fischer et al. v. Board of Education of Woodbridge*, 1965 *S.L.D.* 40, 43. Petitioners further point to the distinction made by the Commissioner and the State Board in matters where dismissal or transfer from position, or abolition of position is involved, as in *Johnston, supra*, and *Elowitch, supra*, including cases cited therein, in which it was shown that respondent Board in some way changed its position, or in which third-party rights intervened.

Petitioners further assert that the *Ross* case presented a novel issue, and that their rights could not have been known until the matter had been decided by the Commissioner, and thereafter upon appeal by the State Board of Education. The filing of the action herein, after petitioner Sousa's application for salary adjustment had been denied by respondent (as would all other similar applications have been denied, respondent admits), followed in reasonable time, petitioners aver.

The Commissioner holds that the principles enunciated by the State Board of Education in *Biddle, supra*, are still effective and are applicable here. His decision in *Johnston, supra*, does not in any sense supersede *Biddle*, for in *Johnston* the primary claim was to a position which the Wayne Township Board of Education had abolished, a claim which petitioner failed to assert for three years. Had he prevailed in his claim to the position, his rights to salary increment would have followed perforce. In *Johnston*, as in *Elowitch, supra*, and *Harenberg, supra*, and cases cited therein, the doctrine of laches was available as an affirmative defense because it was shown that in the period of delay the position of the respondent Board had essentially changed, and allowance of the rights asserted would have been detrimental to the public interest. *DeStefano v. Civil Service Commission*, 126 *N.J.L.* 121, 123 (*Sup. Ct.* 1941)

In the instant matter, as in *Ross*, petitioners' rights flow from a salary policy and schedule adopted by respondent, and are contractual in nature. *N.J.S.A.* 18A:29-4.1 The amounts of salary adjustments and increments which petitioners *did not* receive by virtue of the application of an unwritten "policy," which the Commissioner in *Ross* held to be ineffective and improper, are stipulated. Notwithstanding budget defeats and reductions, which respondent asserts have been customary both before and since 1966-67, no obligation arises now from the present action, filed in 1969, which did not exist in 1966-67 when the increments were withheld, or in 1968, when the issues present in this case were adjudicated. The Commissioner is well aware of the financial difficulties of respondent Board of Education, as well as of many other boards, but the public may not be enriched by withholding from its teachers moneys to which they are entitled by contract.

The Commissioner finds and determines that laches may not prevail as an equitable defense in this matter. On the basis of the stipulation submitted herein, the Commissioner directs that each of the petitioners, except C. Begier, J. Kuhlman, and E. Warga, be paid the amounts stipulated. The Commissioner is

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unable to determine from the stipulation the correctness of the claims of the three petitioners named as exceptions. Should their claims be unresolved by further conference between the parties, the Commissioner will retain jurisdiction as to them.

COMMISSIONER OF EDUCATION

April 24, 1970

Robert J. Cusack,

Petitioner,

v.

Board of Education of the Borough of West Paterson, Passaic County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Cassel R. Ruhlman, Jr., Esq.

For the Respondent, Thomas P. Cook, Esq.

Petitioner, a teacher in the schools of West Paterson, complains that he has been denied placement on the proper step and level of respondent's salary guide for the 1968-69 school year. Respondent asserts that petitioner is not entitled to the placement claimed because he has not attained the educational level required for such placement.

The case is submitted on a stipulation of facts and briefs of counsel.

Petitioner was in his sixth year of employment by respondent during the 1968-69 school year, and thus was eligible for placement on respondent's salary schedule at the sixth-year level. The salary schedule was meant by the Board to apply to all teachers employed by it, and both the salary schedule and related policies were available in printed form for distribution. Based upon years of employment and degrees or credits earned, the salary schedule had separate columns for those holding a master's degree, and for those having a "Sixth Year of Training," or a master's degree plus 30 additional credits. The definition of a "Sixth Year of Training" was as follows:

> " ' A Sixth year of Training' shall mean a Master's Degree plus proof of the satisfactory completion of 30 additional semester hours in graduate courses in any College or University or Colleges or Universities whose graduate courses for the Master's Degree are acceptable to the State Board

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of Examiners for certification purposes, all as provided for in Chapter 164 of the Public Laws of 1963."

It is agreed that prior to the 1968-69 school year, petitioner held a master's degree and a total of 62 hours of acceptable graduate courses. Of this total, petitioner had taken 47 hours of work prior to the time he formally received the master's degree and 15 hours following such receipt. His salary recognition for the 1968-69 school year was that of a teacher who had earned a master's degree and was in the sixth year of employment, but petitioner's request to be placed at the level for a teacher with a master's degree and 30 graduate credits was refused by the Board.

At a conference of counsel in the instant matter held on August 13, 1969, in the office of the Assistant Commissioner of Education in charge of Controversies and Disputes, Trenton, it was agreed that the issue in this matter is:

"Must graduate credits earned prior to obtaining a master's degree be recognized for the purpose of satisfying the requirement for placement on the 'Sixth Year of Training' level of respondent's salary guide?"

It is petitioner's contention that respondent's definition of the "Sixth Year of Training," is, by its wording, the same as that contained in the State's minimum salary law (*N.J.S.A.* 18A:29-6) and that therefore an interpretation of the law must be made by the Commissioner because the Board's interpretation is in dispute. This argument is tied directly by petitioner to a letter he received from the Board Secretary at the time of his original request to the Board for a different salary level recognition. This letter was stipulated in evidence at the conference of counsel and reads in part as follows:

"It is the Board's opinion that the legislative intent of the sixth year schedule, is a teacher is to improve in service after the Master's Degree is attained. The 'plus 30 credit' provision of the Statute, therefore, means the 30 credits are to be taken and recognized only beyond the established master degree date."

Petitioner notes, in particular, the words "legislative intent" and says that this phrase in the letter and the wording of the Board's policy make it clear that the meaning of the column "Sixth Year of Training" as propounded by the Board should be the same as that given to it specifically by legislative provision.

Petitioner argues further that the definition of "Six Years of Training" should be one in which all graduate credits are to be included no matter when obtained, that the phrase is all-inclusive as defined by statute and that the only particular requirements are a master's degree and an additional 30 graduate credits. He further charges that respondent's policy contains no language limiting the graduate courses to be credited toward advanced placement on a salary guide to those obtained after a master's degree has been awarded.

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Respondent, on the other hand, contends that a board of education may make, amend or repeal rules for the employment and compensation of teaching staff members and that it is within the legal authority of the Board to require that a teacher who wishes to qualify for the "Sixth Year of Training" column must have obtained a master's degree and thereafter completed 30 additional semester hours. Further, it is argued by respondent that the matter of interpretation of a salary policy is one that a board of education has the right to make, and that its own interpretation should be given effect. According to respondent, the factor of legislative intent was merely incidental to the Board's own intent and was not involved in what the Board meant.

The Commissioner agrees with respondent's contention that a board of education has authority to establish salary guides and policies applicable to all staff members as long as they are not in conflict with the basic statutes. He further agrees that absent such conflict or clear evidence that salary policies were administered in a discriminatory manner, he should not substitute his discretion for that of the board either with regard to the formulation of the policies or their interpretation. However, the instant petition clearly involves a dispute over a statutory interpretation with which the Commissioner is concerned because the policy of the Board of Education as quoted, *supra*, contains the phrase "all as provided for in *Chapter* 164 of the *Public Laws of* 1963."

In addition, the letter to petitioner, also quoted in part, *supra*, clearly implies that the Board was tying its policy interpretation to that of the minimum salary law (*N.J.S.A.* 18A:29-7), was accepting the definition the statute established, and was not exercising an independent prerogative which it admittedly could have used in the interpretation of the phrase "Sixth Year of Training." Therefore, the Commissioner's interpretation of the term "Sixth Year of Training" is clearly required in this dispute.

The definitions contained in the statutes in issue are found in *N.J.S.A.* 18A:29-6. Pertinent parts are excerpted as follows:

> " 'Master's degree or the equivalent' shall mean a master's degree conferred by a college or university whose courses for such degree are acceptable to the state board of examiners for certification purposes *or* proof of the satisfactory completion of 30 additional semester hours in graduate courses beyond the course requirements for the bachelor's degree * * *. (Emphasis supplied.)

> " 'Six years of training' shall mean a master's degree plus proof of the satisfactory completion of 30 additional semester hours in graduate courses * * *."

The Commissioner is of the opinion that the 30 hours specified in the definition of "Six years of training" can be considered incremental to the equivalent requirement of 30 hours, which may be used in lieu of a formal master's degree, This means that a teacher with 60 hours "beyond the course

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requirements for the bachelor's degree" (*N.J.S.A.* 18A:29-6) is entitled to the salary payable to those with six years of training. The phrase "Master's degree or the equivalent" as used in the definition given the five-year level of training is a phrase that provides alternatives, namely a "master's degree" *or* 30 hours of graduate work. It follows then, that when the definition for six years of training refers to "master's degree" it refers to such alternatives, and, to the degree that the phrase equates 30 hours of graduate work with the master's degree, it encompasses the two parts.

There is nothing in the statute to support respondent's contention that the required 30 hours of additional graduate work, in the definition of "Six years of training" must be completed during a span of time *after* the master's degree has been formally awarded. To the contrary, the statute simply indicates that a person must possess the degree plus 30 additional hours of graduate work beyond that required for a master's degree or its equivalent (30 hours beyond the bachelor's degree).

Respondent having defined its salary schedule in terms of the statutes, it follows that a teacher who has a master's degree plus 30 additional hours of work beyond the degree qualifies for placement on the "Sixth Year of Training" schedule.

The Commissioner finds and determines that petitioner has met the requirements set forth in respondent's salary schedule for the "Sixth Year of Training" and is entitled to placement on the schedule at that level.

COMMISSIONER OF EDUCATION

April 27, 1970

In The Matter Of The Suspension Of Teacher Certificate Of Lance Cronmiller, School District of Willingboro Township, Burlington County.

COMMISSIONER OF EDUCATION

Decision

The teacher in this case, Lance Cronmiller (hereinafter "teacher") is charged with unprofessional conduct for failure to give the required statutory notice of resignation. The employing Board of Education filed a complaint through the Burlington County Superintendent of Schools to the State Board of Examiners. After hearing Mr. Cronmiller at its meeting on March 19, 1970, the State Board of Examiners recommended to the Commissioner of Education that the teacher's certificate be revoked for the balance of the year. The

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Commissioner afforded the teacher a further opportunity on April 20, 1970, to show cause why the recommendation of the State Board of Examiners should not be effectuated. Mr. Cronmiller appeared on that date before the Assistant Commissioner in charge of the Division of Controversies and Disputes and was heard in his defense.

Mr. Cronmiller was employed as a teacher in the Willingboro school system and acquired tenure status in his position. On Monday, January 19, 1970, he appeared at the school, submitted a letter which stated, "This is my resignation, effective today," left immediately and failed to appear thereafter. The Superintendent of Schools requested the Burlington County Superintendent of Schools to institute appropriate disciplinary measures, and then ensued the referral to the State Board of Examiners and the actions recited *ante.*

In his defense the teacher recited the details of a conference held January 14, 1970, at which a pupil and her mother expressed some six areas of dissatisfaction to him and a guidance counselor. At this conference and subsequently the teacher failed to receive the support he expected from his colleagues and superiors and, as a result, concluded that he had been placed in an untenable position which induced him to resign immediately and without notice. Queried whether he knew of the statutory requirement for notice, the teacher replied that at the time he did not but that it would have made no difference in his action. He stated further that he is unconcerned about the revocation of his certificate for the reason that he has no intention of returning to teaching and seeks only to establish the justification of his action in the circumstances in which it occurred.

The statute controlling this matter is *N.J.S.A.* 18A:28-8 which provides in relevant part:

> "Any teaching staff member, under tenure of service, desiring to relinquish his position shall give the employing board of education at least 60 days written notice of his intention, unless the board shall approve of a release on shorter notice and if he fails to give such notice he shall be deemed guilty of unprofessional conduct and the commissioner may suspend his certificate for not more than one year."

The matters which the teacher alleges to have provoked his precipitate departure are not at issue herein, and the Commissioner will make no findings with respect to them. The provocation under which he acted, whether fancied or real, is not relevant. Whatever feelings the teacher may have had cannot constitute a valid excuse for flouting the law and unilaterally abrogating the terms of his employment. Moreover, the teacher had avenues of appeal by which he could have sought a resolution of his grievances which he failed to employ. Nor did he attempt to arrange terms under which he could be relieved of his duties, obtain an early release, or in any other way reach an agreement. Instead, he walked off the job. Under such circumstances the Commissioner can find no justification for or condonation of the teacher's actions.

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The Commissioner finds and determines that the teacher herein failed to fulfill the terms of his employment with the Willingboro Board of Education and that he violated the law by failing to give 60 days' notice of his intent to terminate his employment. The Commissioner finds Mr. Cronmiller guilty of unprofessional conduct, therefore, and orders his certificate revoked for a period of one year beginning January 19, 1970.

COMMISSIONER OF EDUCATION

April 29, 1970

Florence Fitzpatrick,

Petitioner,

v.

Board of Education of the Borough of Wharton, Morris County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Harbaugh and Collester (Donald G. Collester Jr., Esq., of Counsel)

For the Respondent, Fullerton, Kenihan & Porfido (Eugene J. Porfido, Esq., of Counsel)

Petitioner is an employee in respondent's school system who alleges that she has been unlawfully removed from her position as school principal and assigned as a classroom teacher. She asks the Commissioner to direct the Board of Education to specify the allegations against her upon which it based her reassignment, to afford her a full public hearing thereon, and to reinstate her as principal.

Testimony and documentary evidence were offered at a hearing conducted by the Assistant Commissioner in charge of the Division of Controversies and Disputes at the office of the Morris County Superintendent of Schools, Morris Plains, on April 8, 1969. Inability to obtain the testimony of a witness whose physical condition did not permit her examination delayed completion of the proceedings for some time thereafter. The testimony was finally elicited by means of interrogatories and submitted to the Commissioner for adjudication.

Petitioner had acquired tenure as a teacher in respondent's school system prior to the 1967-68 school year. By appropriate action of respondent, petitioner was appointed as principal of the Marie V. Duffy School and served in

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that capacity for one year from July 1, 1967, to June 30, 1968. She was not reappointed as principal for the 1968-69 school term although such action was recommended by the Superintendent, but was assigned as a classroom teacher. The evidence discloses that at the regular meeting of the Board on April 26, a motion that petitioner be reappointed principal for the 1968-69 school year failed by a vote of 4 to 3. Her assignment as a teacher was approved at the same meeting by a similar vote. At the next meeting of the Board, on May 21, 1968, a motion to reconsider and appoint petitioner to the principalship was defeated by a vote of 4 to 3. A letter from petitioner requesting "a grievance meeting with the entire Board of Education" was read at the same meeting and announcement made that the Board would meet with petitioner on May 27. It was also stated that petitioner would be permitted to be represented at the meeting by counsel and a representative of the New Jersey Education Association.

The meeting on May 27 was attended by petitioner and her two representatives, six members of the Board of Education, counsel for the Board and the Superintendent of Schools. The parties were unable, however, to agree on the purpose or form of the session and most of the time was spent in debate with respect to procedure. Counsel for the Board took the position that petitioner did not come within the ambit of the grievance procedure but that the Board was prepared to accommodate petitioner by hearing any presentation she wished to make. Petitioner's counsel opposed such an informal procedure and contended that petitioner was entitled to a full formal hearing. No agreement was reached and the meeting adjourned. Subsequently, at the regular meeting on June 18, 1968, a motion to afford petitioner "an open hearing" was rejected by a 4 to 3 vote.

In her brief petitioner urges five points on which she rests her contention that respondent's action was unlawful and should be set aside: (1) failure to make and declare proper findings and reasons for the action; (2) failure to afford petitioner a formal hearing; (3) unlawful discrimination; (4) denial of grievance procedure rights; and (5) fundamental principles of fair play and public policy.

The statutes governing the rights of teaching staff members to the protection of tenure in particular assignments set up no requirements or obligations of an employing board of education to make findings or to announce a rationale when it decides to reassign an employee before tenure rights have accrued. *N.J.S.A.* 18A:28-1 *et seq.* Prior to 1962 professional staff members gained tenure in one of four named categories: teacher, principal, assistant superintendent, or superintendent. With the enactment of *Chapter* 231, *Laws of* 1962, such protection was extended to every position for which certification is required. Such protection comes into being after a probationary period which exceeds two years. The evils which this amendment was designed to cure were (1) to eliminate the arbitrary reassignment of employees who had held a particular position for many years and to afford them security in their jobs, and (2) to overcome the reluctance of boards of education to promote from within the staff by providing an additional period of two years in the new position before tenure in that position accrued. *David v. Cliffside Park Board of*

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Education, 1965 *S.L.D.* 56, 61, affirmed State Board of Education, 1966 *S.L.D.* 223, affirmed Superior Court, Appellate Division, *ibid.* The probationary period of two years was incorporated specifically to afford the Board of Education an opportunity to assess the competency of the employee in his new assignment. If the employee is not continued in his new position until he acquires tenure therein, the statute provides for his return to his former job with such tenure rights as he already had in it. *N.J.S.A.* 18A:28-6 The language of the statute provides no basis for reading into it any obligation on the part of the board to make findings or announce reasons for its action:

> "* * * and in the event the employment in such new position is terminated before tenure is obtained therein, if he then has tenure in the district or under said board of education, such teaching staff member shall be returned to his former position at the salary which he would have received had the transfer or promotion not occurred together with any increase to which he would have been entitled during the period of such transfer or promotion."

It is well established that until tenure rights accrue, probationary employees cannot enforce a demand for a statement of reasons for non-continuation of employment or for a hearing thereon. *Zimmerman v. Newark Board of Education*, 38 *N.J.* 65, 70 (1962); *Ruch v. Greater Egg Harbor Regional High School District*, 1968 *S.L.D.* 7, appeal dismissed State Board of Education 11, affirmed Superior Court, Appellate Division, March 4, 1969. Termination of probationary employment is not subject to challenge unless patently arbitrary or the result of unlawful discrimination. There is no such clear showing herein.

Petitioner's third point rests on her allegation that respondent's action was motivated by a belief that as a female she was not as competent to supervise women teachers as a male would be. Consideration of sex as a basis for employment evaluation constitutes an unlawful form of discrimination, petitioner argues, which taints the entire proceedings and action of respondent.

The evidence fails to support petitioner's allegation. Although it appears that a member of respondent's Personnel Committee may have given utterance to some such remark as "women cannot supervise women," the context in which it was made appears to be gratuitous, and there is no showing that it influenced the Board or was the basis on which its action was grounded. The evidence reveals that petitioner's re-employment as principal was considered at a series of meetings of the Personnel Committee extending over several weeks, during which time a variety of factors were reviewed and evaluated. Such review culminated in a recommendation of the Personnel Committee to the Board by a 2 to 1 vote that petitioner's contract as principal not be renewed. Nor is there any showing that the question of petitioner's sex was raised before the Board or entered into its judgment in any way. The Commissioner holds that the proofs fail to support a charge of improper discrimination based upon petitioner's sex as is proscribed by *N.J.S.A.* 18A:6-6.

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Petitioner's fourth point is that respondent refused to accord her a right to be heard under established grievance procedures. The evidence shows, however, that respondent did afford petitioner an opportunity to appear before it with her representatives and to make whatever presentment she chose. Petitioner appeared at such meeting but refused to proceed short of a formal hearing, which respondent declined to afford her.

The Commissioner has already ruled that petitioner had no entitlement to the formal hearing she demanded. Nor, in the Commissioner's judgment, was the matter of non-renewal of petitioner's contract as principal a grievable issue. In so holding, the Commissioner does not denigrate the validity or the importance of grievance procedures. Such accepted and understood means of settling problems which arise with respect to terms and conditions of employment are essential. But failure to renew an agreement does not fall within the ambit of a grievance procedure. Application of grievance procedures to a failure to renew the employment of a probationary employee is an exercise in futility. *Eastburn v. Newark State College, et al.*, 1966 *S.L.D.* 223, 224 (State Board of Education, 1966) Even so, respondent did grant petitioner an opportunity to be heard which petitioner refused. The Commissioner finds that although the grievance procedure was not applicable to the controversy herein, respondent did in fact permit petitioner to be heard, and her refusal to go forward was at her own peril.

Finally, petitioner urges that fair play and public policy demand her reinstatement. She cites the fact that the Superintendent of Schools had recommended her continuation as principal and contends that contrary action by members of a board of education, who are non-educators, flies in the face of public policy and is patently arbitrary. Petitioner argues that the Commissioner should intervene, therefore, and afford petitioner a full hearing and countermand respondent's action.

The Commissioner cannot agree. The Legislature has invested local boards of education with broad discretionary authority with respect to the day-to-day functioning of the public schools and in particular with the employment, assignment, compensation and dismissal of employees. *N.J.S.A.* 18A:11-1 As long as those powers are not exceeded or unlawfully abused, the Commissioner is without authority to intervene to interpose independent judgment. *Boult and Harris v. Passaic Board of Education*, 1939-49 *S.L.D.* 7, 13, affirmed State Board of Education, 15, affirmed 135 *N.J.L.* 329 (*Sup. Ct.* 1947), affirmed 136 *N.J.L.* 521 (*E. & A.* 1948); *Thomas v. Morris Township Board of Education*, 89 *N.J. Super.* 327 (*App. Div.* 1965); *Fanwood v. Rocco*, 59 *N.J. Super.* 306 *(App. Div.* 1960) In this case, the Personnel Committee, after a reasonable period of study and evaluation in which it reviewed a number of reports and other factors, recommended that petitioner, after a year's trial as a principal, be not continued in that position but be reassigned to classroom teaching. The Board of Education accepted the report of its Committee and acted on it. The decision was the subject of discussion and reconsideration at several subsequent meetings and remained unchanged. The action was entirely within the discretionary authority of the Board, and there is no showing that it was motivated by malice,

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discrimination, or any other improper considerations. That it was contrary to the recommendation of the Superintendent and that it was by a split vote is not material. The fact remains that the Board had the power to do what it did and petitioner had no rights which were violated. Under such circumstances petitioner has no cause for action and there is no basis for intervention by the Commissioner.

The petition is dismissed.

COMMISSIONER OF EDUCATION

April 30, 1970

Claire M. Eagan and Basil H. Blair,

Petitioners,

v.

Joseph G. Brady, Robert W. Braid, Donald H. Denight, Edward T. Hamilton and Albert Mann,

Respondents.

COMMISSIONER OF EDUCATION

Decision

All parties to this appeal are incumbent members of the Voorhees Township Board of Education. They seek an adjudication by the Commissioner with respect to who holds title to the office of President and Vice-President. The facts of the matter were established at a hearing before the Assistant Commissioner in charge of Controversies and Disputes at the State Department of Education, Trenton, on April 13, 1970.

At the annual election held February 10, 1970, three of the respondents, Mr. Denight and Mr. Hamilton, and a Mr. James Curran were declared elected to the Board. These three members were duly sworn and assumed their office at the reorganization meeting held February 16, 1970.

At that meeting, petitioner Eagan and respondent Hamilton were nominated for the office of President. The first vote resulted in a 4-4 tie with one member abstaining. A motion was then made to refer the impasse to the County Superintendent but failed of approval. There followed a second balloting the results of which were Mrs. Eagan 5, Mr. Hamilton 3 and one abstaining. Petitioner Blair was named Vice-President by a similar vote.

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Mr. Curran's election to the Board was contested by the candidate who ran fourth in the voting, respondent Robert Braid, and a recount of the balloting at the annual school election was ordered by the Commissioner. The recount was held on February 24, 1970, and disclosed that the original tabulation of the votes was in error and that Mr. Robert Braid had received three more votes than Mr. Curran. As a result of the Commissioner's finding Mr. Curran was unseated and Mr. Braid took his place on the Board.

Thereafter, at a meeting on March 26, the following resolution was adopted on an affirmative vote of five members of the Board:

> " ' *Resolved*, that inasmuch as Mr. Braid was duly elected a board member by the Commissioner of Education, the post of President and Vice President be declared vacant and a new vote taken on these two posts.' "

Following passage of the motion, the Board proceeded to elect respondent Mann and respondent Brady to the office of President and Vice-President respectively. The petition herein contesting the action to replace petitioners as duly elected officers of the Board, followed on April 3.

In support of their action respondents contend that petitioners owed their election as President and Vice-President to a crucial vote cast by Mr. Curran who was subsequently determined not a member of the Board. They allege that petitioners would not have been elected had the subsequently determined rightful winner of the seat, Mr. Braid, participated in the organization meeting in place of Mr. Curran. Under such circumstances, respondents aver, Mr. Braid was denied the right to vote on the offices of the Board. Therefore, they took action to void the prior vote and to elect those persons who they allege would have been chosen had the election results been correctly tallied in the first instance. They concede that there is no statute which authorizes such procedure but contend that the action was consistent with the intent and purpose of the law and in the best interests of the school system.

It is clear that Mr. Curran was a de facto member of the Voorhees Township Board of Education at the time of the reorganization meeting and that he held title to that position until he was unseated by the decision of the Commissioner of Education on March 10, 1970.

> "A de facto school officer is one who has entered into the possession of a school office and assumed to exercise the functions thereof by virtue of an apparent election or appointment which is illegal or irregular." 78 Corpus Juris Secundum, § 133, p. 876

It is also well established that the acts of a de facto officer are valid and may not be challenged and set aside on the grounds that he did not hold title de jure.

"The official acts of a de facto school officer, which a de jure officer

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> would be authorized to do, are, if performed in the prescribed manner, as valid and binding on the public and third persons as the acts of de jure officers, and authority to act cannot be questioned collaterally. This is true even though the acts are performed pending a contest or quo warranto proceeding which subsequently terminates in the ouster of the de facto officer from office." 78 Corpus Juris Secundum § 133, p. 877

See also *Oliver v. Jersey City*, 63 *N.J.L.* 634 (*E. & A.* 1899). There can be no question, therefore, that, in general the actions in which Mr. Curran participated while he occupied a seat on the Board, were validly performed and are not subject to challenge by reason of the fact that he was de facto and not de jure.

New Jersey school statutes expressly provide for an annual reorganization of the board of education. Such meeting must be held on the first Monday after the annual school election or not later than three days thereafter. *N.J.S.A.* 18A:10-3 The organization meeting constitutes the first regular meeting of the board. *N.J.S.A.* 18A:10-5 At such meeting each board must elect one of its members as president and another as vice-president to serve for one year and until their respective successors are elected. *N.J.S.A.* 18A:15-1.

The school laws contain no provision for organizing the board at any other time, for reorganizing during the year, or for otherwise electing officers except in the case of a vacancy. Nor is there any statute or rule which provides for the removal of a president or vice-president of a board of education except for refusal to perform a duty imposed upon such office by law. *N.J.S.A.* 18A:15-2 Absent such authorization there is no power in a board of education to reorganize during the course of the year or to elect new officers.

Boards of education are creations of the Legislature and as such have only those powers as are specifically granted, necessarily implied or incidental to authority expressly conferred. *Edwards v. Mayor and Council of Moonachie*, 3 *N.J.* 17 (1949); *N.J. Good Humor Inc. v. Bradley Beach*, 124 *N.J.L.* 162 (*E. & A.* 1939) Such powers can neither be increased or diminished except by the Legislature. *Burke v. Kenny*, 6 *N.J. Super.* 524 (*Law Div.* 1949) The general powers of a board of education to "make, amend and repeal rules * * * for its own government" (*N.J.S.A.* 18A:11-1) are limited by the requirement that such rules may not be inconsistent with the school law. Such general powers cannot be stretched to permit removal and re-election of a board's officers absent specific statutory authorization. The Commissioner finds that respondent's action purporting to unseat petitioners as President and Vice-President respectively was inconsistent with law and is, therefore, *ultra vires.*

The Commissioner finds and determines that Claire M. Eagan and Basil H. Blair were elected President and Vice-President respectively of the Voorhees Township Board of Education at the organization meeting held February 16, 1970, and continue to hold title to such offices. The action of the Voorhees

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Township Board of Education purporting to elect other members as President and Vice-President is declared invalid and is set aside.

COMMISSIONER OF EDUCATION

May 6, 1970

In The Matter Of The Annual School Election Held In The School District Of Toms River Regional, Ocean County.

COMMISSIONER OF EDUCATION

Decision

Pursuant to a petition filed by Lois Falk, Donald Kemper, Gilbert Selznick, Edward Gatsch, Bobbie Barnett and George Ball, alleging irregularities in the conduct of the annual school election held on February 3, 1970, in the Toms River Regional School District, an inquiry was conducted by a hearing examiner designated by the Commissioner of Education at the office of the County Superintendent of Schools on March 9, 1970. The report of the hearing examiner is as follows:

There were three allegations of irregularity with regard to the conduct of this election.

The first allegation is that " * * * the names of the candidates were not listed on the machine ballots in the order prescribed by law." In this regard petitioners cite the provisions of *N.J.S.A.* 18A:14-42 which bears the heading "Manner and Use of Machines," and they ask that particular attention be given to section "d", which reads as follows:

"The names of all candidates to be voted upon at such election shall be arranged in the manner provided by this act * * *"

Petitioners maintain that at the drawing, held prior to the election for place on the ballot, they drew positions marked one through ten for three-year terms and advertised these positions, by number, to their constituents in such a manner that a voter could vote for No. 6, for example, and not have to read the candidate's name. However, on the voting machine ballot the candidates for a three-year term were placed *after* or to the right of the two candidates running for a one-year unexpired term and were given the numbers three through twelve. It is this placement of the names of the candidates running for a three-year term *after* the grouping of names for an unexpired term which petitioners question. They cite the ballot illustration of *N.J.S.A.* 18A:14-36 which has candidates for

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a full three-year term first, followed by candidates running for a two-year and a one-year term in that order, and with a space between the groups. Petitioner maintains that such a blank space is also needed on a machine ballot since this is the separation used in the ballot illustration.

Officials of the Board contend that they did follow the law in the construction of the ballot, that the form of the ballot contained in *N.J.S.A.* 18A:14-36 is merely an illustration, that it is not a mandatory form, and that there is no reason why, on a machine ballot, the names of the candidates running for an unexpired term may not be placed in a horizontal arrangement to the left of the names of candidates running for a three-year term. It is further maintained that the statute, *ante*, was written with paper ballots only in mind, and that it cannot be readily adapted to machine use.

The second allegation of petitioners develops from the first and is concerned with the fact that candidates' names for a three-year term were drawn for placement on the ballot in a sequential numerical order. It is maintained that the numbers assigned as a result of this drawing should have been assigned to the names as they were placed on the ballot. The numbers were not so assigned because the two candidates running for the unexpired term were placed to the left of the group of candidates running for the three-year term. Petitioners contend that the assigned number had no lawful place on the ballot. On the other hand, the election official present maintained that a number had to be assigned, to be placed under the name of each candidate on the ballot, because the tally on the back of the machine had to be read from a number designation and needed a corollary number from the ballot on the machine face to insure accuracy.

Petitioners' third allegation is that a space should have been provided between the groups of candidates for the several terms for purposes of clarity and understanding by the voters. The election official maintained, however, that groups of candidates could best be separated by a heavy line, on this particular machine, rather than a locked-out space, as requested by petitioners. Such a lock-out device could easily be pried off the front of the machine, and the lever actuated, he asserted, producing confused results.

The final charge is that no written notice, or notice of any kind, was mailed to the candidates concerning the preparation of the voting machines, as required by *N.J.S.A.* 18A:14-42b. Petitioners say that, if such notice had been mailed, the error on the machine ballots would have been discovered and rectified.

N.J.S.A. 18A:14-42 states:

> "The voting machines shall be prepared for use and shall be used at such election in the same manner, and the superintendent of elections or the county board of elections, as the case may be, * * * shall perform the same duties, as are required when the same are used in elections held

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pursuant to Title 19, Elections, of the Revised Statutes, except that * * *

> "b. Written notice of the time and place when the machines will be prepared for use at the elections shall be mailed to each candidate to be voted upon at such election, stating the time and place where the machines may be examined, at which time and place said candidates shall be afforded an opportunity to see that the machines are in proper condition for use in the election * * * "

The hearing officer finds that no such notice was sent to the candidates.

* * * *

The Commissioner has reviewed the report of the hearing examiner.

He determines that the statute *N.J.S.A.* 18A:14-36 containing the ballot illustration was meant to provide uniformity throughout the State in the listing of names of candidates running for places on board of education; and that the groups should always be listed in the same manner. Therefore, the Commissioner directs the following arrangement of the ballot on a voting machine:

1. The names of candidates running for a three-year term are to be placed in the primary position at the top of a vertical arrangement or at the left of a horizontal arrangement, as the case may be.
2. The names of candidates running for a two-year term are to be placed under or to the right of the names of candidates for a three-year term.
3. The names of candidates running for a one-year term should be placed under or to the right of the names of candidates for a two-year term, if any.
4. The Commissioner finds that it is not practical to separate groups of names on a machine ballot strip by a blank space and directs that such separation be achieved by use of a heavy line.

The Commissioner also determines that no statute authorizes a number designation for the names of candidates running for places on boards of education. He therefore directs that such designations be omitted from ballots or ballot strips in all future elections.

Finally, the Commissioner observes that, while *N.J.S.A.* 18A:14-42 b. says that notice of machine readiness for inspection shall be "mailed to each candidate," it does not say specifically that an election officer, or the Board Secretary or another official shall be responsible for such mailing. He observes further, that, while it is the election board official who knows when the voting machines are ready for inspection, it is the Board Secretary who has the addresses of the candidates. While the Board Secretary is not specifically charged by statute with a part in this notification, he is charged under the terms of *N.J.S.A.* 18A:14-63 with " * * * the duty to perform any such duties, not in conflict with those imposed upon any other officer by this law, as may be necessary for the proper conduct of a school election." It can hardly be said that notification of candidates to the effect that the machines are ready for inspection is in conflict with a duty imposed on an officer or officers of the

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County Board of Election because it is only the Board Secretary who has the addresses of the candidates and is in a uniform position throughout the State to give such notification properly. It follows then that the Superintendent of the County Board of Election should assume the responsibility for giving notification of machine readiness to the Board Secretary and that it becomes the duty of the Secretary then to notify the candidates that inspection is in order. The Commissioner directs, therefore, that notice of machine readiness for inspection be transmitted to candidates for places on a board of education in the manner described above.

The Commissioner finds and determines that certain irregularities, as detailed *ante*, occurred in the conduct of the annual school election held in the Toms River Regional School District on February 3, 1970. He finds further that such defects were insufficiently substantive to prevent the free expression of the electorate from being expressed and determined. The Commissioner, therefore, concurs in and confirms the results of the election as previously announced.

COMMISSIONER OF EDUCATION

May 6, 1970

In The Matter Of The Tenure Hearing of Martin Groppi, Passaic County Manchester Regional High School District, Passaic County.

COMMISSIONER OF EDUCATION

Decision

For the Complainant, Samuel A. Wiener, Esq.

Charges of conduct unbecoming a teacher, inefficiency and incapacity to properly carry out his duties and obligations were certified by the Passaic County Manchester Regional High School District Board of Education (hereinafter "complainant") against Martin Groppi (hereinafter "respondent") a teacher in its employ, to the Commissioner of Education, on May 28, 1969. Respondent, although he has acknowledged receipt of service of the charges and certification thereof, has entered neither answer nor defense.

Complainant Board of Education held a hearing on the charges against respondent on May 13, 1969. Respondent acknowledged receipt of notice of the hearing date, but did not attend to defend himself nor was he represented by counsel.

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A hearing on the charges certified to the Commissioner was held on March 4, 1970, at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner of Education. Respondent acknowledged receipt of notice of the hearing set by the Assistant Commissioner of Education in charge of Controversies and Disputes, but did not appear to contest the charges. The report of the hearing examiner is as follows:

The facts in this case are established in the record of the hearing held by compainant Board, *supra,* at which witnesses were examined under oath concerning the charges. The Board made no finding beyond certifying to the Commissioner that the charges, and the evidence in support thereof, would be sufficient, if true in fact, to warrant dismissal or reduction in salary. The transcript of the hearing was offered by the Board as its presentation of the facts in support of the charges. The charges which were submitted in writing by the Superintendent of Schools are as follows:

> "Mr. Groppi was named as the Class Advisor for the Class of 1969, as of October 1, 1965. Money raised by the Class of 1969 through the collection of dues from its members and from all other money-raising activities were turned over to him by the class treasurers or the chairman of the particular committee responsible for a particular money-raising project.
>
> "The records of the class treasurers show that there was a total of $981.80 which was collected in dues in cash turned over by the treasurers to Mr. Groppi, over and above the amount of dues turned over by him to the treasurer of the General Organization Account and the Business Administrator for the district. The School Business Administrator was designated by the Board of Education to be in charge of the General Organization Account on or about March 1, 1968 and, as such, would have been the one to receive said money from the Class Advisor.
>
> "One of the money-raising projects of the Class of 1969 was the sale of Fanny Farmer Candy. The records of the Fanny Farmer Candy Co. show that there was a profit of $1,128.54 on the sale of the candy sold by members of the Class of 1969, of which only $447.14 is shown on the books of the class treasurer as being the net profit.
>
> It was part of Mr. Groppi's duties as Class Advisor to take all money turned over to him and deliver and turn the same over to the school treasurer of the General Organization Account and, later, to the district's Business Administrator, for the purpose of having the same deposited to certain bank accounts for and on behalf of the Class of 1969.
>
> "The difference of $981.80 in class dues and $681.40 of the profit on the sale of candy, for a total of $1,663.20, is unaccounted for by Mr. Groppi.
>
> "In addition to the foregoing, there are five members of the Class of 1969 who each gave to Mr. Groppi the sum of $5.00 in cash, as a deposit in

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ordering the graduating ring. The deposits were given to him with the understanding by each of the students, that he would place the order for them. The orders for the rings were never placed by him and the $5.00 deposits of each of them have never been accounted for by Mr. Groppi.

"On September 17, 1968, I discussed the matter of the shortage of $202.25 in class dues with Mr. Groppi, in the presence of the district's Principal and the district's Business Administrator, and his explanation for the shortage was that he had left an envelope with the cash on the counter in the Administrative Office, without calling anyone's attention to it, and without requesting or receiving a receipt therefore, from anyone.

"The method and manner in which Mr. Groppi handled the funds of the Class of 1969 from its inception in 1965, and his failure to make a satisfactory explanation for the shortage, is conduct unbecoming a teacher, is inefficiency, and incapacity to properly carry out the duties and obligations incumbent upon and assumed by Martin Groppi as Class Advisor for the Class of 1969 and as a teacher in the Passaic County Manchester Regional High School District.

The hearing examiner finds from the testimony of the Secretary of the Board that ample notice of the Board's hearing was given to respondent. He further finds from the testimony of the witnesses, including the Superintendent of Schools, the high school principal, the faculty advisor of the senior class, and several pupils, that respondent did fail to deposit in the General Organization Account funds collected by pupils and entrusted to him. The testimony of other pupils supports the charge that respondent accepted deposits for class rings but failed to place ring orders as he had promised or otherwise account for the deposits left with him.

* * * *

The Commissioner has read the report of the hearing examiner and concurs with his findings of fact. The Commissioner further finds that the charges, established as true in the hearing herein, are sufficient to warrant dismissal of respondent from his employment in complainant's schools. He therefore directs the Board of Education of Passaic County Manchester Regional High School District to dismiss Martin Groppi as of the date of his suspension.

COMMISSIONER OF EDUCATION

May 6, 1970

You are viewing an archived copy from the New Jersey State Library.

Michael Keane,

Petitioner,

v.

Board of Education of the Flemington-Raritan Regional School District, Hunterdon County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Spinrad, Steinberg & Marshall (Max Spinrad, Esq., of Counsel)

For the Respondent, Wesley L. Lance, Esq.

Petitioner asserts that he has attained tenure status in the schools of respondent Board of Education and, therefore, that his dismissal from his position was illegal since no charges have been filed against him pursuant to law. Respondent denies that petitioner has achieved tenure in the district schools and maintains that the dismissal with 60 days' notice was a contractual right that it exercised.

A hearing in this matter was held on April 15, 1970, in the Agricultural Extension Building Auditorium, Flemington, by a hearing examiner appointed by the Commissioner. Both counsel waived filing of briefs and submit the matter, on the testimony heard, documents received in evidence and oral summation. Subsequently, by letter dated April 20, respondent asked that the matter be reopened for the taking of additional testimony. Petitioner opposes any such reopening.

From the testimony and evidence the hearing officer reports the following facts. Petitioner was employed by respondent under four contracts as follows:

	Assignment
August 15, 1966 to June 30, 1967	Assistant to the Principal
July 1, 1967 to June 30, 1968	Assistant Principal
July 1, 1968 to June 30, 1969	Principal
July 1, 1969 to June 30, 1970	Principal

It is stipulated that petitioner holds both the standard elementary teacher and elementary principal certificates in full force and effect.

On February 16, 1970, at the annual reorganization meeting, respondent Board of Education passed two resolutions that abolished the positions of "Assistant to the Principal" and "Assistant Principal", and dismissed petitioner from further duties in the district with payment for a 60-day period subsequent to February 16, 1970.

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Petitioner maintains that the resolution purporting to abolish the positions of "Assistant to the Principal" or "Assistant Principal" was a subterfuge to avoid recognition of his tenure rights. He claims that such rights came into being as a result of his service as a "teaching staff member," as defined in the statutes, for the required statutory period. He further maintains that the Board meeting of February 16, 1970, was an illegal meeting. He alleges that there was no proper notice prior to the meeting as required by *N.J.S.A.* 18A:17-7, and that the meeting was not open to the public at the appointed time of 8 p.m.

On the other hand, respondent maintains that petitioner acquired no tenure rights for his service of a year as "Assistant to the Principal" or a year as "Assistant Principal" since these positions have no certificate authorization, and in any event the positions were abolished by the resolution of February 16 referred to, *ante.* Further, respondent opines that petitioner has no tenure as principal since he has not served for more than two years in that position as required by statute.

Testimony at the hearing was primarily concerned with the reorganization meeting of the Board on February 16, 1970, and whether the meeting was legally called and conducted. The testimony of the Board Secretary was that all Board members had received oral, but not written, notice of the meeting and that the meeting had been called to order at 8 p.m. in the office of the Superintendent of Schools. This testimony was corroborated by school officials, but there was no evidence that establishes that the meeting was open to the public at that time pursuant to the requirements of *N.J.S.A.* 18A:10-6. To the contrary, the weight of the credible evidence is that the door to the meeting room was closed at the appointed time, and members of the general public were not free to enter. It does appear that shortly after 8 p.m. school officials determined that the number of visitors present in the building was so large that the location of the meeting should be changed to the auditorium and that the meeting did, in fact, reconvene there at 8:10 p.m.

The Commissioner's examination of the facts reported by the hearing officer leads to the inescapable conclusion that petitioner has, in fact, acquired tenure in respondent's school district. There can be no question that petitioner fulfilled the employment requirements for the accrual of tenure as set forth in *N.J.S.A.* 18A:28-5 and particularly the probationary period (b) thereunder:

> "The services of all teaching staff members including all teachers, principals, assistant principals, vice principals, superintendents, assistant superintendents, and all school nurses including school nurse supervisors, head school nurses, chief school nurses, school nurse coordinators, and any other nurse performing school nursing services and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in

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compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title, * * * after employment in such district or by such board for: * * *

(b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year; * * *"

It is likewise clear that petitioner's employment was that of "teaching staff member" as defined in *N.J.S.A.* 18A:1-1:

" 'Teaching staff member' means a member of the professional staff of any district or regional board of education * * * holding office, position or employment of such character that the qualifications, for such office, position or employment, require him to hold a valid and effective standard, provisional or emergency certificate, appropriate to his office, position or employment, issued by the state board of examiners * * *."

It is also established that he possessed the appropriate certificates for elementary teacher and principal. It is obvious that petitioner was employed by respondent for three consecutive academic years and continued to be employed at the beginning of the next succeeding academic year. It follows that he completed his probationary period, fulfilled the conditions for the acquisition of tenure status, and became vested with rights to continued employment in the district. Petitioner's purported dismissal by respondent on February 16, 1970, absent charges and a hearing therein, is a nullity, therefore, and is set aside.

Petitioner having thus acquired tenure of employment in the school district, there remains the question whether he has such protection in a particular category of position. Such protection in a specific work category comes into being only after tenure in the district has accrued and is accomplished by the employment in a particular job for one of the statutory probationary periods defined in the law. *N.J.S.A.* 18A:28-6 Protection in a position is dependent on the achievement of tenure status in the district and is in addition thereto. The fact that a teaching staff member has not been employed for more than two years in any particular category cannot be used as a device to circumvent or annihilate protection already achieved in employment in the district.

In this case, while petitioner has fulfilled the requirements for tenure in the district, he has not, up to this time, fulfilled any of the probationary periods necessary to establish tenure in a particular position. He did not serve for more than two years as assistant principal nor has he been employed for two calendar years as principal. Therefore, while he has tenure in the district, such tenure cannot be claimed either as assistant principal or principal. His tenure, therefore is in the general category of teacher. Cf. *Lange v. Audubon Board of Education,* 1951-52 *S.L.D.* 49; *Lascari v. Lodi Board of Education,* 36 *N.J. Super.* 426 *(App. Div.* 1955); *David v. Cliffside Park Board of Education,* 1966 *S.L.D.* 56, affirmed State Board of Education 223, affirmed Superior Court, Appellate Division, Sept. 28, 1966, *ibid.* 223.

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The above conclusions being dispositive of the issues herein, there is no need to consider other questions raised and argued. Nor is there need to consider respondent's request to reopen the hearing for the reason that the proofs to be offered could have no effect upon the decision herein.

The Commissioner finds and determines that Michael Keane has acquired tenure of employment as a teaching staff member in the Flemington-Raritan School District and that respondent's action purporting to dismiss him without a statement of charges and a hearing thereon is *ultra vires* and of no effect. The Commissioner finds further that petitioner's tenure has not been established in any particular position which he may claim. Respondent Board of Education is directed, therefore, to reinstate him in any position of teaching staff member for which he holds an appropriate certificate, with such rights as to compensation as may be his pursuant to *N.J.S.A.* 18A:6-30.

COMMISSIONER OF EDUCATION

May 14, 1970

Thomas B. McGeoy,

Petitioner,

v.

Robert J. Deichert, Thomas J. McCart, John R. Ober and Charles Wagner,

Respondents.

COMMISSIONER OF EDUCATION

Order

For the Petitioner, Barry M. Weinberg, Esq.

For the Respondents, Maressa & Console (Joseph Maressa, Esq., of Counsel)

It appearing that Thomas B. McGeoy having filed an appeal charging respondents with illegal action on the part of the municipal governing body with respect to the budget of the local district board of education; and it appearing that all of the parties are members of the Township Committee of Voorhees Township; and it appearing that the complaint is addressed to an action of that body by one of its members; and it appearing that under the statutory provisions of *N.J.S.A.* 18A:6-9, the quasi-judicial functions of the Commissioner of Education are restricted to matters arising under the school laws; and it further appearing that the Commissioner, therefore, has no jurisdiction over the matter

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of this appeal; now therefore, for this and other good cause shown, the Commissioner determines that this matter does not fall within the powers invested in him pursuant to school law and it is dismissed for lack of jurisdiction.

COMMISSIONER OF EDUCATION

June 2, 1970

Carrie Mae Johnson, as mother and next friend of Samuel Johnson, a minor, individually and on behalf of all others similarly situated,

Petitioner,

v.

Board of Education of Upper Freehold Regional School System, James Dwyer, Superintendent of Schools, and Michael F. Carey, Principal, Allentown High School,

Respondents.

COMMISSIONER OF EDUCATION

Decision on Motion

For the Petitioner, Legal Aid Society of Mercer County (G. Thomas Bowen, Esq., of Counsel)

For the Respondents, Barclay P. Malsbury, Esq.

Petitioner and twenty other students were suspended from respondent's high school after alleged perpetration of a riot on April 29, 1970, and the Superintendent of Schools set up an off-campus facility for these twenty-one students to attend to continue their education.

Petitioner has appealed to the Commissioner of Education for reinstatement in the high school proper and filed a motion for interim relief *pendente lite.* Argument of counsel on the motion was heard by an examiner appointed by the Commissioner on June 4, 1970, at the State Department of Education, Trenton. The report of the hearing examiner is as follows:

Counsel for respondent Board of Education contests the Commissioner's right to hear this matter on the following grounds:

1. Petitioner did not submit his appeal according to the Commissioner's rule of practice, *N.J.A.C.* 8:24-4, and the charges were not verified by oath.
2. Petitioner represents this to be a class action and there is no provision for such an action in the statutes.

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3. There was no service of the appeal on respondents.
4. The Legal Aid Society of Mercer County as a non-profit organization is not licensed to practice before the Courts and petitioner's attorney represents the Legal Aid Society. This object was subsequently withdrawn by petitioner by letter dated June 8, 1970.

Petitioner cites the following reasons for his request for reinstatement:

1. Petitioner's mother submitted an affidavit which alleges a lack of proper educational facility and program.
2. Petitioner's mother alleges also that her son was improperly suspended from school and was not given a hearing prior to his suspension thus denying him due process according to law.
3. Petitioner's affidavit also criticizes the lack of a proper educational facility, improper suspension from school and denial of his right to due process.

Respondents aver the following:

1. Petitioner was given a preliminary hearing through parent conferences with the school principal at the time of his suspension.
2. The off-campus facility is adequate and was approved by the Monmouth County Superintendent of Schools pursuant to the rules outlining his duties as prescribed by the State Board of Education.
3. The Board of Education and the high school staff set up the curriculum with the help of the Division of Curriculum and Instruction and the Office of Equal Educational Opportunity of the State Department of Education.
4. The total program was approved by the Deputy Commissioner of Education.
5. The case is *moot* since the petitioner and several other students have been readmitted to high school.

Subsequent to the argument of counsel on the motion for interim relief, the Superintendent of Schools notified the hearing examiner that all students previously assigned to the off-campus facility have either graduated from high school or have been reinstated in regular classes and that the Board of Education does not plan to open the off-campus facility in September 1970.

The Commissioner has read the report of the hearing examiner.

The Commissioner does not agree with counsel's contention that it would be improper to hear this matter. *N.J.A.C.* 8:24-19 of the rules for appeals reads as follows:

"*Relaxing of Rules*

The rules herein contained shall be considered as general rules of practice to govern, expedite and effectuate the procedure before, and the actions of the Commissioner in connection with the hearing and determination of controversies

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and disputes under the school laws. They may be relaxed or dispensed with by the Commissioner, in his discretion, in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice."

The Commissioner acknowledges that affidavits submitted by mother and son are essentially the same as the filed charges and will accept their sworn statements as a suitable substitute. The class action in the instant case refers to a specific class of 21 students similarly situated and as such the Commissioner considers it to be within the scope of his authority. The Commissioner finds also that respondents were served with a copy of the appeal and that the petitioner is properly represented by a licensed attorney in the State of New Jersey.

In *Polskin v. Board of Education of North Plainfield,* 1968 *S.L.D.* 217 at page 218, the Commissioner said:

> " * * * and it appearing that at the date of such filing of respondents answer the 1967-68 high school tennis season was effectively complete; and it further appearing that the pupil in question completed his course of study and was graduated from respondent's high school at the close of the 1967-68 school year and is, therefore, no longer enrolled in respondent's school district or subject to its jurisdiction or control; and it appearing, therefore, that there is no affirmative relief which can be afforded and that the issue raised is now moot; and it being well established that the Commissioner of Education, consistent with the policy of the Courts, will not hear and decide controversies which are moot * * *."

See *Worthy v. Dover Township Board of Education,* 1938 *S.L.D.* 687, and *Tedesco v. Lodi,* 1955 *S.L.D.* 69.

Accordingly, it appears to the Commissioner that the question of reinstating petitioners in their regular high school classes is moot, and consequently no decision by the Commissioner in this case is necessary.

The motion is dismissed.

COMMISSIONER OF EDUCATION

June 25, 1970

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In the Matter Of The Tenure Hearing Of Louis Guadagnino, School District Of The Township of Florence, Burlington County.

COMMISSIONER OF EDUCATION

Decision

For the Complainant, Dimon, Haines and Bunting (John Dimon, Esq., of Counsel)

For the Respondent, Powell, Davis, Dietz and Colsey (John A. Sweeney, Esq., of Counsel)

Two charges of corporal punishment and one of insubordination were filed with the Commissioner of Education against Louis Guadagnino, a teacher and coach employed by the Florence Township Board of Education. The Board of Education, hereinafter called petitioner, certified that the charges would be sufficient if true in fact to warrant dismissal or reduction in salary.

Counsel for respondent moved to dismiss the charges on procedural and due process grounds. Following a hearing of argument of counsel, the Commissioner on May 5, 1970, denied respondent's motion. Counsel for respondent renewed the motion at the subsequent plenary hearing, and decision was reserved.

Absent any new argument for renewal of the motion to dismiss, the hearing examiner concludes that respondent's motion is without further merit and recommends that the motion be denied.

A hearing on the charges was conducted at the Burlington County Office Building on May 6, 1970, and in the Burlington City Council Chambers on May 7, 1970, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

Respondent is the head coach of the high school basketball team and has been charged with eight specific incidents in two charges of using corporal punishment on his players.

The hearing examiner makes the following findings with respect to each of the specifications of the charges.

CHARGE I – Specification 1.

"Louis Guadagnino, a school teacher, employed by the Township of Florence did on or about January 27, 1969, during a basketball game with the Marie Katzenbach School for Deaf, strike Fred Quig several times with a clenched fist wilfully and deliberately, in violation of New Jersey Statutes Prohibiting Corporal Punishment."

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Fred Quig, a student and player on the basketball team, testified that the coach walked down the bench in the locker room punching each boy on the head with a clenched fist and that he (Quig) sitting on the last seat, was punched on the head four or five times. He stated also that he was struck many times during practice. Frank Burg, a student and player on the basketball team, testified that he saw respondent punch Fred Quig.

Other players present in the locker room offered conflicting testimony that the coach had used a slap, but not a hard slap, to the side of the players' heads as he walked down the line-up on the bench. Several players testified that the blows did not hurt, and were not meant to be punishing, but as added inducement for them to play a better game after the coach's half-time pep talk. Respondent denies that he ever punched or intentionally caused any physical harm to any of his players while coaching. He testified that before each practice session, he called his boys together for a talk and always asked if there were any injuries or any complaints. He received no such claims or reports. Testimony of other witnesses affirmed respondent's procedure for beginning practice sessions and petitioners did not deny the coach's description of practice session procedures.

The hearing examiner determines that the testimony relative to this charge is inconclusive in making a finding of corporal punishment with the intent to punish. *In Craze v. Allendale,* 1938 *S.L.D.* 587, the State Board of Education said, at page 588:

> "The act was not done with any intent to punish, to inflict pain as a penalty for any infraction * * *. For such an act to be unlawful, there must be an unlawful intent * * *."

No such intent to inflict pain or do physical harm has been established. The hearing examiner recommends that this charge be dismissed.

CHARGE I – Specification 2

> "Louis Guadagnino, a school teacher, employed by the Township of Florence did on or about January 30, 1970, during the Jamesburg game strike Fred Quig in the side of the head with clenched fist, wilfully and deliberately, causing temporary loss of hearing in violation of New Jersey Statutes Prohibiting Corporal Punishment."

Fred Quig testified that he developed a "buzzing" in his ear after being struck, that his ear was ringing for about 30 seconds, and that he could not hear later. Frank Burg testified that he saw Fred being punched on the side of the head.

Here, as in Specification 1, there was conflicting testimony given by other players. All of the players who testified except one said the coach sometimes used an open hand as described in Specification 1, *supra* but said he did not

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punch anyone. Respondent denied punching Fred Quig, but said that he may have used an open hand on his boys as a coach is prone to do for the purpose of encouraging better play.

The hearing examiner determines that the testimony and evidence in support of Specification 2, of Charge I is insufficient to make a finding of corporal punishment for the reasons cited in *Craze v. Allendale, supra*, and recommends that this charge be dismissed.

CHARGE I – Specification 3

> "Louis Guadagnino, a school teacher employed by the Township of Florence did wilfully and deliberately during the Allentown Scrimmage Game jab Fred Quig in the eyes with his forefingers and thumb and squeezed them together exerting extreme pressure causing eyes to tear and smart, in violation of New Jersey Statutes Prohibiting Corporal Punishment."

Fred Quig testified that the above charge is true although it was not witnessed by anyone else. Frank Burg testified that he saw Fred's eyes "tear" after the alleged incident but did not see his eyes being squeezed.

Respondent denies committing this act. The hearing examiner determines that the weight of believable evidence here does not support a charge of corporal punishment and recommends that Specification 3 of Charge I be dismissed.

CHARGE I – Specification 4

> "Louis Guadagnino, a school teacher, employed by the Township of Florence, did on or about December 18, 1969, during the Marie Katzenbach game, deliberately and wilfully slap and assault Fred Quig, in violation of New Jersey Statutes Prohibiting Corporal Punishment."

Fred Quig testified he was struck on the head with a fist "several times." This alleged incident happened in the locker room during half-time. Frank Burg testified that he saw Fred being hit, but none of the other witnesses in the locker room at the time saw the incident here alleged.

Respondent denies this charge and there was no further corroborating testimony.

The hearing examiner determines that the weight of credible evidence fails to support this charge and recommends that Specification 4 of Charge I be dismissed.

CHARGE II – Specification 1 is withdrawn by agreement of counsel.

CHARGE II – Specification 2

> "Louis Guadagnino, a school teacher, employed by the Township of Florence did on or about January 9, 1970 during the Northern Burlington

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Regional game wilfully and deliberately stomp his heel on the foot of Frank Burg two times in violation of New Jersey Statutes Prohibiting Corporal Punishment."

Frank Burg testified that the above charge is true. Mrs. Burg, Frank's mother, testified that she witnessed this incident and saw respondent "stomp" on Frank's toes with his heel, three or four times when the player was taken out of the game and sat on the bench beside the coach. Mrs. Julia Dudick, Board Secretary, testified that she saw the coach step on Frank's foot during the game, as charged above.

Respondent denies deliberately stomping on Frank Burg's foot, but recalls hitting Frank's foot with his own, twice while seated beside him on the bench during the game.

The testimony does not indicate an accidental act by respondent, but rather, in terms of Frank Burg's testimony, a deliberate use of physical contact to teach the player a lesson not to commit "walking" violations.

The hearing examiner determines that this charge is supported by the weight of evidence and that respondent did inflict corporal punishment here against petitioner in violation of *N.J.S.A.* 18A:6-1.

CHARGE II – Specification 3

"Louis Guadagnino, a school teacher, employed by the Township of Florence did on or about January 30, 1970 during the Jamesburg game wilfully and deliberately strike Frank Burg in the face during a time out with a rolled up sheaf of papers, in violation of New Jersey Statutes Prohibiting Corporal Punishment."

Frank Burg testified that the above charge is true and the paper sheaf caused a "stinging hurt." Fred Quig witnessed this incident, saw Frank being hit, and using his hands described the paper as about six to ten inches long. However, this incident was witnessed by one other player, who said the coach tapped petitioner on the shoulder with the papers. Respondent does not deny that it "could have happened," but argues it was not a malicious act nor did he ever intend to inflict injury or pain on anyone.

The hearing examiner determines that the weight of credible evidence here supports the conclusion that the alleged incident of being struck by a sheaf of paper did occur. Earlier testimony suggested the paper was a rolled up program, which the examiner will accept, having been given no other description of the article. The hearing examiner finds that this incident cannot be construed as an act committed with the intent to punish or cause physical harm and recommends that Specification 3 of Charge II be dismissed.

CHARGE II – Specification 4

"Louis Guadagnino, a school teacher, employed by the Township of

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Florence did on or about January 30, 1970, during the Jamesburg game wilfully and deliberately punch Frank Burg in the nose, causing his nose to bleed, in violation of New Jersey Statutes Prohibiting Corporal Punishment."

Frank Burg testified that the above charge is true. His mother testified that he had a "nose bleed" at breakfast time for four or five days following the date of the alleged incident. Fred Quig testified that he did not see Frank punched, but saw a little blood after the alleged incident.

The testimony of other players indicated that there was no bleeding and Frank Burg testified that the blood was not visible because he sniffed frequently to prevent its flowing. Respondent denies punching Frank Burg in the nose and argues that Frank never complained to anyone about his alleged injury.

The testimony supports a conclusion that Frank Burg certainly could have had nose-bleeds as he and his mother testified. However, it has not been established that they were caused by a punch on the nose by his coach and the testimony supporting this charge is neither clear nor convincing. The hearing examiner recommends that this charge be dismissed.

CHARGE II – Specification 5

"Louis Guadagnino, a school teacher, employed by the Township of Florence did on or about January 30, 1970, during the Jamesburg game wilfully and deliberately pinch Frank Burg on the side of the neck with extreme pressure and caused a discoloration which lasted several days, in violation of New Jersey Statutes Prohibiting Corporal Punishment."

Frank Burg testified that the above charge is true and Fred Quig testified that he saw the coach pinch Frank.

Another player testified that he saw the marks on Frank's neck *before* the game in which the incident allegedly happened, and still another student witness testified that Frank Burg told him that the marks on his neck were made by a girl.

Respondent denies pinching Frank Burg on the neck.

The hearing examiner concludes, after considering the conflicting testimony, that there is insufficient credible evidence to sustain Specification 5 of Charge II and recommends that this charge be dismissed.

The hearing examiner makes note of the fact that both Fred Quig and Frank Burg stayed on the team and finished the season although all the alleged incidents occurred some weeks prior to the end of the basketball season. The respondent testified that the petitioning players never complained to him, nor was he aware of their alleged problems until he heard rumors of charges being filed. The athletic director and two other teachers testified on behalf of the

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respondent and said they had never witnessed coach Guadagnino punching or battering any player although they admitted it could have happened in their absence.

Another witness testified that he heard Frank Burg and his mother say they wanted to get rid of Mr. Guadagnino, but this contention is denied by Frank and his mother.

CHARGE III – Specification I

"Louis Guadagnino, a school teacher, employed by the Township of Florence, did on or about February 4, 1970, refuse to comply with two requests made by Calvin E. Ingling, Superintendent of Schools, in that he failed to supply a report and information regarding alleged incidents in the Jamesburg, New Jersey High School Locker Room in December 30, 1969, which involved profanity, physical abuse and unruly conduct. The said Louis Guadagnino being then and there the basketball coach, supervising students at a student school activity; all of which is in violation of New Jersey Statutes, the Florence Township Board of Education Policies, the contract between the Florence Township Board of Education and said teacher, and custom and usage between supervision and employees."

The Superintendent of Schools testified that the above charge is true and that in the presence of the athletic director and the school principal, respondent refused to give him the information he requested.

Respondent admits he would not make any statement to the Superintendent but argues that he was protecting himself and had a right to remain silent. Respondent testified further that he heard rumors around the school of charges being filed against him and was concerned about any eventuality that might threaten his employment.

* * * *

The Commissioner has read the report of the hearing examiner and concurs wih his findings and recommendations.

The Commissioner reaffirms the denial of the motion to dismiss on the same grounds as set forth in his decision on the motion to dismiss dated May 5, 1970.

The petitioners have not established any of the specifications of Charge I and it is hereby dismissed. Specification 3 of Charge II has been established as fact with sufficient supporting credible testimony. While the Commissioner does not condone the use of physical force and considers it an unwise action he determines that this incident is not of itself a sufficiently flagrant violation to warrant either dismissal or reduction of salary. Specifications 1, 2, 4, and 5 are dismissed as recommended by the hearing examiner.

The Commissioner does not find that respondent is guilty of insubordination as specified in Charge III. In the atmosphere of rumor and

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confusion that existed and with other witnesses present in the office of the Superintendent, respondent was within his right to remain silent. Any statement made in that arena could have been used against him at a later formal hearing and he could not be coerced to say anything at that time that would be detrimental to his character or his employment. *N.J.S.A.* 18A:25-7 states:

> "Whenever any teaching staff member is required to appear before the Board of Education or any committee or member thereof concerning any matter which could adversely affect the continuation of that teaching staff member in his office, position or employment or of the salary or any increments pertaining thereto, then he shall be given prior written notice of the reasons for such meeting or interview and shall be entitled to have a person of his own choosing present to advise and represent him during such meeting or interview."

The Commissioner cannot construe respondent's action in remaining silent in this instance as insubordination. The statute above clearly sets down the rights on matters that could adversely affect his employment. Respondent has a right to notice and representation in such a meeting before the Superintendent of Schools. Because respondent was not charged with disrespect or any overt action against the Superintendent that could be considered insubordination, but simply remained silent to protect himself, the Commissioner finds no basis in fact to sustain this charge. Therefore, the charge of insubordination is dismissed.

The Commissioner finds it significant that the alleged offenses occurred prior to the end of the basketball season and both petitioners remained with the team and played until the season ended.

The Commissioner finds that the charges and the evidence in support thereof are insufficient to warrant dismissal or reduction in salary and hereby orders that this matter be dismissed.

COMMISSIONER OF EDUCATION

June 25, 1970

You are viewing an archived copy from the New Jersey State Library.

Michael J. Keane,

Petitioner,

v.

Flemington-Raritan Regional Board of Education,
Hunterdon County,

Respondent.

COMMISSIONER OF EDUCATION

Decision
On Motion To Strike

For the Petitioner, Spinrad, Steinberg & Marshall (Max Spinrad, Esq., of Counsel)

For the Respondent, Wesley Lance, Esq.

Petitioner's tenure status as a teaching staff member in respondent's school district was upheld by the Commissioner of Education in a prior appeal decided May 14, 1970. Petitioner has filed a second petition of appeal contesting the action of respondent to reassign him from his former position as principal to classroom teacher. Respondent has countered with a Motion to Strike the petition on the grounds that the appeal raises issues already decided by the Commissioner and that no new issues are raised on which requested remedies may be granted. Argument on the Motion was heard before a hearing examiner assigned by the Commissioner at the State Department of Education, Trenton, on June 19, 1970.

Petitioner makes five claims in the instant appeal as follows:

1. That he had acquired tenure as a principal as a result of the decision of the Commissioner in the first appeal dated May 14, 1970;
2. That the compensation afforded for the period of his illegal dismissal was incorrectly established;
3. That, by virtue of petitioner's tenure as a principal, his salary cannot be reduced;
4. That respondent's resolution purporting to reassign petitioner and afford him back pay was undated and therefore illegal;
5. That respondent's action to demote petitioner from principal to teacher is illegal unless reasons underlying such action are afforded.

Respondent contends that petitioner has produced no new material with respect to his entitlement to reinstatement as principal and that the Commissioner's earlier decision did not find that he had acquired tenure in such position. It concurs that petitioner has rights to compensation pursuant to statute. Respondent argues further that it was under no obligation to reinstate petitioner as principal and its action to assign him to a classroom teaching position was in harmony with the Commissioner's decision in the earlier appeal.

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For the reason that the issues raised in the instant appeal have already been adjudicated in the decision of May 14, 1970, respondent moves to dismiss.

The Commissioner will consider petitioner's five claims seriatim:

1. It is clear that petitioner has acquired tenure of employment as a teaching staff member in respondent's employ by reason of his more than three years of consecutive employment. The category of teaching staff member embraces all positions for which a certificate issued by the State Board of Examiners is required. *N.J.S.A.* 18A:1-1 It is equally clear that he has not gained tenure status in any specific position within that general category because he has not fulfilled the statutory requirement of more than two years in any position. Not having been employed for more than two years as a principal, petitioner has not acquired tenure in such position, and he has no claim whatever to reinstatement as principal or to continuation in such assignment. *N.J.S.A.* 18A:28-6. His tenure, therefore, can be only as a member of the professional staff of the school district. Until petitioner serves more than two years in a position for which a specific certificate is required he can not claim tenure except within the general category of teaching staff member and respondent is entitled to assign him, at its discretion, to any position which petitioner's certification qualifies him to fill. The decision in the first appeal on this issue, issued May 14, 1970, in no ways indicated that petitioner had acquired tenure as a principal. It held merely that petitioner had gained protection in some kind of professional employment in the district and that he could be assigned to any position for which he was qualified. Under such holding the Board could reinstate him as principal if it chose, or it could reassign him as a classroom teacher or to any other position within the scope of his professional license.

In summary, the Commissioner has determined that respondent was without power to dismiss petitioner from its employ, absent dismissal charges and a hearing thereon, but the termination of his services as principal and reassignment to another position such as classroom teacher was within the scope of its discretionary authority.

2. Petitioner alleges that the compensation offered him by respondent for the period of his illegal dismissal is incorrectly computed and argues that the Commissioner should determine the proper amount. He contends that respondent has offered to pay him from February 16, 1970, the date of his purported dismissal, to May 26, 1970, when the Board acted to reassign him, at the salary rate of teacher. Petitioner urges that he should be paid at the rate of principal not only for this period but until the end of the school year. Respondent makes no counter claims but concedes that it is obligated to compensate petitioner pursuant to the statutes.

The Commissioner does not conceive it to be his function to determine the precise amount of compensation due petitioner, but he will express guidelines for making such computation.

It is clear that petitioner was employed as principal under a contract which

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provided, *inter alia*, for the giving of 60 days' notice of termination by either party. Upon the effective date of that contract petitioner acquired tenure of employment in the district but not as principal. Respondent's action of February 16, 1970, which incorrectly sought to dismiss petitioner from its employ, effectively terminated his services as principal. Thereafter he was entitled to be paid at the rate of the position to which he was reassigned. But in this case respondent made no reassignment of petitioner but attempted to dismiss him. Such dismissal was found to be unlawful and respondent was directed to assign petitioner to a position within the scope of his certification. Respondent assigned him as a classroom teacher at a meeting on May 26.

The pertinent statute, *N.J.S.A.* 18A:6-30 provides that an employee who is illegally dismissed "shall be entitled to compensation for the period covered by the illegal dismissal." Such period in this case was from February 16, 1970, when petitioner was illegally dismissed from respondent's employ, until May 26, 1970, when he was properly reinstated in a classroom-teaching position. During this period he was assigned nowhere and the only salary applicable is the one he held at the time of the erroneous action. Such position was principal. The Commissioner holds that until petitioner was reassigned he was entitled to be paid at the rate commensurate with his former job, and he is therefore entitled to the salary of principal from February 16, 1970, until May 26, 1970. In addition he would be entitled to be compensated for any unused vacation leave, if any, which had accrued during his term as principal. From May 26 on petitioner's rate of pay should be fixed at the salary he would have received as a classroom teacher had he occupied such position during his entire term of employment in the district. *Cf. N.J.S.A.* 18A:28-6.

The Commissioner cannot agree with petitioner's argument that a reading of *N.J.S.A.* 18A:6-30.1 entitles him to be paid at a principal's salary for the balance of the school year. That statute has been construed consistently to permit a board of education to relieve a probationary employee of his duties immediately with compensation for 30 days or 60 days or whatever termination notice has been agreed upon or for the full term in the absence of a termination clause. *Gager v. Lower Camden County Regional Board of Education,* 1964 *S.L.D.* 81

The Commissioner directs respondent to compute and pay to petitioner the back compensation to which he is entitled according to the guidelines enunciated herein. If agreement cannot be reached, the Commissioner will adjudicate this issue separately upon request.

3. Petitioner's contention that his salary cannot be reduced because he had acquired tenure as a principal is without merit. It is established that he has no claim to tenure in a principalship and, therefore, any reduced salary he suffers as a result of reassignment cannot be considered an illegal reduction under the Teachers' Tenure Act. *N.J.S.A.* 18A:28-5, 6 It is well established both by statute and case law that an employee's compensation is at the rate of his present assignment and no claim can be made to be continued at the higher rate

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of a position formerly held when lawfully reassigned to a lesser paid job. *N.J.S.A.* 18A:28-6; *Deily v. Jersey City Board of Education*, 1950-51 *S.L.D.* 44

4. Petitioner's contention that respondent's resolution was undated and therefore illegal is likewise without substance. No allegation is made that the Board failed to take the action contested or that it occurred under circumstances which would render it *ultra vires* or that it has not been properly recorded in the minutes of a legally constituted meeting. The mere fact that the copy of respondent's resolution supplied omits the date on which it was adopted cannot be construed to be a fatal defect invalidating the resolution.

5. The fact that respondent has refused to accede to a demand to enunciate the reasons underlying its determination to terminate petitioner's assignment as principal does not render its action illegal. It is well established that probationary status in public employment does not invest the employee with rights to continuation of such employment into a more protected condition such as tenure. Absent legislative requirement, such probationary employment may be terminated at the discretion of the employer. The following excerpts from the case of *Jones v. Hopper*, 410 F. 2*d* 1323 (*U.S. Court of Appeals, Tenth Circuit*, 1969), involving refusal to reappoint a state college professor, are pertinent:

> "The Supreme Court has consistently held, 'the interest of a government employee in retaining his job, can be summarily denied. It has become a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer.' "
>
> " 'Among the most fundamental rules of the law of master and servant is that which recognizes that, absent an applicable statutory or contractual provision to the contrary, an employer enjoys an absolute power of dismissing his employee, with or without cause.' 51 *A.L.R.* 2*d* 745 § 2 (1960)."
>
> " 'It would be intolerable for the courts to interject themselves and to require an educational institution to hire or to maintain on its staff a professor or instructor whom it deemed undesirable and did not wish to employ.' "

See also *Parker v. Board of Education*, 237 *F. Supp.* 222 (*D.C. Md.* 1965); *Zimmerman v. Newark Board of Education*, 38 *N.J.* 65 (1962); *Ruch v. Greater Egg Harbor Regional Board of Education*, 1968 *S.L.D.* 7, affirmed Superior Court, Appellate Division, March 24, 1969; *Schaffer v. Fair Lawn Board of Education*, 1968 *S.L.D.* 213; *Amorosa v. Bayonne Board of Education*, 1966 *S.L.D.* 214.

The Commissioner has dealt with each of petitioner's contentions at some length in order to clarify beyond question his earlier decision. The Commissioner's study of petitioner's pleadings in this second appeal and the brief and oral argument submitted in opposition to respondent's Motion to

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Strike lead him to conclude that no new facts or issues not included in the original appeal have been raised herein with the exception of the question of the exact amount of back pay due. The matter of back pay is remanded to the parties for determination in accordance with the principles enunciated *supra.* On all other issues respondent's Motion to Strike is in order and will be granted.

The Commissioner finds and determines that the issues raised by petitioner in this appeal are *res judicata* and there is, therefore, no cause for action or relief which can be afforded. Respondent's Motion to Strike is granted and the petition is dismissed.

COMMISSIONER OF EDUCATION

July 1, 1970

Board of Education of the Borough of National Park,

Petitioner,

v.

Borough Council of National Park
And The Gloucester County Board of Taxation,
Gloucester County.

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Alvin G. Shpeen, Esq.

For the Respondent, Samuel G. DeSimone, Esq.

Petitioner hereinafter "Board" appeals from an action of the Borough Council of National Park, hereinafter "Council", certifying to the County Board of Taxation a lesser amount of appropriations for current expense purposes for the 1970-71 school year than the amount proposed by the Board which was defeated by the voters. The facts of the matter were educed at a hearing conducted on June 2, 1970, at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner. The Gloucester County Board of Taxation, a nominal party respondent only, did not appear and was not represented. The report of the hearing examiner is as follows:

Council, after reviewing the budget with the Board, made its determination and certified $93,770 for current expenses to the Gloucester County Board of Taxation, a reduction of $22,650 from the amount proposed

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by the Board to be raised by local tax levy. Meetings between the Board and Council and the Gloucester County Superintendent of Schools failed to resolve the issue, and the Board appealed to the Commissioner to restore the funds deleted by the Council so that it could operate an adequate system of education for the pupils of the school district.

Council suggested that economies could be effected in the following items without harm to the educational process (Exhibit P-1):

Current Expense Account	Budgeted by Board	Suggested by Council	Reduction
J130a-Board Members' Expenses	$ 2,400	$ 1,400	$ 1,000
J130f-Administrative Office Expense	1,000	500	500
J211b-Salaries-Principal	15,500	14,500	1,000
J213a-Salaries-Regular Teachers	202,450	186,800	15,650
J410a3-School Nurse	6,900	4,000	2,900
J640d-Telephone	700	400	300
J720b-Repairs of Building	2,500	2,200	300
J2-6-Summer School	2,500	1,500	1,000
Totals	$233,950	$211,300	$22,650

The Board offered testimony supporting its budget proposal and Council testified justifying its reasons for budget cuts as follows:

J-130-a Board Members' Expenses

The administrative principal testified that there was no expense in this line item for the school year 1968-69, but it was budgeted as a line item for the 1969-70 school year. The budget for 1970-71 shows $2,400 listed for this account, which represents an increase of $400 over the amount budgeted in 1969-70. The Board listed the following reasons for this $2,400 proposal:

"Board Members' Expenses Include:

1. Annual dues for members in state and national Federated Board Associations.
2. Attendance at various conferences and workshops held throughout the year.
3. Subscriptions to various journals and educational periodicals."

Council avers that the amount budgeted is excessive and that all Board of Education members may not be able to attend all conferences and workshops. Council recommends a cut of $1,000 leaving the budgeted amount at $1,400.

The testimony does not show clearly a need to increase this line item to the total amount nor was Council convincing in its reasons for a $1,000 cut. The hearing examiner recommends that $600 be restored leaving the budgeted amount at $2,000.

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J-130-f Administrative Office Expense

The budgeted figure of $1,000 for the school year 1970-71 represents an increase of $200 over the amount set in 1969-70. While this amount may be desirable and cannot be termed excessive, the hearing examiner has not been convinced that it is necessary for the thorough operation of an adequate educational system and recommends that it be reduced by $200.

J-211-b Salaries-Principal

Testimony by the principal revealed that his salary is set by a Board-adopted ratio as applied to the top step on the teachers' salary guide. The amount set by budget was $15,500 which is substantially below the amount as determined by using the ratio principle, but it does represent a figure negotiated between the principal and the Board of Education. Council recommended a cut of $1,000 on the basis that the proposed budget raise is too large for a single year. The hearing examiner can see no reason to interfere with the Board's determination of the principal's salary and recommends that $15,500 be appropriated as budgeted.

J-213-a Salaries - Regular Teachers

Council recommends a cut of $15,650 from the budget of $202,450 for teachers' salaries. The recommended cuts are in special education by the elimination of one teacher, $7,600; art, by not increasing the offering to a full-time position, $3,950; and music, by not increaseing the offering to a full-time position, $4,100. Council asserts that the special education class has only three Borough students and four tuition students and the position is not justified; that a half-time art teacher and a half-time music teacher are sufficient to handle the needs of the school.

The principal testified that the special education teacher taught a two-part program:

a. Educable mentally retarded comprised of eight students from within the district and one tuition student.

b. Neurological impaired comprised of three students from within the district and four tuition students.

He testified further that eliminating this position would not result in any savings since the statutes require that the Board of Education provide for the instruction of handicapped children. This would involve not only tuition and transportation for nine or more students next year totalling $9,000 or more, but also the loss of an anticipated revenue of $5,000 for the tuition students now served. Therefore, an expenditure will be effected rather than a savings.

The principal testified also that enrollment in the school will increase by 30 students next September necessitating full-time art and music teachers so that all students can have regular instruction with these specialists. The full-time art and music positions were also negotiated items agreed on with the local teachers' association.

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The hearing examiner finds that the special education class in this school district is necessary and a logical solution by the Board in meeting its statutory responsibility to provide for such instruction and recommends that $7,600 be restored to the budget as salary for a special education teacher. The increase in enrollment is sufficient to justify the hiring of full-time art and music teachers, and the hearing examiner recommends that $8,050 be restored for these full-time positions.

J-410-a-3 School Nurse

While this position was budgeted for three days only for the current school year, it was changed to a full-time position by the Board in the fall of 1969 and has remained as such for the school year 1969-70. The principal testified that the nurses's duties are more than just meeting emergencies. Other duties include some teaching of health and safety education and guidance of female students during pubescence. Her recommended salary for 1970-71 is $6,900. This item also was negotiated and agreed on with the teachers' association.

Council argues that maintaining this position as part time with a salary of $4,000 will provide adequate nurse coverage in the school and give the nurse a reasonable salary increase.

The hearing examiner finds that a full-time nurse for 517 students will provide adequate coverage for the school, is within the standard set in the guidelines for school health services, and recommends that $2,900 be restored to the budget for a full-time position of school nurse.

J-640-d Telephone

The budgeted amount for 1970-71 is $700, and Council recommends a cut of $300. Testimony disclosed that the phone equipment installation and service are no more than necessary for the school, and that normal usage will exhaust the budgeted amount. It was testified that the equipment charge alone will exceed $600.

The hearing examiner finds that $700 is necessary for the Board of Education phone service and recommends that the $300 be restored.

J-720-b Repairs of Building

The Board proposed $2,500 for this item which was cut $300 by the Council. The principal testified that this is a minimum amount needed for repairs and that $2,500 had already been cut in this item by the Board before it made its final proposal.

Council recommends a more gradual program of repair and replacement of windows and shades as reasons for its cut of $300.

The hearing examiner finds that this is a reasonable suggestion and a modest cut and recommends that the budgeted amount of $2,500 be reduced to $2,200.

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J-2-6 Summer School

The Board proposed $2,500 for the operation of its summer school. The principal testified about its success in remedial reading and arithmetic during the summer of 1969 and said that $2,000 of the total amount would be in salaries for five teachers for four weeks work. The remaining $500 is for materials and supplies.

Council recommends a cut of $1,000. The hearing examiner finds that the Board proposal is necessary to continue the operation of its summer school and recommends that $1,000 be restored for this item.

The following table shows the contested budget items as recommended by the hearing examiner:

Current Expense Account	Budgeted by Board	Reduction by Council	Restored by Commissioner
J-130a-Board Members' Expenses	$ 2,400	$ 1,000	$ 600
J-130f-Administrative Office Expense	1,000	500	300
J-211b-Salaries– Principals	15,500	1,000	1,000
J-213a-Salaries– Regular Teachers	202,450	15,650	15,650
J-410a3-School Nurse	6,900	2,900	2,900
J-640d-Telephone	700	300	300
J-720b-Repairs of Building	2,500	300	0
J2-6-Summer School	2,500	1,000	1,000
Totals	$233,950	$22,650	$21,750

* * * *

The Commissioner has examined the report of the hearing examiner and concurs with his recommendations and findings. The Commissioner directs that $21,750 be restored to the appropriations for school purposes and such additional amount be certified to the Gloucester County Board of Taxation.

COMMISSIONER OF EDUCATION

July 13, 1970

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Margaret Mendell,

Petitioner,

v.

Peter A. Cimmino, Superintendent of Schools and the Board of Education of the Borough of Kinnelon, Morris County,

Respondents.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Jeffer, Walter, Tierney, DeKorte, Hopkinson & Vogel, (Reginald F. Hopkinson, Esq., of Counsel)

For the Respondents, Lafferty, Rowe, McMahon & McKeon, (James L. McKeon, Jr., Esq. of Counsel)

Petitioner is a member of the Board of Education of the Borough of Kinnelon and complains that the Superintendent of Schools improperly denied her request to see personnel records. She seeks an order directing the Superintendent and the Board of Education to make such records available to her when requested.

The matter was submitted in a statement of facts and in briefs of counsel. Oral argument on the question was heard on June 16, 1970, at the Extension Service Conference Room, Morris Plains, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

Petitioner contends that the Superintendent refused on two separate occasions to show her applications and correspondence for administrative positions in the school system for which vacancies existed. Petitioner avers that she not only has a right to see all applications and correspondence, but a duty to examine these documents in order to make independent decisions when voting to fill any such vacancy. Petitioner contends further that the respondent arbitrarily, illegally and improperly refused to release this information to her which was the property of the Board of Education.

Petitioner complains that the mode of procedure below, established by the Board of Education, is illegal and invalid because it was not formally adopted at a public meeting and that respondents' actions in denying her requests established a pattern by twice refusing improperly to give her the information she requested.

"MEMO OF PROCEDURE

The Board directs the Superintendent to make available, upon request of

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any or all members such information as may be needed and requested by that member or members in order to arrive at an informed decision. In the event that the information in question is confidential, the requested information will be submitted at the next regular work meeting of the Board in such a way as to safeguard its confidential nature."

Respondent agrees in general with petitioner's allegations, but asserts that he was following a Board-adopted procedure to protect applicants who submit confidential information, and petitioner has no cause to complain when she agrees with the procedure, *supra* and the procedure is followed in all respects. Respondent further submits that all information requested by petitioner was given to her to assist her in arriving at intelligent decisions before voting.

Respondent contends that no pattern has been established since petitioner refers to only one occurrence of withholding information from her after the adoption of the mode of procedure, *supra* and, therefore, the issue is moot.

The hearing examiner finds that the only consequential issue in this matter is whether or not a member of a board of education shall have the right to examine personnel records which are in the possession of a superintendent. In *Witchel v. Canici*, 1966 *S.L.D.* 159, the Commissioner concurred with the recommendations of the hearing examiner who said on page 162:

"There remains, then, the question of what limits if any exist upon the exercise of such responsibilities and prerogatives. It is conceded by petitioner's counsel that a board member's access to board records under the superintendent's control should be subject to reasonable limitation as to time, but not as to purpose. (Tr. 26-27) It is the conclusion of the hearing examiner that access between meetings to personnel records of the Board of Education in the custody and control of the Superintendent when such records relate to the Superintendent's recommendation or proprosal of a candidate for employment, promotion, transfer, or dismissal, is essential to the exercise of petitioner's responsibilities and duties. Such access should be available during regular office hours, and not subject to the judgment of either the Superintendent or the majority of the Board as to the validity of the purpose thereof, and the hearing examiner so recommends."

* * * *

The Commissioner has reviewed the report of the hearing examiner and concurs with his determination of the essential issue therein.

The Commissioner determines that this mater is *res judicata* as established by *Witchel v. Cannici, supra,*, and quotes from that decision at page 162,:

"The Commissioner observes in this case an unfortunate breakdown in relationships among Board members and between a part of the Board and the Superintendent. The Commissioner here reaffirms his belief that the superintendent's participation in the screening and recommendation of

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> professional personnel for appointment and promotion is indispensable for the proper and effective administration of a New Jersey school system. *Valente v. Board of Education of Bayonne*, 1950-51 *S.L.D.* 57, 60; see also *Carr v. Board of Education of Bayonne*, 1938 *S.L.D.* 276, reversed State Board of Education 279, 281. However, such participation cannot be proper and effective when some members of the board of education, whether by action of the superintendent, or by the vote of the majority of the board, cannot have such full and complete access to personnel records as will enable them to make independent decisions."

At this juncture, the Commissioner finds that a determination of whether or not petitioner was denied the information she requested is immaterial as is the question of this matter being moot. The Commissioner said in *Witchell v. Cannici, supra*, at page 162, that

> "*** petitioner be given the right to examine any and all personnel records prepared or maintained for the Board of Education by its officers or employees, during regular business hours, when such records relate to an applicant or employee recommended or proposed for employment, promotion, transfer, or dismissal, as the case may be.",

and he reaffirms that decision in the instant matter.

Having made this decision, the Commissioner concludes that a further ruling on the charges of a pattern being set by respondents of denial of access to applications is unnecessary. Adherence to the directive herein will render such issue moot.

COMMISSIONER OF EDUCATION

July 14, 1970

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Patricia Meyer,

Petitioner,

v.

Board of Education of the Borough of Sayreville, Middlesex County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Lindabury, McCormick & Estabrook, (George W. Cannellis, Esq., of Counsel)

For the Respondent, Hayden & Gillen, (Eugene P. Hayden, Esq., of Counsel)

Petitioner, a teacher employed by respondent Board of Education for three academic years, was not offered a fourth contract. She contests the non-renewal of her employment and asks the Commissioner to order the respondent Board of Education to rehire her for the school year 1969-70. Respondent does not deny that petitioner was regularly employed for three academic years, 1966-67, 1967-68, 1968-69, and was not employed for a fourth year, but denies that its action was in any way tainted or illegal.

Petitioner appeals to the Commissioner of Education for his determination on the facts as set forth in the pleadings and briefs of counsel. Counsel are in substantial agreement on the facts in this matter:

"It has been stipulated by counsel for the respective parties that the petitioner was employed by the Board of Education of the Borough of Sayreville, hereinafter referred to as the Board, as a teacher for three consecutive years; that she received consistently good reviews with respect to her classroom and related duties; and that she was one of the beneficiaries of a contract which was negotiated by representatives of the teachers and the Board of Education, the provisions of which covered the school year 1968-69. It is also agreed that pursuant to said contract, which is appended to the petition as Exhibit A, and more particularly on page four of the same under Article V, provision is made for the issuing of contracts for the upcoming school year and for notifying non-tenure teachers who are not to be rehired substantially as follows:

'V. Contracts:

1. Contracts will be issued as soon as practical after the April meeting of the Board of Education.

2. Teachers who are not to be rehired will be notified by March 1.

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> 3. A teacher whose work is deemed unsatisfactory by his principal or the Superintendent shall be notified in writing by January 31, so that he may have an opportunity to improve. His shortcomings shall be specifically outlined, and he shall receive constructive help from his superiors.' " (Petitioner's Memorandum of Law, P.1)

Petitioner asserts that she was not notified that her work was unsatisfactory and given an opportunity to improve, and was not notified until March 28, 1969, that she would not be rehired.

Petitioner alleges that the Board of Education's failure to hire her for the fourth year constituted an unlawful, arbitrary and discriminatory action when that failure was based on the sole fact that petitioner was an active member of a teachers union. Petitioner argues that the general rule established in *Zimmerman v. Newark Board of Education*, 38 *N.J.* 65, 80 (1962) and its reliance on *People v. Chicago*, 278 *Ill.* 318, 116 *N.E.* 158, 160 (1917), which states that the Board may decline to reemploy an applicant for any reason or no reason at all, does not apply in the instant case because of illegal discrimination against her because of her association with the local teachers union and because of the Board's failure to comply with its provision for renewal of employment contracts as set forth *supra.*

Although petitioner charges the Board with discrimination against her for her union activities, she sets forth no factual basis in support of such a charge. On the other hand, respondent offers the affidavit of the principal of the school in which petitioner was employed. In her affidavit the principal denies that she "ever indicated to Patricia Meyer, or anyone, that [she] was displeased with them because of union activity." The affidavit further recites an occasion on which the principal had sent to petitioner a memorandum concerning her failure to report to work on time. Petitioner angrily berated the principal, and accused the principal of sending the memorandum only because of petitioner's union activity. The principal thereupon called in officers of the teachers organizations, who agreed that they were not aware of the principal's ever taking a position for or against the union or a teachers association.

Respondent does not deny that petitioner was not notified in writing by January 31, 1969, that her work was unsatisfactory, and that she was not notified by March 1 that she would not be rehired. Respondent also admits that in negotiating and executing the document entitled "Professional Salary Guide 1968-69," which contains the excerpts stipulated *supra*, it was intended by both parties to be a binding contract. However, respondent denies that the "Salary Guide" is a contract between respondent and petitioner. Rather, respondent argues, the individual teacher's contract made between petitioner and respondent for the school year 1968-69 is binding on petitioner, and her right to notice of reemployment or termination is controlled by that contract, and not by a contract between the Board and the Sayreville Teachers Association, where there is no showing of any specific intent to overrule the already existing contracts between the Board and individual non-tenure teachers. Respondent further argues that the argument that failure to notify a teacher by March 1

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that she would not be rehired results in automatic reemployment is an absurdity, since in any event the Board could exercise its right to terminate a teacher on notice as provided in its contract with the teacher. Respondent relies upon *Zimmerman v. Board of Education, supra*, in support of its position that it may decline to employ or reemploy a teacher for any reason or no reason at all.

The Commissioner finds no support in fact for petitioner's bare allegation that she was denied reemployment because of her activities in connection with a teachers organization. In *Ruch v. Board of Education of Greater Egg Harbor Regional High School District*, 1968 *S.L.D.* 7, dismissed State Board of Education 11, affirmed Superior Court, Appellate Division, March 24, 1969, petitioner alleged that his failure to be reemployed was arbitrary, capricious, and discriminatory in that it was allegedly based on inaccurate and prejudiced reports about him. In denying petitioner's demand for reasons for non-renewal of his contract and a hearing thereon, the Commissioner said:

> "***While petitioner has charged respondent with arbitrary, frivolous and discriminatory conduct with respect to his further employment, such a bare allegation is insufficient to establish grounds for action. *U.S. Pipe and Foundry Company v. American Arbitration Association*, 67 *N.J. Super.* 384 *(App. Div.* 1961) " *Id.* at page 10

In the instant matter petitioner alleges an unsubstantiated conclusion, which is, in fact, specifically denied in the affidavit of her principal. Such an allegation does not warrant a finding that respondent's non-renewal of her employment contract constitutes unlawful action, and the Commissioner so holds.

There remains the question of the effect of respondent's failure to give notice of non-reemployment set forth in the "Professional Salary Guide," *supra.* Petitioner's contention is that such failure, under the terms of the "Salary Guide" entitles her to reemployment just as surely as if the Board had taken affirmative action to reemploy her. Such a result is clearly inconsistent with *N.J.S.A.* 18A:27-1, which states:

> "No teaching staff member shall be appointed, except by a recorded roll call majority vote of the full membership of the board of education appointing him."

While a board of education may make rules governing, *inter alia*, employment, promotion and dismissal of teaching staff members, such rules must be consistent with *N.J.S.A.* 18A:27-4. Thus, any rule of the Board, whether by negotiated contract with the teachers' organization or otherwise, which would effect employment or reemployment of a teacher staff member in a way other than the manner specifically provided by *N.J.S.A.* 18A:27-1, is, on its face, *ultra vires.* This does not mean that a board may not agree with its teachers on an

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orderly procedure to endeavor to correct unsatisfactory performance or to give a teacher fair opportunity to seek other employment if he is not to be reemployed, but the failure of a board to conform to such an agreement cannot constitute a waiver of a statutory obligation.

It is well established that the Commissioner will not intervene to compel a board of education to employ a non-tenured teacher whom it does not wish to employ, unless it is clearly shown that the board has acted unlawfully or in violation of its contract with the teacher. *Ruch v. Board of Education of Greater Egg Harbor Regional High School District, supra; Taylor and Ozmon v. Paterson State College*, 1966 *S.L.D.* 33; *Amorosa v. Board of Education of Bayonne*, 1966 *S.L.D.* 214; *Branin v. Board of Education of Middletown Township*, 1967 *S.L.D.* 9; *Schaffer v. Board of Education of Fair Lawn*, 1968 *S.L.D.* 213; *Gager v. Board of Education of Lower Camden County Regional High School District*, 1964 *S.L.D.* 81; *Ruggiero v. Board of Education of Greater Egg Harbor Regional High School District*, decided by the Commissioner March 17, 1970; *Nashel v. Board of Education of West New York*, 1968 *S.L.D.* 183. In *Jones v. Hopper*, 410 *F. 2d* 1323, 1329 (U.S. Ct. of Appeals, 10th Cir., 1969), the Court quoted *Ward v. Board of Regents*, 138 *F.* 372, 377 (*8th Cir.* 1905) in part as follows:

> " ' * * * It is elementary that no cause of action can arise from the lawful exercise of a statutory power in the absence of an express provision conferring it. It is also a principle of law as securely founded that an exercise of a power by an administrative board or officer to whose judgment and discretion it is committed is not a proper subject of review by the courts when fraud or conditions equivalent thereto do not exist.' "

The Court also quoted from *Greene v. Howard University*, 271 *F. Supp.* 609, 665 (*D.D.C.* 1967) as follows:

> " 'It would be intolerable for the courts to interject themselves and to require an educational institution to hire or to maintain on its staff a professor or instructor whom it deemed undesirable and did not wish to employ. * * * ' "

In the instant matter, petitioner had a contract of employment for the school year 1968-69. There is nothing to show that either party did not comply with and fulfill the terms of that contract. The agreement expired by its own terms at the end of the school year. Thereafter no rights accrued to either party, nor has either one any further obligation to the other. *Gibson v. Board of Education of Collingswood*, decided by the Commissioner March 26, 1970

The Commissioner finds and determines that the non-renewal of petitioner's contract of employment for the school year 1969-70 was a determination properly within the discretionary power of the respondent; that petitioner's allegation that the non-renewal was motivated by unlawful reasons is not supported in fact; and that respondent's failure to comply with certain provisions of its contract with a teachers organization does not, and cannot

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under law, establish a right of reemployment. The petition is accordingly dismissed.

COMMISSIONER OF EDUCATION

July 16, 1970

DECISION
Of The State Board of Education

Petitioner was employed as a teacher by the Board of Education of the Borough of Sayreville for the academic years 1966-67, 1967-68 and 1968-69, but was not rehired for the 1969-70 year. *N.J.S.A.* 18A:28-5 (b) establishes tenure after employment for

> " * * * three consecutive academic years, together with employment at the beginning of the next succeeding academic year;"

With respect to the oft-cited general rule that a board of education has the right to refuse employment or reemployment to any applicant "for any reason whatever or for no reason at all" (see *People ex rel. v. Chicago,* 278 *Ill.* 318, 116 *N.E.* 158, 160 (*Sup. Ct.,* 1917), there are, as stated in *Zimmerman v. Board of Education of Newark,* 38 *N.J.* 65 (*Sup. Ct.* 1962, recognized limitations on such authority:

> "Today, the powers of a board of education in appointment, transfer or dismissal are not so broad. They are limited by the Fourteenth Amendment of the *United States Constitution,* For example, in *Morris v. Williams,* 149 *F. 2d* 703, 708-09 (8 Cir. 1945), the court held that a custom or usage of a school board in discriminating against Negro teachers of Little Rock in respect to salaries solely on account of color violates the Fourteenth Amendment. The board's powers are also limited not only by the terms of the contract of employment but also by the New Jersey Constitution, by the Teacher's Tenure Act, and by other statutory provisions such as the Law Against Discrimination * * *. Except as provided by the above limitations or by contract the Board has the right to employ and discharge its employees as it sees fit." (at pp. 70-71)

In that context, the court considered the claim of Zimmerman (a non-tenure teacher who served in Newark for three consecutive academic years, but was not thereafter rehired) who contended that in practice, tenure normally would have followed automatically "where a teacher had received satisfactory ratings for three academic years." The evidence there showed that he had received such ratings up to the time that he invoked his Fifth Amendment privilege against self-incrimination under the United States Constitution on May 19, 1955, (approximately one month prior to completion of his third academic year) before the House Un-American Activities Committee in Newark. Prior

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proceedings to dismiss him on that ground failed.[1] Nevertheless, when the court considered the local board's refusal to rehire him, the ultimate finding of four members of the seven member court was that notwithstanding the Fifth Amendment problem, and even if his rehiring would have normally followed, still the statutory requisite had not been met:

> "Accordingly, unless Zimmerman by an affirmative act of the Board was reemployed subsequent to June 30, 1955, he cannot be said to have been employed for three consecutive academic years 'together with employment at the beginning of the next succeeding academic year' * * *. This statutory step had to take place, for 'it is axiomatic that the right of tenure does not come into being until the precise condition laid down in the statute has been met.' "[2] *Zimmerman v. Board of Education of Newark*, *supra*, at p. 75

By so holding, the majority recognized no "right to reemployment" of a non-tenure teacher even where the refusal of such reemployment was based solely on the exercise by the teacher of a constitutional right. One finds it difficult to reconcile the recognition of a basic and specifically expressed constitutional right in a dismissal situation and the rejection of it in a public reemployment situation. However, the three remaining members of the court, speaking through Chief Justice Weintraub, while agreeing with the ultimate result, presented a different view:

> "The Legislature intended wide latitude in the employing authority to determine fitness for permanent employment. It is clear that public employment may not be refused upon a basis which would violate any express statutory or constitutional policy. A simple example would be discrimination for race or religion. But I am not sure such specific limitations are the only restraints. If the employing agency, for an absurd example, thought blondes were intrinsically too frivolous for permanent employment, a court would find it difficult to withhold its hand.
>
> "But if we may inquire into 'unreasonableness' it would seem to follow there must be a 'reason' i.e., 'cause' for refusal to continue the teacher into

[1] Zimmerman's case was originally dealt with in *Laba v. Newark Board of Education*, 23 *N.J.* 364 (*Sup. Ct.* 1957), a case involving two tenured teachers and Zimmerman, all of whom had invoked the Fifth Amendment privilege and were dismissed for that reason. It was held that neither the non-tenured Zimmerman nor the other two tenured teachers could be dismissed during a contract term for invoking their Fifth Amendment privileges. The decision did not rest on any contractual basis but solely on the constitutional deprivation involved, following *Slochower v. Board of Education*, 350 *U.S.* 551, 76 *S. Ct.* 637, 100 *L. Ed.* 692 (1956), *reh. den.*, 351 *U.S.* 944, 76 *S. Ct.* 843, 100 *L. Ed.* 1470 (1956).

[2] The opinion, in treating the rehiring issue, did not mention the refusal as being based on the exercise by Zimmerman of his Fifth Amendment privilege. The concurring opinion of three justices, however, was not so restrained: "It is clear the Board would not continue Zimmerman because he pleaded the Fifth Amendment before the House subcommittee when his connection with communism was the subject of inquiry." (See p. 80.)

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a tenure status. That course has its difficulties. It would not mean the court would not recognize a wide range of 'reasons' or would lightly disagree with the employer's finding that the 'reason' in fact existed. But it would follow that upon demand the teacher would be entitled to a statement of the grounds, with the right to a hearing and to a review as to whether the grounds are arbitrary in nature or devoid of factual support. * * * Such individual inquiries could involve some practical problems in the administration of a school system.

"I think the question might well be left for another day, since here the reason was given and I cannot say it was arbitrary in nature or unfounded in fact." [3] *Ibid.*, p. 80

It is against this backdrop that we must consider the petitioner's claims. She first asserts that by virtue of a certain agreement of which she was a beneficiary, between the Sayreville Board of Education and the Sayreville Education Association, the Board was contractually bound to rehire her and thus establish her tenure. [4] The pertinent provisions of that agreement are:

"I. This guide will become effective September, 1968 and will supercede all other local salary guides.

"V. Contracts:

1. Contracts will be issued as soon as practical after the April meeting of the Board of Education.
2. Teachers who are not to be rehired will be notified by March 1.
3. A teacher whose work is deemed unsatisfactory by his principal or the Superintendent shall be notified in writing by January 31, so that he may have an opportunity to improve. His shortcomings shall be specifically outlined, and he shall receive constructive help from his superiors."[5]

[3]Justice Weintraub went on to say that a board could not be said to have acted unreasonably or arbitrarily in refusing to rehire a non-tenure teacher because that teacher claimed a Fifth Amendment privilege, where the employment of such a teacher might involve the board in controversy "with an appreciable segment of the public", even though the public reaction might be unwarranted.

[4]Although the document is entitled "Professional Salary Guide, 1968-69", it appears to embrace matters beyond the concept of a "salary policy" or "salary schedule" referred to in *N.J.S.A.* 18A:29-4.1 *et seq.*, covering, as it does, minimum eligibility requirements for employment, duty assignments, and mandatory requirements relating to retirement.

[5]Presented as part of the evidence also was the statutory form of contract between employing board and individual teacher described in *N.J.S.A.* 18A:27-6, -7 and -8. It is a printed form with blank spaces for filling in the name of the teacher, the commencement and terminal dates of instruction, salary, current date, and signatures. It contains no provisions respecting tenure and, according to respondent at oral argument, its printed terms are not negotiable by the teacher.

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It was stipulated that the agreement was in full force and effect, that petitioner was an intended beneficiary thereof, and that a notice of non-rehiring, without specifying the reasons therefor, was given on March 28, 1969, almost four weeks after petitioner had reasonable grounds to assume that she would be rehired and thus acquire tenure.[6] It was further stipulated that no notice was given to petitioner of unsatisfactory work performance either before or after the January 31 date (*par.* V, 3 of the contract). But there is more than an approbation by silence here, for it was specifically stipulated that petitioner received "consistently good reviews with respect to her classroom and related duties."[7]

Petitioner would mold out of the contract provisions and the failure of notice by March 1, 1969, a pledge on the part of the Board to grant tenure, claiming, "The Sayreville Board of Education thus, in effect, 'fixed' a 'shorter period' through the terms of the contract. . .", relying on *N.J.S.A.* 18A:28-5(a). The statute does not support the argument, and the argument is otherwise unpersuasive. Subsection (a) concerns employments which are based on calendar-year service (not academic-year service covered in subsection (b) as that term is defined in *N.J.S.A.* 18A:1-1) and permits employing boards to fix shorter periods within which tenure may be acquired. Petitioner's employment was on an academic-year basis. Subsection (b) grants no authority whatever to a board to shorten the period within which tenure may be acquired. Besides, we are satisfied from a reading of the agreement that none of the parties to it intended *par.* V, 1 as a tenure provision.

This brings us to the petitioner's second assertion: Whether, in view of the factual picture presented, the cited provisions of the contract between the Association and the Board, and the present state of judicial determinations on the subject, the general rule under which a board need not rehire a non-tenure teacher nor give reasons therefore is here applicable. No testimony was taken before the Commissioner. Petitioner's affidavit, such as it was, must be taken as alleging that the *Board* refused to rehire her because of her union activities. Respondent countered with the affidavit of the *principal* of the school at which petitioner was employed which contained a denial by the *principal* of any displeasure with petitioner because of union activities (There is no proof in the record as to the *Board's* position with respect to petitioner's allegations).[8]

[6]It might well be argued at this point that the burden of proving a lawful refusal to reemploy immediately fell upon the local board.

[7]We assume, in the absence of contrary evidence, that the review system in effect was competent to measure every aspect of petitioner's ability, conduct, character and fitness which might have any bearing upon her employment.

[8]The record reflects that the parties considered the focal questions to be questions of law, and in attempting to aid the administrative process, agreed to submit the matter to the Commissioner upon briefs and affidavits. The affidavits, in form and content, fall short of presenting a sufficient factual base upon which we can fully and fairly consider the arguments of the parties.

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The right to membership in a union and the right of participation in union activities by teachers are expressly granted by the *New Jersey Constitution of 1947, Art.* 1, *Par.* 19:

> " * * * Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing."

As shown earlier in this opinion, the majority opinion of our Supreme Court in *Zimmerman* stated that the powers of a local board of education to employ and discharge persons are limited "not only by the terms of the contract of employment, but also by the New Jersey Constitution." *Laba* (see fn. 1) held that the *dismissal* of a non-tenure teacher from an *existing* employment founded on the exercise of a Fifth Amendment constitutional right could not be sustained. We regard it as equally true, as Chief Justice Weintraub indicated in his concurring opinion in *Zimmerman* (see p. 3 hereof), that neither the employment nor reemployment of a teacher in a public school may be refused "upon a basis which would violate any express constitutional policy." The contract between the Association and the Board may have been negotiated, in part, with this concept in mind. While the Board's refusal to rehire might have been unattackable in the absence of the contract provisions, those provisions, with the stipulated facts presented, give color to the claim (however insufficient, for purposes of our final determination, the factual basis for that claim may be in the record) that the failure to rehire was based solely on the exercise by petitioner of her constitutional right. In this setting, we must give the Commissioner an adequate opportunity to hear a controversy that has been fully developed from a factual standpoint and to apply his administrative expertise in the resolution of that controversy before we can examine into it for the purpose of expressing such policy and other considerations as we feel are necessary.

Accordingly, the matter is remanded to the Commissioner for a hearing at which the parties should introduce full proofs through testimonial and documentary evidence. Certain matters, however, have been agreed upon by the parties and are already settled. These are:

(a) The existence and validity of the agreement between the Board and the Association, and petitioner's status as a beneficiary of that agreement;

(b) That petitioner, throughout her service as an employee of the Board, received "consistently good reviews with respect to her classroom and related duties"; and

(c) That the Board gave no notice of intention not to rehire petitioner until March 28, 1969.

The stage will thus be set for a factual inquiry into the nature and extent of petitioner's union activity and its effect on the Board's decision to refuse her reemployment.

December 2, 1970 Pending before Commissioner of Education on Remand.

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Board of Education of the City of Newark,

Petitioner,

v.

City Council and the Board of School Estimate of the City of Newark, Essex County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Victor A. DeFilippo, Esq.

For the Respondents, Anthony J. Juliani, Esq.

Petitioner, hereinafter "Board", appeals from an action of respondent, hereinafter "Council", certifying to the Essex County Board of Taxation a lesser amount of appropriations for school purposes for the 1970-71 school year than proposed by petitioner in its budget.

The facts underlying the controversy in the form of testimony and documentary evidence were presented at a hearing before the Assistant Commissioner in charge of the Division of Controversies and Disputes at the State Department of Education, Trenton, on April 16, 1970. At the conclusion of petitioner's presentation respondent moved for a continuance of the hearing in order that it might speak to the issue of whether the increases in salaries, which represent a major part of the additional funds sought, will increase the effectiveness of the school system and are necessary to insure its thorough and efficient operation.

On January 31, 1970, petitioner adopted a resolution establishing a budget of $79,248,418 and certifying $54,290,748 to the Board of School Estimate as the amount necessary to be raised from local tax sources for school purposes for the 1970-71 school year. On February 18, 1970, the Board of School Estimate determined that the amount of local school appropriations should be set at $39,000,000, a reduction of $15,290,748 from the amount requested by the Board of Education. Subsequently, the Municipal Governing Body made a further reduction and set the amount to be raised for the calendar year 1970 at $37,381,710 and certified such amount to the Essex County Board of Taxation.

The amounts at issue are shown in the following table:

Total school budget	$79,248,418	
Requested - local tax sources	54,290,748	
Determined by Bd. of Sch. Estimate	39,000,000	$15,290,748
Certified by Council	37,381,710	1,618,290
		$16,909,038

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Petitioner alleges that a thorough and efficient school system cannot be maintained with such reduced appropriations. In addition it cites the fact that since adopting its budget it has concluded negotiations with its teaching staff and that the agreements entered into call for an outlay of $4,350,000 over and beyond the sum contemplated and certified to the Board of School Estimate. Petitioner asks the Commissioner to review the reductions made in the school appropriations and to restore the amounts necessary to operate the school system in a thorough and efficient manner, and to add the further sum necessary to implement the agreement with its employees. The total amount requested to be reinstated is $21,259,038 ($16,909,038 plus $4,350,000).

Respondent, in its answer, notes that the amount of local appropriations for the 1969-70 school year is $37,381,710 and that the sum requested by petitioner for 1970-71 constitutes an increase of $16,909,038. No evidence was submitted to support such an increase, respondent asserts, and Council certified, therefore the same amount for next year as was appropriated for the current term. It alleges that the increased funds reported by the Board of Education were primarily for salary increases for school personnel and that the increases contemplated in the budget were further enlarged by $4,350,000 as a result of negotiation.

Respondent urges that there is no evidence that the constitutional mandate to provide a thorough and efficient school system will not be carried out with the monies appropriated and that the burden to prove otherwise rests upon petitioner. It maintains further that when the major portion of an increase in a school budget is for the purpose of providing higher salaries for school personnel, the issue is not within the scope of the Commissioner's jurisdiction. The availability of funds and whether to appropriate them for such purpose is reserved to the Board of School Estimate, respondent contends, and is not a proper subject for an order of the Commissioner.

From the testimony and evidence offered it appears that the total school budget for 1969-70 was $64,719,330 and the amount proposed for 1970-71 is $79,248,418, an increase of $14,529,088. Petitioner supplies the following data in support of the necessity for such increase.

a. $1,000,000 for what the Board terms "normal salary increments." These increases are those which are called for under a salary policy adopted during the 1968-69 school year. Petitioner points out that pursuant to *N.J.S.A.* 18A:29-4.1 the amount of funds needed to implement such a policy is statutorily required.

b. $8,000,000 for what petitioner calls "new salary increases." Petitioner testified that in January 1969 it adopted a revised salary policy calling for increases above the 1968-69 levels. Such policy is now operative and its funding requirements are also mandated by the statute cited, *supra* the Board avers.

c. $900,000 to provide for full-year operation of positions which did not

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come into being until some time after the beginning of the current year. In order to fund such positions for a full year's operation, the Board maintains, an amount of $900,000 is required.

d. $1,000,000 for substitute teachers. Petitioner states that this account has been underbudgeted before and this additional sum is needed to establish realistically the amount required to provide substitutes for absent personnel.

e. $1,449,000 representing an increase in various expenses detailed as follows:

Transportation	$ 73,000
Fuel	55,000
Utilities	70,000
Custodial supplies	10,000
Pensions and fringe benefits	375,000
Rent	25,000
Tuition	75,000
Repairs	95,000
Cafeteria	408,000
Athletics	17,000
Miscellaneous	246,000
Total	$1,449,000

f. $2,100,000 for instruction services requested by the administration. This amount, according to petitioner, includes 189 new positions such as additional teachers to reduce class size, 10 additional reading teachers, 5 helping teachers, 6 psychologists, 7 social workers, summer school personnel, etc.

These increases may be shown by the following recapitulation:

a.	Normal salary increments	$1,000,000
b.	New salary increments	8,000,000
c.	Full-year operation of all positions	900,000
d.	Substitutes	1,000,000
e.	General expense increases	$ 1,449,000
f.	Additional instructional services	2,100,000
		$14,449,000
g.	Non-detailed miscellaneous costs	80,088
	Total increase in 1969-70	$14,529,088

Respondent offered no testimony or documentary evidence to refute the claims made by petitioner. Nor did it submit any data or testimony to show where it believed economies could be effected by the school district, or what were the underlying considerations on which its action was based. Other than to indicate that the amount certified was the same as for the prior year, respondent made no attempt to explain how it made its determination. Instead it moved for a continuance in order to present testimony of an entirely different nature.

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Respondent asks opportunity to show that increasing the salary of teachers does not necessarily increase their competence or the effectiveness of their services. It expresses the belief that there are able teachers in the Newark School system whose desire to teach is not to any great degree affected by amounts of salary paid and who would continue to provide the same quality of teaching regardless of how much they were paid. Unless the relationship between the contemplated increases and heightened efficiency of the school system can be demonstrated and can be found as a fact, respondent contends the authorization of additional appropriations becomes a rubber stamp procedure based on the mere entering into of a contract between petitioner and its staff. Respondent also expresses concern that the New Jersey Courts have empowered the Commissioner of Education to order increased appropriations "based on vague concepts." It raises a question whether the Commissioner must not examine the salaries, the cost of living and all of the economic facts of life in regard to the teaching profession before he makes an *ipso facto* determination that increased salaries make better school systems.

The Commissioner finds no necessity for an excursion into the tangential areas suggested by respondent in order to decide the issue raised herein. The New Jersey Courts have spoken clearly with respect to the Commissioner's jurisdiction, function and responsibilities with respect to school budget appeals. They have also enunciated principles and limitations by which he is to be guided in the application of his expertise to the questions presented to him. *East Brunswick Board of Education v. East Brunswick Township Committee*, 48 *N.J.* 94 (1966); *Board of Education of Elizabeth v. City Council of Elizabeth*, 55 *N.J.* 501 (1970) Whatever concern respondent may entertain with respect to the powers the Courts have established as being vested in the Commissioner by the Legislature is not involved herein and is an issue which must be raised in the Courts and not before the Commissioner. The Commissioner will deny respondent's request for a continuance for the reason that he considers the purposes enunciated by respondent to be irrelevant and immaterial to the issues raised herein.

Although petitioner has not raised specifically a charge that respondent acted arbitrarily in reducing the school funds, the manner in which respondent arrived at its figure (recertifying the prior year's amount) appears to have been the kind of arbitrary action which the Court declared unacceptable in the *East Brunswick* case, *supra*, and which the Commissioner condemned in *National Park Board of Education v. National Park*, 1967 *S.L.D.* 66, and *Haledon Board of Education v. Haledon Mayor and Council*, decided by the Commissioner of Education February 13, 1970. Nowhere is there any indication that the governing body followed the procedures laid down by the Courts by which its determinations were to be made.

However arbitrary respondent's action may have been, the Commissioner finds it unnecessary to ground his determination herein on that issue. Petitioner has clearly established its need for the $16,909,038 by which its budget was curtailed if it is to maintain and operate a thorough and efficient system of

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public schools in the City of Newark. Respondent has presented no convincing testimony or argument to refute that need. On the other hand, petitioner has presented clear-cut and well-supported analyses of its needs and cost increases over the current year's which are entirely credible. Several of the items, such as implementation of salary policies previously adopted, are mandatory; the need for an adequate budget for substitutes was established; and the other items represent normal increases in cost of materials and services. The Commissioner finds, therefore, that the amount of $79,248,418 budgeted by the Newark Board of Education for the 1970-71 school year is not excessive in terms of the needs of the school district and that the amount of $16,909,038 by which respondent reduced the appropriation is necessary and must be restored for the maintenance of a thorough and efficient school system.

Petitioner requests the Commissioner to order respondent to certify an additional amount of $4,300,000 to provide the funds necessary to implement a contract it negotiated with its employees. From the testimony it appears that the entire cost of the agreement runs to $4,800,000, but petitioner states that it can apply $500,000 from its budgeted salary account to reduce the sum needed to $4,300,000. This amount was not included in petitioner's annual budget for the reason that the budget was prepared, delivered to the Board of School Estimate and acted upon in early February as required by law, and the negotiations which resulted in the agreement for which petitioner now seeks funds, were not concluded until sometime thereafter. Petitioner seeks a supplementary appropriation therefore over and above its annual budget estimates.

Such a request is beyond the scope of the Commissioner's authority. While the Courts have clearly established the power of the Commissioner to hear and decide appeals from alleged excessive reductions made by municipal governing bodies of annual school budgets, he finds no such authority with respect to supplemental appropriations. The law on the question of supplemental appropriations has been clearly set forth in *Newark Teachers' Association v. Newark Board of Education*, 108 *N.J. Super.* 34, (*Law Div.* 1969). In that case the Board of Education completed a salary agreement with its teachers in August and certified the amount needed to the Board of School Estimate. That body refused to endorse the appropriation, whereupon the Teachers' Association filed suit. In deciding the issue the Court observed that there is no statutory provision permitting a board of education to amend its annual budget after it has been approved. It noted that "additional funds may be requested and appropriated only under *N.J.S.A.* 18A:22-21 to 23."

In the instant matter petitioner prepared and submitted its estimate of funds needed for the 1970-71 school year in the form of its annual budget. That budget was reduced by the Board of School Estimate and the Municipal Governing Body by an amount of $16,909,038, and such reduction is a proper subject for the appeal herein. Subsequent to the adoption of its annual budget, the Board determined that an additional sum of $4,300,000 would be needed to implement agreements it had reached with its staff. Such amount was submitted

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to the Board of School Estimate and was rejected. The Board of Education then included this supplemental appropriation in its appeal, herein, of the reduction of its annual budget. In the Commissioner's judgment the circumstances in this case are similar in all material elements to the situation in the *Newark Teachers' Association* case cited, *supra*, and are controlled thereby. In such case the Commissioner must find that the matter of supplemental appropriations rests with the Board of School Estimate and is beyond the scope of his determination of the adequacy of annual school budgets.

The Commissioner finds and determines that a thorough and efficient system of public schools as mandated by the New Jersey Constitution and the school laws of New Jersey cannot be maintained for the 1970-71 school year with the amount of appropriations certified by the Newark City Council. He directs, therefore, that there be added to the sums already certified an amount of $16,909,038 for the current expense of the school district.

COMMISSIONER OF EDUCATION

July 16, 1970

Juanita Zielenski,

Petitioner,

v.

Board of Education of the Town of Guttenberg, Hudson County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Moser, Roverto and McGough, (George P. Mose, Esq., of Counsel)

For the Respondent, John Tomasin, Esq.

Petitioner, a teacher employed in respondent's schools until June 30, 1969, alleges that she has acquired tenure and is entitled to continue in her employment. Respondent denies that petitioner has obtained a tenure status and therefore asserts that she has no claim to continuing employment.

A hearing in this matter was conducted on January 28, 1970, at the office of the County Superintendent of Schools in Jersey City by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

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There is no material disagreement with regard to some of the basic facts underlying this dispute, which are listed as follows:

1. Petitioner served as a substitute for one day in a school of respondent during December 1965.

2. She served again as a substitute teacher in a second grade position in a school of respondent on January 31, 1966.

3. At the end of this second day of work as a "day-to-day" substitute, petitioner was asked to return in the same assignment the following school day and for succeeding days on a regular basis. This regular assignment was to serve as a "trial" period.

4. This "trial" period continued from February 1, 1966, through June 30, 1966, although no formal contract was ever issued. During this time petitioner was paid at the rate of $490.00 per month. This was the district's starting salary for first-year teachers and for long-term substitutes, in accordance with policy and practice with respect not only to petitioner but to other substitutes employed continuously for at least a full month.

5. During this five-month period petitioner was afforded the same sick-leave benefits and school vacation benefits as were afforded to regular contract teachers. Payroll records for sick-leave payment to be approved by the Board do not distinguish between permanent and substitute teachers.

6. A contract was executed between petitioner and the Board for the 1966-67 school year at a salary of $4,900.

7. Thereafter, petitioner was employed by regular contract for the 1967-68 and 1968-69 years and completed work under the term of these contracts.

8. In May of 1969 petitioner signed a contract sent to her by the Superintendent of Schools, but because the employment was not approved by the Board of Education for school year 1969-70, a fully executed contract was not returned to her.

9. During the whole period of three years and five months of employment referred to, *ante*, petitioner was a fully certified teacher serving in the same position.

10. Prior to petitioner's employment on February 1, 1966, there had been no teacher employed under contract and assigned to this position for a year.

11. Petitioner's continuing employment during the five months of 1966 was known to the Board of Education, not alone to the Superintendent, because petitioner's name was reported twice by a committee as part of a report to the

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Board of teachers who had days credited as sick leave. The reports were included in the Board's minutes of April 12, 1966, and May 10, 1966.

It is petitioner's contention that during the five months dating from February 1, 1966, and extending through June 1966, she was treated as a contract teacher, even though she had no contract in writing, and that this span of time should be included within the total period of three years and five months of service and that, therefore, tenure was actually acquired within this period. She buttresses this contention by the assertion, supported by the minutes of the Board of Education, that in addition to being paid a salary payable to a regular contract teacher, she was also given the same sick leave entitlement given to all regular teachers, and had no deduction of salary for holiday periods.

Respondent, on the other hand, offered testimony to the effect that many other teachers had been similarly treated as "substitutes" and that the mere fact that petitioner had the benefits of salary and sick leave given to regular teachers did not prove that petitioner's status was other than that of a substitute. It was the testimony of the Superintendent of Schools that he employed petitioner as a substitute for a period of trial, and that he had no other power to employ except in this limited way and that she understood this. Respondent further maintains, in support of its claim that petitioner's status was mutually regarded as that of a substitute, that the prorated salary paid petitioner for the months February-June 1966 was $490 per month, and remained at that amount for the full year of 1966-67 without question by petitioner.

* * * *

The Commissioner has considered the findings of the hearing examiner as set forth above.

The central issue in this matter is whether the five months served by petitioner from February 1, 1966, to June 30, 1966, constituted employment within the meaning of the tenure statute. It is clear that the nature of petitioner's employment during this period was little different from that of any other teacher under contract. It is also clear that petitioner's service was not as a substitute for absent teacher, because the position in which she worked was vacant.

In these respects, petitioner's status during this five-months' period was not essentially different from that considered in the case of *Wall v. Board of Education of Jersey City*, 1938 *S.L.D.* 614, reversed State Board of Education 618, affirmed 119 *N.J.L.* 308, *(Sup. Ct.* 1938), wherein the State Board held that:

> "It is a misnomer to apply the name "substitute" to teachers who are steadily employed. We agree with the following statement in the Commissioner's opinion:
>
> * * * The word 'substitute' does not describe adequately the type of

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employment of petitioner * * *. It denotes one put in the place of another or one acting for or taking the place of another. The petitioner and other so-called substitutes were not acting in place of teachers who were absent, but were assigned to positions in practically the same manner as teachers under tenure in the school system. * * * (page 619)

" * * * The statute is silent as to the rate or method of payment. It simply requires 'employment' for the period stated. The appellant was certainly 'employed' during the period of her teaching in Jersey City. She taught the same classes in the high schools through the years of her employment. That she was paid at a per diem rate instead of by the month or the year does not change the fact that she had regular, continuous employment. * * * (page 621)

" * * * the *Statute* provides a certain probationary period during which boards of education may determine whether the work of the teacher is of a character to induce it to employ her beyond that period. They cannot * * * 'legally evade' the statute * * * by providing for a further probationary period. (page 622)

" * * * though the appellant was termed a 'substitute' her regular continuous teaching of the same classes in the same schools for over three years made her in fact a regular steadily employed teacher regardless of the terms used to describe her position. It is the actual realities of the situation which count, not the words used to describe them." (page 622)

However, the instant matter differs from *Wall* in a significant respect. The petitioner *Wall* was employed by resolution of the Jersey City Board of Education in the designated-but unlawful-position of "substitute" teacher. In the instant matter there is no evidence that respondent Board took any action to employ petitioner prior to February 1, 1966, or later during the ensuing five months until it entered into formal contract with her for the 1966-67 school year. Her engagement as a teacher during this period was no more that that which the Superintendent was authorized to offer, namely, the position of substitute. That respondent Board was aware that petitioner was at work in its schools is clear from its action to approve her pay for sick leave, but again the evidence does not establish that in so paying her the Board acted in any way different from its policy to extend sick leave benefits to long-term substitutes. Respondent Board's action with respect to petitioner, being no different from its action and policy with respect to other long-term substitutes, cannot therefore be construed as ratification of an "oral" contract which petitioner claims the Superintendent made with her.

There can be no doubt that the statutes give to a board of education the exclusive power to appoint teachers (*N.J.S.A.* 18A:27-1) and to establish the terms and conditions of such employment either under rules and regulations of the board (*N.J.S.A.* 18A:27-4), or by entering into formal written contracts (*N.J.S.A.* 18A:27-5), the minimum terms and conditions of such contracts being

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established by statute (*N.J.S.A.* 18A:27-6), including the proper filing of the contracts (*N.J.S.A.* 18A:27-8). In petitioner's case none of these statutory requirements were met with respect to the period between February 1, 1966, and June 30, 1966.

In an earlier case, *Nashel v. Board of Education of West New York*, 1968 *S.L.D.* 183, the Commissioner held that a unilateral attempt by a superintendent to terminate a teacher's employment without appropriate action by the employing board of education was beyond the scope of the superintendent's authority and was invalid. While in the instant case the Superintendent makes no claim to authority to appoint a teacher under contract, and in fact specifically eschews such authority, the Commissioner holds that any engagement undertaken by a superintendent to employ a teacher, without the necessary affirmative action by the employing board in accordance with the statutes, cannot constitute employment within the meaning of the Tenure Law, *N.J.S.A.* 18A:28-5. In *Zimmerman v. Board of Education of Newark*, 38 *N.J.* 65,75 (1962) the Courts said:

> "Accordingly, unless Zimmerman by an affirmative act of the Board was re-employed subsequent to June 30, 1955, he cannot be said to have been employed for consecutive academic years 'together with employment at the beginning of the next succeeding academic year. *N.J.S.A.* 18A:13-16. This statutory step had to take place, for, it is axiomatic that the right of tenure does not come into being until the precise condition laid down in the statute has been met.' *Ahrensfield, supra*, 126 *N.J.L.* at p. 544." The Commissioner holds that the "affirmative act" is equally required at the beginning of employment, as in the instant case, or at the conclusion of the tenure probationary period as in *Zimmerman.*

The Commissioner finds that petitioner has not been employed by respondent Board for the requisite period of time to acquire the right of tenure as set forth in *N.J.S.A.* 18A:28-5. The petition of appeal is therefore dismissed.

COMMISSIONER OF EDUCATION

July 16, 1970

Pending before State Board of Education.

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Carolyn R. Hom,

Petitioner,

v.

Board of Education of the Upper Freehold Regional School District, Monmouth County

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Charles Frankel, Esq. (Peter B. Shaw, Esq. of Counsel)

For the Respondent, Barclay P. Malsbury, Esq.

Petitioner, a teacher in repondent's schools, charges that she was forced to resign under duress and in violation of her contractual rights. She seeks an order requiring respondent to pay her 60 days' salary. Respondent denies that she was forced to resign, and asserts that she voluntarily waived her claim to compensation.

A hearing was conducted on November 24, 1969, at the office of the County Superintendent of Schools in Freehold by a hearing examiner appointed by the Commissioner. Briefs of counsel have been filed. The report of the hearing examiner is as follows:

Petitioner was employed under her first contract in respondent's high school for the 1968-69 school year. The contract (P-1) contains the following clause:

> "It is hereby agreed by the parties hereto that this contract may at any time be terminated by either party giving to the other sixty days' notice in writing of intention to terminate the same ***."

The testimony and exhibits (R-1, 2, 3, 4) establish that throughout petitioner's incumbency her supervisors found and discussed with her certain problems of her teaching techniques and class management. By January 27, 1969, the Superintendent reported to her in part as follows:

> "I frankly find it difficult to discover any favorable conditions present in my visit to your classroom * * * "

The Superintendent further proposed a conference involving himself, petitioner, and the principal to discuss her problems. Such a conference was held on February 8, 1969.

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On the afternoon of March 14, 1969, petitioner was summoned to the principal's office. She arrived there after participating in a student-faculty volleyball game, at approximately 2:30 or after. The principal and Superintendent were present. Excerpts from the transcript of petitioner's testimony as to what ensued are presented as follows:

"Q What happened when you got into the office?

"A He told me to sit down. I sat down. Mr. Dwyer says 'Miss Hom, you left me no choice but I have to fire you.'

"Q Is that the first thing that anybody said to you?

"A After they told me to sit down.

"Q Did you respond to that? What was the next thing that was said?

"A I just said 'What do you mean? I don't understand'

And he said –

"Q Who is 'He'?

"A Mr. Dwyer said something about he had to fire me because I wasn't teaching my classes and I said 'What do you mean I'm not teaching?' I told him I didn't understand how he could fire me. I told him I was teaching my classes. He said but I wasn't teaching them and I says but I don't – (Tr. 14)

"A He said if he fired me it would go down on my record as being fired and he wouldn't send a recommendation on me and no other school would ever hire me again. Then he said if I resigned, he would send a recommendation on me because he believed I knew my Biology but he didn't think I could teach.

"Q Anything else discussed then?

"A I told him I didn't want to resign because I thought I was teaching school, I still wanted to teach and he says I wasn't teaching and I couldn't teach and if I didn't resign he was going to fire me.

"Q Did you say anything to that?

"A Then he said something about well, do you want to resign or are you going to let me fire you? I says well I don't know. I says I can't make a decision this fast. I said I can't think this fast. I said you have to give me some few minutes to think. He says you don't have any time. It's already three o'clock and school's over. I said but I can't think this fast. I don't know what to do. So then he said something about well it's three o'clock now and you can go and then you come back before you leave school and tell Mr. Stoneback of your decision." (Tr. 16)

The direct testimony of the Superintendent on this portion of the interview is excerpted from the transcript as follows:

"Q Do you recall what you stated to Miss Hom?

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"A Yes. When Miss Hom came in, the door was closed so that there would be privacy, and Miss Hom was asked to sit down. I was standing over by the window. Mr. Stoneback was seated at his desk. He rose when Miss Hom came in, but then seated himself. At this point I indicated to Miss Hom that in accordance with many supervisory reports and the behavior, of her attitude, a number of other things which I guess are not at issue at this point, decision was made that for the sake of the youngsters in the school and their best interest her employment should cease and at this point I indicated to Miss Hom that she had an alternative – either she would be dismissed in accordance with terms of her contract, 60-day clause in her contract or she could resign at her own free will and waive those rights.

"Q Did you say anything else to her?

"A Yes

"A I also indicated to her, Mr. Malsbury, that the benefit for resignation was that, as Miss Hom herself has stated, it was the belief of Mr. Stoneback and myself that she did have a knowledge of Biology which could be used in some other fields, for example, some Biology Lab or some such endeavor, and while I could never give her a recommendation frankly to work with students or children in the future as a teacher, I could see that there might be a possibility of giving a reference there, but at any rate I did explain to her, you know, the purpose for the choice alternatives.

"Q Did you state that if you discharged her, you would not give her a recommendation?

"A No, I did not. I just indicated at that point that if we were forced to terminate her contract in accordance with the terms of the clause in her contract that such a, you know, notification on her record would certainly not help her in employment. I did not indicate under those circumstances whether or not I would, you know, give her a recommendation.

"Q Did you at any time state to her that if you terminated her employment immediately that she would receive her 60-day salary?

"A Yes. It was indicated that she would get this in accordance with her contract.

"Q And did you at any time indicate to her that if she resigned that she would receive no further salary?

"A I indicated to her that if she resigned her contract would be terminated by mutual agreement of the parties and that it would no longer be in force and that she'd have no further contact with the district. And I pursued with Miss Hom the – asked her, you know, various points whether or not there were any questions that she did have, some questions relating to, as she has indicated, the cause,

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> reasons, so forth. Also asked her if it was clear to her what her choices were and gave her an opportunity to consider this." (Tr. 66-68)

The testimony also establishes that petitioner was told that she must make her choice that day, and could not under any circumstances return to work on the Monday following, March 17. Her emotional condition at the time of this interview was described by the Superintendent as "unhappy," but by the principal, whose role was that of an observer, as "exceedingly distraught." A teacher whom petitioner met when she left the office described her state as "coherent," "highly upset," "shaky," and concerned about the money she had paid for a trip to Europe which was planned for later that spring.

The hearing examiner finds further that the Superintendent explained to petitioner that if she were terminated by the Board on 60 days' notice, she would be paid for that period of time, and that if she resigned effective at once she would not be paid. She was not informed at the time that she could resign effective 60 days later and be entitled to pay for that period, even though her services were not used. She was advised by the teacher whom she met outside the office to consult representatives of teacher organizations.

It was further testified that the Superintendent came to the interview with a prepared notice of termination. He had discussed the matter at an informal Board meeting on the previous evening and was told to do what was necessary.

About 15 to 20 minutes after petitioner had left the office she returned, apparently much calmer, and indicated to the Superintendent and principal that she was prepared to resign. She was given paper and wrote a resignation, effective on March 14, 1970. (P-2) Testimony as to whether the form of the resignation was suggested by the Superintendent is sharply contradictory; the hearing examiner is not convinced that the precise form was either dictated or suggested, but that petitioner clearly inferred what was expected in the resignation. On receipt of the resignation, the Superintendent noted thereon: "Resignation accepted by me on 3/14/69", and signed his name. (P-2) The resignation was accepted by the Board at a meeting on March 19, and petitioner was so notified. (R-5)

The hearing examiner makes the further finding that:

1. Although the Superintendent was standing throughout the first interview, he made no movement that could be construed as placing petitioner under physical fear. His manner was described by the principal as "firm."

2. Petitioner was not fully aware at the time she wrote her resignation of the terms of her contract, nor did the Superintendent explain, or feel obligated to explain, the terms thereof as related to her right to give 60 days' notice of termination.

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3. The clear purpose of the meetings on March 14 was to secure petitioner's immediate resignation, and the alternative offered her of being terminated on 60 days' notice by the Board was presented in such terms as to make it an undesirable alternative.

4. The termination notice which the Superintendent had prepared in advance had not been authorized by a formal action of the Board at a regularly called meeting of that body.

Petitioner contends that she gave her resignation under conditions which the Courts have held to be duress, and that it was therefore a nullity. She cites *Gobac v. Davis,* 62 *N.J. Super.* 148 (Law Div. 1960), and the cases reported therein, in support of her contention that the circumstances under which she submitted her resignation created a state of mind in which she was induced to do what she would not otherwise have done, and which she was not bound to do. She emphasizes particularly the following language of the Court in *Gobac,* at page 158, citing *Rubenstein v. Rubenstein,* 20 *N.J.* 539 (1956):

> "***The act or conduct complained of need not be 'unlawful;' in the technical sense of the term; it suffices if it is 'wrongful in the sense that it is so oppressive under given circumstances as to constrain one to do what his free will would refuse.' "

Petitioner also cites *Evaul v. Camden Board of Education,* 35 *N.J.* 244 (1961), in which the Court, as respondent points out, did not find duress, but did hold that Miss Evaul's

> "***submission of her resignation was an impetuous act prompted by her understandably distraught condition." (*Id.*, at page 249)

The Court, therefore, ordered her reinstatement in her position on "equitable principles."

Petitioner contends further that her resignation may not be construed as a waiver of her contractual rights to 60 days' termination pay. Citing *East Orange v. Board of Water Commissioners,* 41 *N.J.* 6, 17 (1963) and 3A *Corbin Contracts,* sec. 752 (1960), she contends that waiver is an intentional relinquishment of a known right, and asserts that she did not act voluntarily and was unaware of her rights when she did act.

Respondent contends that petitioner was given full understanding of the difference between resigning and being terminated by the Board, and that the alternatives were clearly defined to her. Respondent distinguishes the present case from the *Evaul* case, *supra,* in that following her resignation Miss Evaul attempted to withdraw it, whereas petitioner herein made no such attempt before her resignation was formally accepted by the Board. Respondent further points out that in *Evaul,* because her act "was occasioned by her own impetuous conduct, and her reinstatement is based upon equitable principles," she was not entitled to back pay upon reinstatement.

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The Commissioner has reviewed and carefully considered the report of the findings of the hearing examiner and the argument of counsel.

It is unnecessary to comment on respondent's reasons for wishing to conclude its employment relationship with petitioner. Whether she accepted or agreed with the reasons given her, it is clear in this case that she was aware of them, and had been counseled by her superiors on her job performance.

The significant issue here concerns the matter in which the termination was effected. She was given no choice between (1) resigning without full knowledge of her rights, and without adequate time to consult and become aware of her rights, and (2) being terminated on notice by the Board under conditions which she could only recognize as a threat to any future career in teaching. The principal, an eye-witness to the interview, describes her as "exceedingly distraught." The Commissioner finds in the circumstances of this resignation such a close parallel to those under which the plaintiff in *Gobac v. Davis*, *supra*, submitted his resignation, as to bring the present matter clearly within the definition of duress enunciated by the Court in that case, as quoted by the hearing examiner, *supra*, and more fully recited in petitioner's brief.

Nor can petitioner's act be considered in any way a *voluntary* waiver of her rights, or an "impetuous act" of her own, as in *Evaul*, *supra*, so as to deny her the right of the 60 days' compensation to which she would have been entitled for termination under the terms of her contract.

The Commissioner finds and determines that petitioner's resignation on March 14, 1969, was given under duress, and that it does not constitute a waiver of her contractual right to terminate her employment on 60 days' notice of her intention so to terminate. He accordingly directs the respondent Board of Education to compensate petitioner for 60 days at the rate provided in her contract of employment.

COMMISSIONER OF EDUCATION

July 16, 1970

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Rebecca Christie and Gail Christie by their parent and natural guardian Charlotte Christie individually; and Eric Vold by his parent and natural guardian Gunnar Vold, and Gunnar Vold Individually,

Petitioners,

v.

Board of Education of the Township of Mahwah, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioners, Barry G. Leveen, Esq.

For the Respondent, John J. Sullivan, Esq.

Petitioners are students of Mahwah High School, Mahwah, New Jersey. They bring this action to contest the validity of a school regulation that interfered with their distribution of written materials produced off the school grounds during May of 1969. They also contest the way in which the Respondent Board of Education of the Township of Mahwah, hereinafter called "Board," decided on appropriate discipline for the alleged illegal distribution and for the indefinite term of the discipline, and they protest the inclusion of any reference to the instant matter in the records of the students. Respondent asserts that actions of school officials or the Board pertinent to the matter were a reasonable exercise of the power granted to the Board and officials by the laws providing therefore.

The case is submitted on the following stipulation of facts and in briefs of counsel:

> "During mid April, 1969, one of the articles which appeared in the publication called 'The Oracle', referred to hereinafter, had been previously submitted to the school paper, 'Tom Tom', and permission to publish this article in the 'Tom Tom' was refused by vice-principal Robert Dierman. On May 19, 1969, a publication called 'The Oracle' Volume I, No. 1, was distributed on the campus of the Mahwah Junior-Senior High School in Mahwah, New Jersey by some of the students whose names appeared in that paper as editors. No permission of the Administration was asked or given for such distribution. The Board of Education contends that in some instances the publication was distributed inside another school publication known as the 'Phoenix', which is an authorized school periodical. The petitioners deny this. Some of the editors of the 'Phoenix' are the same students whose names appear in 'The Oracle' as editors.
>
> "At the same time and later, the students who distributed 'The Oracle'

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requested contributions and donations for 'The Oracle.'

"At approximately 1:30 P.M. on May 19, 1969, Acting Superintendent of Schools Richard Gallivan was notified by Mr. Thomas Riker, School Principal, that the distribution of this publication had taken place. Mr. Riker became aware of distribution at 9 A.M. and did not contact the students involved until 12:30 P.M. Mr. Riker summoned to his office Gail Christie, Beckie Christie, Erik Vold, Glenna Hartwell, Isabel Ivey, Dave Defarrari, who are named as editors in 'The Oracle', and announced to them the violation of school regulations, and called to their attention possible disciplinary action. They did not deny the facts of publication and distribution. The principal informed the students that the facts would be related to the School Board by the Acting Superintendent and they would hear further. A statement from the editors then requested, over the public address system, the return of the publication from the student body, and stated that they would return the contributions received.

"Some of the students involved were aware of the school regulations as, during the preceeding week there was a student election, at which time there were requests to distribute campaign literature, and such literature was submitted to the principal for approval before distribution.

"*May 19, 1969 - evening:* There was a general meeting of the Board of Education of the Township of Mahwah, and at the public meeting, parents raised the question of the distribution of the newspaper on campus. Much public discussion was heard. At the termination of the meeting, the School Board informed those in attendance at the meeting that the administrative decisions on the question would be announced at a public meeting to be held the following week, on May 26th, and the Board also stated a meeting would be held by both students and parents before then.

"Later that evening, and before the students and their parents were heard, after the close of the public meeting, and executive session of the School Board was held and disciplinary action for the violation of the school regulations and laws was discussed, and it was recommended that indefinite social probation be given to the students involved.

"*May 20, 1969:* The editors, Gail Christie, Beckie Christie, Erik Vold, Glenna Hartwell, Isabel Ivey, Dave Defarrari, and Bruce Akin, were notified by the high school principal, Thomas Riker, that indefinite social probation was going to be the punishment applied to each of them. This was before a hearing was allowed to the parents and students involved.

"*May 22, 1969:* Acting Superintendent of Schools, Richard T. Gallivan, agreed that the parents of the editors would meet with him and Mr. Riker to review the problem, and one or both of the parents of each child attended. No students were present. The issue was discussed in detail for approximately three hours, and the parents were notified at that time that

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the School Board would announce the indefinite social probation in due course.

"*May 24, 1969:* At the request of the students and their parents, Mr. Gallivan arranged for them to meet with the School Board on Saturday, May 24th. The students and their parents requested separate meetings with the Board. The students met with the Board from 9 A.M. to 10 A.M., and the parents from 10 A.M. to 12 A.M.

"The principal questions discussed at this meeting were the publication, the punishment, when the social probation would be lifted, and whether it would affect the graduation of the respective children. There was no decision made at this time by the Board, but it was stated that the Board would keep in mind the contentions of the respective parents and students, and they were jointly notified that the Board would make a public statement at a public meeting on May 26th.

"*May 26, 1969:* A special public meeting of the Board of Education was called for a hearing on student dress codes and Mr. Gallivan also read the following statement at that meeting:

> 'The students in question in this matter have been placed on indefinite social probation as of last Tuesday morning. The reason for the action is because the students were found in violation of the School Board policies 6:10 by the unauthorized distribution of materials in school and the unauthorized solicitation of funds to support this material.
>
> Social probation means that a student is allowed to participate in the curriculum during the regular school hours of 8:00 A.M. to 2:20 P.M. but that the student is not allowed to participate or attend any school function on or off campus in which the school is a participant.
>
> The adjective "indefinite' serves the function of allowing all parties concerned the time necessary to consider the given violation and its consequences and for all parties to ponder their future actions. In the case of the administration and the Board, it is our intent to apply a reasonable but prudent standard in this matter. The students involved and their parents have met with the administration and the Board and have been so advised.'

Thereupon the School Board announced the decision of indefinite social probation and left the matter with the Acting Superintendent of Schools to administer. Some local citizens attending this meeting objected to the indefinite aspect of the punishment.

"*June 9, 1969:* The principal, Thomas Riker, was instructed by Mr.

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Gallivan that he should notify the parents and students that indefinite social probation would be discontinued as of June 12, 1969, and as of June 13, 1969, the students would be free to participate in all school activities. Mr. Gallivan notified the respective parents of this decision by letter.

"*June 17, 1969:* Gail Christie and Eric Vold, two of the original editors, submitted another edition of 'The Oracle'. Volume I, No. 2, to Mr. Riker, and both he and Mr. Gallivan approved. On June 20th distribution took place. The students were informed that they could distribute the publication, but that they were not to solicit funds on the school grounds. On June 17th permission was originally requested.

"The school authorities contend that there is kept in the Guidance Department of the High School a disciplinary file on each student in the school system. In this file is listed disciplinary action taken in reference to the student for the current year. The file is retained for one year and then destroyed. This is not part of the student's transcript of record or a permanent file on the student. Noted in the disciplinary file of each of the students involved is the following:

> 'Publication of underground newspaper - defamatory and profane - - indefinite social probation.'

"The Board imposed sanctions on the students involved relying on the position that these students violated school laws and the regulations set forth in the School Board Policy Manual, which is a publication issued by the School Board, which policy has been in effect since 1957. The particular clause involved is as follows:

> '6:10 Activities of Students
>
> The public schools, conceived and supported by the American people, cannot separate themselves from the communities of which they are a part. The business and industrial enterprises of a community contribute significantly to the support of the schools through taxation, and their management and labor personnel participate in the direction and control of the schools by voting, by serving on boards, in P.T.A. groups and on lay committees and by personal influence on school and public officials. In like manner the people who make up the institutions of the press, religion, labor, the charitable and welfare organizations, the patriotic groups and the special interest societies and associations all share in the support and control of the schools. Indeed, it can be demonstrated that there is a strong interrelationship between healthy business life in a community and effective schools, with benefits flowing in both directions.

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Accordingly, the Mahwah Board of Education does not propose a policy which will set the schools aloof or create a breach between the schools and the business and institutional life of the community; thus, the following principles shall be in effect:

1. The determination of the curriculum and all of the activities of the school is the responsibility of the local Board of Education and the administrative staff who must always retain the initiative in the introduction of materials, methods and activities, within the laws and rules prescribed for them by the state. * * * *

3. * * * *

All such money-raising activities by the schools must have the approval of the Superintendent of Schools who, in turn, shall report such approvals to the Board of Education in a yearly report.' "

At a conference of counsel held in the office of the Assistant Commissioner in charge of Controversies and Disputes on October 30, 1969, the issues in this matter were determined to be as follows:

I. Is the Board's rule 6:10 an adequate and lawful statement to regulate the distribution (by pupils in Mahwah High School) of written materials published and produced off the school grounds and disseminated on the school grounds?

II. Shall the Commissioner direct the Board to expunge from the records of petitioning pupils all reference to the incidents of May and June 1969 which gave rise to the petition herein?

It is petitioners' contention that Rule 6:10 from the Board's policy book is too broad, too vague and leaves too much discretion in the hands of whatever power cares to exercise it. In support of this contention petitioners maintain that what they did and said in this case was no more than they were entitled to do and say under the interpretation of recent decisions of the Commissioner of Education and the Courts of the land, and that, therefore, the sanctions imposed by the Board were unconstitutional as violative of their fundamental rights of free speech and free expression. In support of this contention, petitioner cite *Goodman et al. v. South Orange-Maplewood Board of Education*, decision of the Commissioner, June 18, 1969; *Tinker v. Des Moines Independent Community School District et al.* 21 *L. Ed.* 2d 731 (1969); *Scoville v. Board of Education of Joliet Township High School District*, 286 *F. Supp.* 988 (1968); *Zarden v. Louisiana State Board of Education*, 281 *F. Supp.* 747 (1968). Petitioners contend that in the instant case, as in *Goodman*, *supra*, "the principal's regulation is in actuality concerned with content and that therein lies its invalidity." (*Goodman*, page 7) Furthermore, petitioners argue that the Board's rule is not adequate because it contains no statement concerned with the right of

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due process, and that in fact it was a denial of due process to impose a sentence before a proper hearing had been held.

On the other hand, respondent argues that a board of education has the right to regulate the distribution of all publications on school property and particularly so in the case of the "Oracle" because it was a business venture and money-raising activity as evidenced by a statement on page two of the "Oracle" as follows:

"Contribute to the Oracle. We need articles, time and money.

"Patronize our advertisers. These people have demonstrated their faith in the youth of today, and this is the way to thank them."

It follows then, in respondent's argument, that the action it took against a "business venture" was within its prerogative and a proper exercise of its authority under the terms of Rule 6:10 which were known to the students.

However, respondent also cites the *Goodman* decision referred to by petitioners, *ante*, as a decision permitting regulation and says further that petitioners were not deprived of their right to free speech and expression because the first edition of the "Oracle" was distributed without the knowledge of respondent and the second edition was distributed with permission asked of and granted by respondent, and that the content of the publication was not the reason for discipline.

Respondent further maintains that the matter of due process need not be discussed in the instant case since it was not made part of the issues in the agreement of counsel. In any event, respondent argues, petitioners were afforded hearings and were not subsequently denied a "right" but denied a "privilege." The contention here is that the contested disciplinary action involved "social probation" and constituted the withdrawal of a privilege, and as such does not necessitate a hearing, by contrast to suspension or expulsion which affect the right to attend school under the terms of *N.J.S.A.* 18A:37-4, and the New Jersey Constitution, Article VIII, section IV, paragraph I.

The Commissioner finds that the resolution of this issue turns not upon the adequacy of the rule relied upon by respondent to control what it purports to control, but rather upon the application of the rule to the precise circumstances of this case. The Commissioner takes no exception either to respondent's authority to make a rule for the government and management of its schools (*N.J.S.A.* 18A:11-1) or to the specific prohibition contained in section 3 of Rule 6:10 requiring prior approval by the Superintendent of money-raising activities. Without such a control, such activities could proliferate to the detriment of the educational program. However, the Commissioner is convinced that the disciplinary action invoked herein was imposed under the cloak of section 3, while the real reason was that the petitioners, without prior approval of school authorities, had published and distributed printed matter

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which such authorities found offensive. The Commissioner is impelled to this conclusion from the record made in each of the involved pupils' disciplinary file, as set forth in the stipulated facts, *supra*. Nothing in the statement of Rule 6:10 as provided in the stipulation sets forth the clear necessity for prior administrative approval of such a publication as the "Oracle" in such a way that all students could be adequately guided in their conduct. The fact that "some of the students involved were aware of the regulations" presupposes the existence of regulations, but whether such regulations dealt only with student election campaign materials or more broadly with all types of published materials creates such an area of uncertainty and indefiniteness that it cannot be found that the pupils who were punished knew, or could have known, that they were in violation of school regulations. In any event, when the editors of "The Oracle" were informed that they had violated regulations, they requested, in what must be concluded was an authorized use of the school's public address system, the return of the publication and promised the refund of contributions. It seems to the Commissioner that the matter might well have been concluded at that point.

However, it is apparent from the chronology of events which followed that the school authorities felt that punishment was necessary. After public discussion of the incident at a Board meeting on May 19, announcement was made that the Board would meet the parents of the involved pupils on May 26. But at an executive meeting of the Board following the public meeting, indefinite social probation was recommended, and on three subsequent occasions, on May 20, 22, and 24, it was made clear to either the parents, their children, or both that the imposition of this punishment lacked only the formal announcement which was made on May 26.

The Commissioner finds no necessity to consider the niceties of due process in this situation. The pupils were found in violation of a rule which, in the stipulated form, cannot be sustained. The punishment for the violation was determined in administrative conference. Any meetings with parents or pupils which followed thereafter cannot be viewed as other than an administrative justification for a course of action already determined. In such circumstances it is likewise unnecessary to consider the nature of the punishment which, *ab initio*, was unjustifiable.

There remains the question of the records of this event in the pupils' files. Respondent represents in the stipulation that the disciplinary record is maintained for a current year, retained for one year, and then destroyed. It is further represented that the record is not a part of a transcript, or a permanent file on the student. The Commissioner relies upon this representation and embodies it as a part of his decision in this case. *Cf. Bertin v. Board of Education of Edison Township*, 1968 *S.L.D.* p. 24.

The Commissioner finds and determines that petitioners were improperly punished for publishing and distributing a publication which had not been previously approved by the appropriate administrative authorities in respondent's school district, because there existed no suitable guidelines for such

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a publication by which the petitioners could have governed their behavior. To the extent that the "indefinite social probation" which was imposed as punishment was removed even before the petition herein was filed, the question of the revocation of such punishment is moot, but to the degree that the continued threat of such punishment may operate against these petitioners or others similarly situated, the Commissioner directs that respondent promulgate adequate guidelines for the publication and distribution of student expression consistent with the principles set down by the Commissioner in *Goodman v. Board of Education of South Orange and Maplewood, supra.* The Commissioner further directs the destruction of pupil records of this matter in accordance with the policy stipulated by respondent, *supra.*

COMMISSIONER OF EDUCATION

July 16, 1970

Malcolm Woodstein and Ina Woodstein,

Petitioners,

v.

Board of Education of the Township of Clark, Union County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioners, Morey Udine, Esq.

For the Respondent, Morris Barnett, Esq.

The issue raised in this appeal is whether the Clark Township Board of Education has failed to meet its statutory obligations for the education of petitioners' son, a seven-year-old boy with needs for a special education program which petitioners, his mother and father, contend respondent has not provided. Respondent Board of Education maintains that it has been ready and able to provide an appropriate program and facilities for the current school year 1969-70.

A hearing in this matter was held on May 8, 1970, at the office of the County Superintendent of Schools, Westfield, before a hearing examiner designated by the Commissioner. Counsel also filed briefs. The report of the hearing examiner follows:

Petitioners' son, hereinafter referred to as "M", was born on July 15, 1952, and at the time of this appeal was seven years old. Prior to the age when he was eligible to enroll in public school he had been placed for brief periods in

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two private nursery schools and had been diagnosed by petitioners' physicians as a brain-damaged child who was hyperactive and lacking in the basic communication skills. At the age when he was eligible for public school placement, petitioners lived in Edison and M was placed by the Board of Education of that community in September of 1967 in the Midland School for brain-damaged children, North Branch, New Jersey. Tuition was paid by the Edison Board of Education for that year and for the opening two months of the 1968-69 school year.

In November of 1968 petitioners moved to Clark Township. Prior to the move petitioners wrote to Clark school officials, described the problems of their son, and requested that his placement at Midland School be continued with payment of tuition by the Clark Board of Education. Subsequent to the receipt of this letter, the Clark Child Study Team did a complete evaluation of M. The Clark Board of Education continued the child's placement at Midland for the balance of the 1968-69 school year and paid his tuition.

M was examined again in March 1970, and conferences followed between petitioners and members of the Child Study Team. He was classified as multiple handicapped and within this category was said to be

(a) perceptually impaired
(b) socially and emotionally maladjusted
(c) communications impaired
(d) hyperactive

Testimony was somewhat conflicting with regard to the decision involving M's placement for the following 1969-70 school year. Petitioners contend that the Midland School told them in Spring 1969 that Clark Township had agreed to his placement at Midland again in September 1969, but there was no documentary evidence that Clark officials had so committed the system. To the contrary, it was the testimony of the Child Study Team coordinator that all during the Spring months of 1969, the local team, school administrators, and the County Child Study Team were jointly engaged in a study of the feasibility of establishing a multiple handicapped class within the Clark Public Schools for the 1969-70 year.

In July of 1969 the Clark Board of Education formally approved the establishment of such a class for four multiple handicapped children, including M, to begin in September 1969, with the four children housed in a standard-size classroom. Petitioners were subsequently apprised of this decision and later discussed it at a conference with the Clark Superintendent of Schools held on August 21, 1969. Following this conference there was an implied request (Exhibit P-1) by petitioners for a hearing before the Clark Board of Education. It was not granted, and on September 2, 1969, formal assignment of M to the class in the Clark Schools was made by the Superintendent in a letter to petitioners (Exhibit R-1).

M was never enrolled in this class. Instead, he has continued his previous

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enrollment in Midland School, but tuition costs for 1969-70 have been borne in their entirety by petitioners.

Petitioners contend that M has made a good adjustment to the Midland School, and that a move by him to a public school class at this time would not be a "suitable" placement, since he requires constant supervision and specialized care. They maintain that their opinions in this regard were formed partly as the result of recommendations of their own physicians who have urged them to continue the placement at Midland. They have done so on this advice and pray that the Commissioner will require the respondent to provide and pay for the tuition and transportation expense involved. They further allege that the proposed program of Clark Township is not "suitable" because of the lack of a speech correctionist and because the teacher had no previous teaching experience in special education. Respondent, on the other hand, maintains that M's educational needs can be accommodated in its special education class for the multiple handicapped, and that these specific needs and his placement in the class were taken into consideration when the class was established for the current 1969-70 school year. Therefore, it disclaims any obligation to pay the costs of M's tuition and transportation to other schools in either the past or future. Respondent further maintains that the Commissioner does not have jurisdiction in this matter since no appeal was filed with the Clark Township Board of Education, and administrative remedies were not exhausted.

The hearing officer finds that most of the contention in this matter stems from a definition of the word "suitable" within the context of *N.J.S.A.* 18A:46-13 which reads in part as follows:

> "It shall be the duty of each board of education to provide *suitable* facilities and programs of education for all the children who are classified as handicapped * * *." (Emphasis supplied).

The Superintendent of Schools and the coordinator of the Child Study Team testified that in their opinion the facilities and program provided for the children of the multiple handicapped class are suitable to their needs as diagnosed by the Child Study Team. The Superintendent of Schools testified that the teacher engaged to teach the class is properly certified to teach socially maladjusted and emotionally disturbed pupils and that she is enrolled in advanced work for a Master's degree in this special field. He further said that approval for the class as established in September 1969 was gained from the County Child Study Team and State officials who were consulted prior to its establishment. The age span of the four children, including M, assigned to the multiple handicapped class in September 1969 was said by the Superintendent to be 6 years 4 months to 7 years one month.

The coordinator of the Child Study Team testified that the team comprised a psychologist, a social worker, and a learning disabilities specialist, all employed full time and each of them certificated. A consulting psychiatrist is also employed part time. Each of these team members were involved in the

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classification of M. In addition, a full-time nurse is available in the building where the multiple handicapped team is housed and a speech correctionist employed for use in the school system is available in a consultant capacity to the teacher of this special class. A physician is also on call. A physicial examination of M was administered in 1968, and the reports of his family physicians were used in the classification procedure in 1969.

Following consultation among team members in the Spring of 1969 the class of four children was established and labeled the "Learning Development Class." Children assigned to it all had perceptual impairment, were socially and emotionally maladjusted, and had functional moderate mental retardation. Three of the four children were hyperactive and communications impaired. M was classified by the team as being perceptually and neurologically impaired, functionally mentally retarded, and socially maladjusted. Facilities for the class include equipment for gross motor development, sensory motor development, language training and perceptual cognitive skills. The class meets daily from 8:45 a.m. to 1 p.m. and transportation is provided for all children.

The following letter to the Clark Township Superintendent of Schools from counsel for petitioners has relevance to the question of jurisdiction in this matter:

"August 27, 1969

Board of Education
Township of Clark
246 Lexington Blvd.
Clark, N.J. 07066

ATTN: Dr. Carl H. Kumpf

RE: Michael Woodstein

Dear Dr. Kumpf:

Thank you for allowing us the opportunity of discussing this matter with you on August 21, 1969.

Kindly advise as soon as possible whether you intend to contact the County Superintendent as per our discussion or whether you will allow us to present this matter to the Board of Education.

Very truly yours,
MOREY UDINE"

Petitioner had no hearing before the Board of Education subsequent to August 27, 1969.

* * * *

The Commissioner has considered the report of the hearing examiner as set forth above. It is his determination to accept jurisdiction in this matter for the reason that respondent did not take steps to schedule a meeting with petitioners subsequent to receipt of the letter of petitioners to the Superintendent, recited *supra.* The Commissioner holds that petitioners attempted to avail themselves of

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their administrative remedies before the Board of Education. Respondent failed to afford them such opportunity, and the Commissioner, therefore, will assume jurisdiction.

It is clear that respondent Board of Education has proceeded in this matter in a statutorily correct manner pursuant to *N.J.S.A.* 18A:46-6 *et seq.*, that the children to be assigned to this handicapped class were classified properly, and that the facilities provided were "suitable" within the intent of the statute and State Board Rules. He notes, too, that there is no major disagreement over the classification of M and that the exhibit containing the reports of the physicians employed by petitioner serve to corroborate the classification of the Child Study Team. Neither does there seem to be major disagreement over the facilities or program provided to the children in respondent's class. Rather, the barrier to a joint finding by the parties to this dispute that a "suitable" education could be provided in respondent's class seems to be a feeling of petitioners that M should not be assigned to a new school situation at this time but instead should be left in the school where he has made progress to date with a one-to-one teacher-pupil ratio. The Commissioner cannot agree that such placement is the only "suitable" kind. While parents have a right to make a choice between private and public school placement, they do not have a right to require that public school districts pay tuition costs to private schools in the event that this is the parental choice. See *R.v. The Board of Education of the Town of West Orange*, 1966 *S.L.D.* 210; also *Lange v. Hi Nella Board of Education*, 1959-60 *S.L.D.* 65. In the *R.v. West Orange* decision, *supra*, the Commissioner said at p. 212:

> "It is clear that R was * * * placed in private school on her parents' volition and with no involvement on the part of respondent. Under such circumstances the financial obligations incurred by that action devolve solely upon the parents and not upon the Board of Education."

The Commissioner finds and determines that the Clark Township Board of Education has fulfilled its statutory obligations with respect to the education of petitioners' son and that no liability devolves upon it for the payment of tuition or of transportation costs to a non-public school.

The petitioner is therefore dismissed.

COMMISSIONER OF EDUCATION

July 17, 1970

Pending before State Board of Education

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Hazel Diggs as mother and next friend of Janice Diggs, a minor, individually and on behalf of all others similarly situated,

Petitioner,

v.

Board of Education of the City of Camden, Dr. Charles Smerin, Superintendent of Schools, Joshua Conwell, Principal of Camden High School, Camden County,

Respondents.

COMMISSIONER OF EDUCATION

Decision on Motion

For the Petitioner, Carl S. Bisgaier, Esq.

For the Respondents, Leonard Spector, Esq.

Petitioner, a twelfth grade student in respondents' Camden High School, was suspended from school on March 10, 1970, subsequent to her arrest by the local police. She is charged with being implicated with other students in causing a fire in the school and is suspended pending "further investigation in the matter."

Petitioner has filed a petition of appeal with the Commissioner attesting her innocence of the charges against her and asserting that she has been denied her right to due process of law. She asserts that she was not given a full hearing prior to her suspension and seeks immediate reinstatement in school *pendente lite.*

Argument on the motion for interim relief was heard on May 13, 1970, at the State Department of Education, Trenton, by an examiner appointed by the Commissioner.

Petitioner argues that discontinuing her education will cause her irreparable harm, that she is a senior, and seeks the right to study in school and prepare for final examinations with other students.

Respondent Board of Education states that petitioner has the privilege of coming to the school to get her assignments from her teachers. However, she receives no professional instruction and is entirely responsible for keeping up with her studies on her own initiative. She will be permitted to take her final examinations. Respondent asserts that petitioner was properly suspended from school according to *N.J.S.A.* 18A:37-4 and *N.J.S.A.* 18A:37-5, which do not require a hearing.

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The Commissioner has considered the arguments of counsel and the report of the hearing examiner.

The Commissioner notes that it has not been established that petitioner is guilty of any offense, nor is it established that she had a proper hearing prior to her suspension from school.

In *R.R. v. Board of Education of the Shore Regional High School*, 109 *N.J. Super.* 337, a case involving pupil suspension, the Court ruled as follows:

> "The action taken by the Shore Regional High School officials meets the literal requirements of *N.J.S.A.* 18A:37-4 and *N.J.S.A.* 18A:37-5, but literal compliance without more violates R.R.'s constitutional rights to due process of law." (at page 346)

Also,

> "*N.J.S.A.* 18A:37-2, *N.J.S.A.* 18A:37-4 and *N.J.S.A.* 18A:37-5 must, therefore, be construed to require public school officials to afford students facing disciplinary action involving the possible imposition of serious sanctions, such as suspension or expulsion, the procedural due process guaranteed by the Fourteenth Amendment." (at page 347)

The Commissioner understands that petitioner is suspended and not expelled from school. However, the result is the same in that her continuing suspension since March 10, 1970, accomplishes the same purpose as expulsion. More than eight weeks have elapsed since petitioner's suspension. The Commissioner's comment in *Scher v. Board of Education of West Orange*, 1968 *S.L.D.*, 92, 96 is relevant:

> "The Commissioner is constrained to comment further, however, with respect to certain aspects of the manner in which this matter was handled. He can see, for instance, no justification for a delay of five weeks from the time of the suspension to respondent's ultimate determination. Such a hiatus, in a pupil's senior year in high school particularly, can severely damage chances of satisfactory completion of his studies and graduation and his ability to achieve a class standing acceptable for admission to post-secondary school educational opportunities. If such delay is necessary before a final determination is made, the Commissioner suggests that some kind of opportunity to keep up with class work be afforded during such period, either at home, after school hours, in another school, or by other suitable means."

The issue is not clear as to why the suspension is being continued. Whether the Board of Education is waiting for Court action against the petitioner or deliberating on a course of action on its own, it has an obligation to continue an equivalent form of instruction for the petitioner.

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The Commissioner does not consider assigned student study at home as the equivalent of that available through regular school attendance or other methods provided by the Board and there can be no question that irreparable harm will result if petitioner is not granted equivalent instruction.

Absent a plenary hearing which shows that petitioner is a clear danger to herself or to the orderly operation of the school, she cannot be denied her entitlement to free public school education. There has as yet been no such clear showing.

The Board of Education of the City of Camden is hereby ordered to reinstate Janice Diggs immediately in her regular school classes, or to offer her equivalent instruction at home or other suitable place pending disposition of the issues herein.

ACTING COMMISSIONER OF EDUCATION

May 18, 1970

Board of Education of the Black Horse Pike Regional School District,

Petitioner,

v.

Mayors and Councils of the Boroughs of Bellmawr and Runnemede, and the Mayor and Township Committee of the Township of Gloucester, Camden County,

Respondents.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Hyland, Davis & Reberkenny (S. Lewis Davis, Esq., of Counsel)

For the Respondents Bellmawr and Township of Gloucester, Weinberg and Fishman (Barry M. Weinberg, Esq., of Counsel)

For the Respondent Runnemede, Florio and Steinberg (James J. Florio, esq., of Counsel)

Petitioner, the Board of Education of the Black Horse Pike Regional School District (hereinafter "Board") appeals from an action of the municipal governing bodies of its constituent districts, the Boroughs of Bellmawr and Runnemede and the Township of Gloucester (hereinafter "Councils"), certifying to the Camden County Board of Taxation a lesser amount of appropriations for

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the 1970-71 school year than the amount proposed by the Board and rejected by the voters in the annual school district election.

The facts of this matter were presented at a hearing conducted on April 30 and May 12 and 13, 1970, at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

At the annual school district election held on February 3, 1970, the Board submitted to the electorate the following proposals for amounts to be raised by local taxation for the 1970-71 school year:

Current Expense	$2,190,092
Capital Outlay	5,318
Vocational Evening School	6,684

All three proposals were defeated. Thereafter the Board and Councils consulted, and, separately, Councils adopted resolutions determining lesser amounts necessary to be raised by local taxes, as follows:

	Board's Proposal	Councils' Resolutions	Reduction
Current Expense	$2,190,092	$1,974,092	$216,000
Capital Outlay	5,318	-0-	5,318
Vocational Evening School	6,684	-0-	6,684

In a statement attached to respondents' answer to the petitioner herein, Councils set forth a list of the accounts in which they recommended reductions which are summarized in the following table:

TABLE I

Accounts No.	Item	Board's Proposal	Councils' Proposal	Amount Reduced
213	Sals.-Teachers	$1,692,227	$1,608,427	$ 83,800
214a	Sals.-Librarians	23,016	22,044	972
214c	Sals.-Psych. Pers.	22,000	- 0 -	22,000
220	Textbooks	33,581	25,000	8,581
240	Teaching Supp.	67,873	52,290	15,583
250a	Misc. Supp.-Instr.	8,525	6,300	2,225
250b	Travel Exp.-Instr.	5,000	4,000	1,000
250c	Misc. Exp.-Instr.	15,000	11,735	3,265
410a3	Sals.-Nurses	26,200	25,200	1,000
510d	Sals.-Other Trans. Employees	1,000	- 0 -	1,000
510b1	Sals.-Field Trips, etc.	8,545	12,713	6,400
520c	Contracts-Field trips	10,568	- 0 -	- 0 -
530	Replacement-Vehicles	9,650	- 0 -	9,650
610c	Other Sals.- Plant Oper.	86,820	74,080	12,740
630	Heat for Bldgs.	32,000	23,500	8,500
640	Utilities	54,400	43,400	11,000

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730a	Replacement-Instr. Equip.	10,143	8,073	2,070
1020	Other Exp.Athletic	54,858	42,000	12,858
1111	Sals.-Recreation	4,800	- 0 -	4,800
1121	Other Exp.-Recreation	550	- 0 -	550
1112	Sal.-Civic Activ.	1,000	- 0 -	1,000
1113	Sal.-Spec. Projects	3,000	- 0 -	3,000
J6	Summer School	20,190	- 0 -	20,190
	Total Current Expense	$2,190,946	$1,958,762	$232,184
	CAPITAL OUTLAY			
1240c	Equip. - Instr.	$4,673	$ - 0 -	$4,673
1240d	Equip.-Att. & Health	45	- 0 -	45
1240g	Equip. - Plant Maint.	600	- 0 -	600
	Total Capital Outlay	$5,318	$ - 0 -	$5,318
	VOCATIONAL EVENING SCHOOL			
2.200	Instruction	$18,667	$ - 0 -	$18,667
2.600	Operation	1,750	- 0 -	1,750
2.700	Plant Maint.	150	- 0 -	150
		$20,567	$ - 0 -	$20,567
	Less Anticipated Revenues	13,883		13,883
	Net Appropriation for Vocational Evening School	$ 6,684	$ - 0 -	$ 6,684

(1) Councils recommended a reduction of $15,000 for summer employment of teachers. When it was learned that the Board had eliminated this item before adoption of its budget, Councils withdrew their recommended reduction.

(2) Although Councils' recommended reduction was $2,225, as shown, their statement spoke of a remaining appropriation of $6,000 after the cut. No explanation of the $300 difference was offered.

(3) After reducing the recommended cuts by $15,000 (see Note 1, above), the total of recommended cuts is $217,184. No explanation was offered to reconcile this figure with the $216,000 total reduction in the current expense appropriation as adopted in the resolution of Councils, *supra*.

Testimony was offered as to each of the items shown in the table. The hearing examiner reports his findings and recommendations accordingly.

213 - Salaries of Teachers. The Board proposed the addition of four teachers to accommodate an anticipated enrollment increase of 120 pupils in its two high schools. It is anticipated that it will be necessary to extend the school day to accommodate the enrollment by providing additional instructional periods. The enrollment increases for 1968-69 and 1969-70 support the reasonableness of the anticipated increase for 1970-71. The testimony further shows that the computerized class-scheduling program provides for maximum

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utilization of classroom space (33 pupils per class). The hearing examiner recommends the restoration of the $32,800 budgeted for the addition of four staff members.

The Board provided $12,000 for sabbatical leave pay for two teachers in 1970-71, as established in its 1969-70 negotiated agreement with its teacher unit. Councils contend that this item is a "luxury," in view of the defeat of the budget. In view of the Board's commitment, the allocation of less than 0.9% of its 1969-70 teacher payroll for such a purpose is found to be reasonable, and it is recommended that this $12,000 be restored.

In addition to the four teachers proposed for increased enrollment, the Board budgeted $24,000 for three additional English teachers. The Board's testimony and exhibit (P-2) show that the Board's proposal is to hire four English teachers to accomplish the following purposes:

1. Accommodate increased pupil enrollment.
2. Decrease class sizes in "college preparatory" English from 30 to 25 pupils in Highland High School and from 28 to 24 in Triton High School.
3. Add new elective English courses in "creative writing, journalism, secretarial, etc."

One of the English teachers is among the four requested to accommodate increased enrollment, provision for which has been recommended, *supra.* The equivalent of another teacher would be required for the added new elective courses, and it is recommended by the hearing examiner that this addition be deferred. It is recommended that the reduction in class size be accomplished in two stages rather than one, thereby reducing the need for one teacher. It was further testified that although $24,000 was appropriated for three English teachers, the actual hiring cost will be $21,750, or an average of $7,250 per teacher. It is accordingly recommended that $7,250 be restored for one additional English teacher, and that the remaining $16,750 of Councils' reduction be sustained.

214a - Salaries of Librarians. Each of the petitioner's two schools has a library staff consisting of a librarian and a part-time aide (three hours daily). The Board proposes an additional part-time aide for the library at Triton High School. Councils contend that the additional aide is not justified. In light of the enrollment at Triton - over 1,700 pupils - the equivalent of full-time clerical aid to the librarian is found to be reasonable, and it is recommended that $972 for providing an additional part-time aide be restored.

214c - Salaries of Psychological Personnel. The Board's budget provides for the employment of a school psychologist and a school social worker at a total cost of $22,000. The testimony shows that the school district has no staff to provide for discharging its statutory obligation to classify and evaluate pupils having learning disabilities due to mental and emotional handicaps. Services formally available at the Lakeland County Hospital have been discontinued, and the services of a private facility in the county are difficult to schedule. While

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significant data on referrals and the need for referrals for such classification and evaluation were not offered, the hearing examiner is convinced that the school district cannot satisfactorily perform its statutory obligations without the proposed staff additions in this account. It is, therefore, recommended that the sum of $22,000 be restored to the budget.

220 - Textbooks. The Board's appropriation for this item for 1970-71 is approximately 40 per cent higher than its appropriation for 1969-70, and approximately 80 per cent more than was spent in the 1968-69 school year. (P-6) Although the Board asserts that its textbook appropriations have been drastically curtailed in recent years, generating a backlog of need, in 1968-69 the entire appropriation was not utilized, and in the current year, as of May 11, the expenditures have not exceeded the appropriation. Council proposes an increase of about five per cent over the 1969-70 appropriation. Such an increase is insufficient to provide for an estimated enrollment increase of 120 pupils and at the same time meet the rising costs of new books needed to replace some of the outmoded texts. It is, therefore, recommended that enough money be restored to permit a ten per cent increase in the appropriation; such a recommendation will restore $2,375 of Councils' reduction, and sustain $6,206.

240 - Teaching Supplies. Recent appropriations and expenditures in this item are shown as follows: (P-6)

Appropriated	1968-69	$38,000
Spent	1968-69	36,331
Appropriated	1969-70	47,290
Spent-May 11, 1970		46,421
Budgeted	1970-71	67,873

Councils' proposal is to limit the increased appropriation for 1970-71 appropriately to 11 per cent over the current year, or $52,290. The Board testified to the need to provide an estimated additional $8,000 for supplies for pilot vocational programs from which Federal aid is being withdrawn, $2,000 to provide supplies for additional enrollment, as well as higher costs for supplies generally. The testimony does not support the need for the increase of over 43 per cent, which the Board's appropriation provides. In light of recent years' expenditures, plus the cited needs, an increase of 20 per cent over the 1969-70 appropriation is required, and the hearing examiner therefore recommends that $4,458 of Councils' reduction be restored, and $11,125 sustained.

250c - Miscellaneous Supplies - Instruction. The appropriations and spending data on this item are as follows:

Appropriated	1968-69	$4,500
Spent	1968-69	4,483
Appropriated	1969-70	5,650
Spent - May 11, 1970		5,537
Budgeted	1970-71	8,525

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The Board's testimony as to its need for additional funds in this account points to the need for more office supplies and stationery, the publication of a student handbook on a biennial basis, printing of curriculum materials, student awards, and graduation supplies. It was testified that much of the printing is done in the school's graphic arts shop, on materials purchased through this account. The testimony does not support the more than 50 per cent increase of the 1970-71 appropriation over that for the current school year. Councils propose a reduction of $2,225, which will provide an appropriation of $6,300 for this account. (See Note 2 of Table of Reductions, *supra.*) However, in light of the need for the re-publication of the student handbook at an additional cost of $1,000 over the current year's needs, the hearing examiner concludes that the reduction proposed by Councils will not provide sufficient funds. It is therefore recommended that $1,000 of the cut be restored, and $1,225 be sustained.

250b - Travel Expense - Instruction. The appropriations and spending experience in this account are shown as follows:

Appropriated	1968-69	$2,300
Spent	1968-69	1,738
Appropriated	1969-70	4,100
Spent - May 11, 1970		1,135
Budgeted	1970-71	5,000

The Superintendent testified that an unspecified additional amount of the 1969-70 appropriation would be expended by the end of the current school year. It was further testified that the district proposes to institute a staff workshop program involving travel by teachers to visit classes in other districts. While there can be no doubt that such a program can be helpful in improving instruction, the hearing examiner does not find that it is essential to be instituted as a new program for 1970-71. Councils have proposed a reduction of $1,000 in this account. It is recommended that this reduction be sustained.

250c - Miscellaneous Expense - Instruction. The Board's appropriation for this item in 1969-70 was $12,785. At the time of the hearing $13,700 had been spent in the account. Councils' proposed reduction of $3,265 would provide $11,735 for the 1970-71 school year, and is based on the assertion that many of the expenses could be either decreased or eliminated. It was testified that the rental of data processing machinery used in instruction has been almost fully reimbursed in the past and current year, but will not be so reimbursed in 1970-71; this item is budgeted for $4,600. It was further testified that the cost of computerized pupil scheduling will increase from approximately $1.30 per pupil to $2.00 per pupil in 1970-71. These two items alone will require nearly all of Councils' proposed appropriation, and leave insufficient funds for other essential items. It is accordingly recommended that the proposed reduction of $3,265 be restored to this account.

410a3 - Salaries - Nurses. The district presently employs three school nurses, two at Triton High School and one at Highland High School. The Board

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provided $1,000 in its budget to employ a part-time aide to assist the nurse at Highland and to provide coverage in the nurse's station over the nine-period day planned for 1970-71. In view of the case load (800-1100 referrals per month to the nurses's station) and the volume of clerical work associated with the nurse's duties, the hearing examiner finds that the need for the aide is clearly established. It is recommended that $1,000 be restored in this account.

510d - Salaries - Other Pupil Transportation Employees. The Board budgeted $1,000 to pay the cost of drivers to take district-owned buses for inspection, repairs, and maintenance. This task has been performed heretofore by the Secretary of the Board and the transportation coordinator. The testimony shows that this function cannot be performed by regular drivers as a part of their regular assignment. The hearing examiner finds that the prior practice is not an efficient use of the time and services of administrative personnel, and that the appropriation by the Board is essential for the proper inspection and maintenance of the vehicles. It is recommended that Councils' proposed cut of $1,000 in this account be restored.

510b1 and 520c - Salaries and Contracts - Activities and Field Trips. The combined appropriations by the Board for these two items amount to $19,113, from which Councils propose a reduction of $6,400. The testimony shows that in October 1969, the Board adopted a policy to set aside an annual appropriation of $2.00 per pupil for field trips, and accordingly appropriated $3,200 in account 510b1 for salaries of drivers of district-owned buses, and $3,200 in account 520c for contracted bus service for this purpose. Councils assert that field trips are not vital to the educational process, and that if the Board approves field trips "appropriate in the furtherance of the educational process" the cost should be borne by the pupils who benefit. The Commissioner has previously held that the cost of trips which are a part of the educational curriculum may not be charged to pupils, but become a proper expense of the school district. *Willett v. Board of Education of Colts Neck*, 1966 *S.L.D.* 202, affirmed State Board of Education 1968 *S.L.D.* 276 The hearing examiner, finds that the testimony in support of a program of field trips for vocational orientation and cultural enrichment supports the appropriation of $2.00 per pupil as both reasonable and essential, and accordingly he recommends the restoration of $6,400 to the combined appropriations in these accounts.

530 - Replacement - Vehicles. The Board appropriated in this account $2,400 for the purchase of a 10-passenger vehicle and $7,250 for a 54-passenger bus, to replace existing vehicles. Councils propose that these purchases be deferred. The testimony discloses that the Board seeks to replace a small vehicle which was badly damaged in an accident during the 1969-70 year. Although repairs were made, there remains a lack of confidence in the safety of the bus. Counsel for respondents stated that if the bus were shown to be unsafe, Councils would not oppose its replacement. In an inspection conducted subsequent to the hearing at the suggestion of the Office of Pupil Transportation Services of the State Department of Education, structural, steering, and body defects were found which caused the Camden County Superintendent of Schools, in a letter dated June 12, 1970, to the hearing examiner to state, in part:

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"* * * In my opinion, the report is thorough and this vehicle should not be used for pupil transportation. There are so many things wrong with the mini-bus that if it were to be used, safety could not be guaranteed.

Testimony was offered by way of an exhibit (P-7) that quotes on a replacement vehicle have been secured, and that a new vehicle can be purchased at a net cost of $2,089. The larger bus is sought to replace a 10-year-old vehicle with approximately 100,000 miles of service, at a net cost of about $7,200. (P-7) The replacement of a vehicle of such age and service is clearly essential, and comports with practice recommended by County Superintendents and the Office of Pupil Transportation Services. It is accordingly recommended that a total of $9,300 be restored for the replacement of the two vehicles, and that $350 of Councils' reduction be sustained.

610c - Other Salaries - Plant Operation. The Board's budget provided $9,100 to add two more custodians for the purpose of decreasing present work-loads, and two weekend custodians to provide around-the-clock watchmen and janitorial service, instead of 16-hour coverage as at present. Councils oppose the additional manpower as unnecessary. The hearing examiner finds that the testimony does not support the necessity for the additional staff, and accordingly recommends that the reduction of $12,740 be sustained.

630 - Heat for Buildings. In 1969 the heating system was converted for use of gas as fuel. The 1969-70 budget provided $23,500 for fuel, but billings paid through March 1970 had reached a total of $26,595. The 1970-71 budget of $32,000 was based on actual expenditures for fuel oil in 1968-69, and obviously exceeds probable total costs for 1969-70 by at least $3,000, since little heat is necessary in the last quarter of the school year. It is recommended that $5,500 of Councils' proposed reduction of $8,500 be restored, and $3,000 be sustained.

640 - Utilities. The appropriations and expense data relative to this item are shown as follows: (P-8)

Spent	1968-69	$55,689
Budgeted	1969-70	42,800
Spent - May 11, 1970		58,747
Budgeted	1970-71	54,400

Councils see no reason why the anticipated costs of utilities should increase to the extent shown by the Board's 1970-71 budget figure, and recommend a cut of $11,000 from the budget figure. The testimony shows that extensive use of school facilities in the evening for both educational and civic activities accounts to a large degree for use of electricity far beyond budget anticipations. (P-8) The hearing examiner can find no evidence of unreasonable expenditures for utilities, and no basis in the experience of the district for a conclusion that the budget can bear any reductions. It is therefore recommended that the cut of $11,000 be restored.

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730a - Replacement - Instructional Equipment. The Board's 1970-71 budget contains an item of $4,140 for the replacement of 36 manual typewriters. Councils believe that this replacement should be spread over two years, and recommends a reduction of $2,070. While there is no doubt that these typewriters, now six years old, are subject to breakdowns, Councils' proposed economy is both feasible and reasonable, and the hearing examiner recommends that it be sustained.

1020 - Other Expense - Athletic. The spending data in this account are shown as follows:

Budgeted	1968-69	$27,650
Spent	1968-69	31,817
Budgeted	1969-70	40,833
Spent - May 11, 1970		46,653
Budgeted	1970-71	54,858

Councils recommend that "drastic revisions," in the amount of $12,858, be effected to curb increase not due to normal cost-of-living increments. The testimony of the Board, supported by Exhibit P-6, shows that the Board has consistently appropriated less money to this account than was felt to be needed by school authorities. The result, it was testified, has been that a systematic program of replacement of essential equipment has been impossible. The economies that would be required should Councils' cut be sustained, it was testified, would decrease pupil participation and necessitate elimination of football accident insurance, athletic awards, and attendance at coaching clinics. When allowances are made for higher prices and increased enrollment, the hearing examiner finds that in light of past spending experience and accumulated needs for equipment replacement, the athletics and activities program cannot be sustained if Councils' reduction stands in full. On the other hand, budgeted expenditures amounting to over $7,500 for an awards and sports dinner cannot be supported as essential to a thorough and efficient system of education. It is therefore recommended that $2,858 of the proposed reduction be sustained, and $10,000 be restored to the budget.

1111 and 1121 - Salaries and Other Expenses - Recreation. These items, totaling $5,350, are budgeted for a summer recreation program. Councils propose that they be eliminated entirely, on the grounds that they are not needed for a thorough and efficient educational system. The President of the Board testified that this program has been conducted since 1957, and will be continued as long as the community wants it. The hearing examiner finds that this program is not essential to the educational system, and recommends that Councils' reduction be sustained.

1112 - Salaries - Civic Activities. The Board appropriated $1,000 in this account to defray custodial expense in connection with civic uses of school facilities for which no fees are paid. Data were submitted (P-9) showing extensive use of school buildings for civic and other community activities,

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amounting to approximately no-fee uses of the district facilities. Where money has been available, custodians have been paid for their services; otherwise custodians have been required to leave their other duties to perform necessary services for these activities. The $1,000 appropriation, it was testified, would provide funds for custodial services and thus not detract from regular janitorial duties. The hearing examiner finds this expenditure to be necessary for the efficient operation of the school buildings as a community enterprise, and recommends the restoration of $1,000 to this account.

1113 - Salaries - Special Projects. The Board appropriated $3,000 for salaries to be paid to pupils in a summer vocational work-study program, to enable pupils to improve vocational skills. Councils consider this expenditure unnecessary as a function of the school. While the hearing examiner regards such a program as highly desirable, he does not find it essential to the operation of a thorough and efficient school system. With the exception of summer work in the print shop, the types of work described do not appear to complement the vocational program of the school. It is recommended that the $3,000 reduction be sustained.

J6 - Summer School. The Board's budget provided $20,190 for summer school. This program has been carried on since at least 1964, and provides primarily for make-up or remedial classes. The Board testified that because of the geographical location of the district, pupils needing summer school work have essentially no access by public transportation to other summer schools. Councils regard summer school as a "luxury" which cannot be enjoyed in view of the defeat of the budget. As a means of avoiding costly grade retardation and pupil dropouts, summer school is not regarded as a luxury. In view of testimony that contained within the appropriation of $20,190 is $7,000 which has not been earmarked for negotiated salary increases, and further evidence that in 1968-69 and 1969-70 the expenditures for summer school were $8,611 and $12,424 respectively, it is recommended that $13,190 of Councils' cut be restored, and $7,000 sustained.

1240 - Equipment. The capital outlay budget provided a total of $5,318 for various items of equipment, nearly all in the instructional areas. Councils assert that the items do not appear to be needed at this time. No significant testimony was offered in support of the need for the items in this appropriation. The hearing examiner finds that the appropriation is not necessary for the operation of a thorough and efficient school system, and recommends that the reduction be sustained.

2000 - Vocational Evening School. The vocational evening school was instituted in 1969-70 as a part of the district's commitment as an area vocational school to be eligible for State and Federal vocational education funds. For the first year of operation $5,100 was budgeted, and as of May 11, 1970, actual expenditures amounted to $7,772. For 1970-71, $20,567 was budgeted by the Board, of which $13,883 is offset by anticipated revenues from tuition and State funds, for a net anticipated cost of $6,684. Councils assert that the defeat of this

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specific item as a separate referendum question indicates the voters' desire to eliminate the program. The Board argues that since $7,000 for salaries of teachers have been pro-rated from current expense accounts for State reimbursement purposes, elimination of the program will necessitate finding $7,000 in funds in current expense accounts to offset this loss. The hearing examiner finds that in light of the Board's commitments to be eligible for State reimbursement in its total vocational education program, and the minimal cost of a vital program which is two-thirds supported by other than local taxes, the appropriation of $6,684 is reasonable and essential. It is therefore recommended that this amount be restored.

Testimony was received as to possible uncommitted surpluses at the end of the 1969-70 school year. The Secretary of the Board testified that the surpluses may amount to between $50,000 and $80,000. The hearing examiner finds this surplus to be insufficient to provide a basis for any recommendation that additional moneys be appropriated from surplus. The recommendations of the hearing examiner as to amounts to be restored or sustained are recapitulated in the following table:

TABLE II

Accounts No.	Item	Councils' Reduction	Amount Restored	Amount Not Restored
CURRENT EXPENSE				
213	Sals.-Teachers	$ 83,800	$ 67,050	$ 16,750
214a	Sals.-Librarians	972	972	- 0 -
214c	Sals.-Psych. Personnel	22,000	22,000	- 0 -
220	Textbooks	8,581	2,375	6,206
240	Teaching Supp.	15,583	4,458	11,125
250a	Misc. Supp.-Instr.	2,225	1,000	1,225
250b	Travel Exp.-Instr.	1,000	- 0 -	1,000
250c	Misc. Exp.-Instr.	3,265	3,265	- 0 -
410a3	Sals. - Nurses	1,000	1,000	- 0 -
510d	Sals.-Other Trans. Employees	1,000	1,000	- 0 -
510b1	Sals.-Field Trips, etc.	6,400	6,400	- 0 -
520c	Contracts- Field Trips			
530	Replacement- Vehicles	9,650	9,300	350
610c	Other Sals- Plant Oper.	12,740	- 0 -	12,740
630	Heat for Bldgs.	8,500	5,500	3,000
640	Utilities	11,000	11,000	- 0 -
730a	Replacement- Instr. Equip.	2,070	- 0 -	2,070
1020	Other Exp.- Athletic	12,858	10,000	2,858
1111	Sals. - Recreation	4,800	- 0 -	4,800

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1121	Other Exp.- Recreation	550	- 0 -	550
1112	Sals. - Civic Activ.	1,000	1,000	- 0 -
1113	Sals. - Spec. Projects	3,000	- 0 -	3,000
J6	Summer School	20,190	13,190	7,000
	Total Current Expense	$232,184	$159,510	$72,674
	CAPITAL OUTLAY			
1240c	Equip.-Instr.	$4,673	$ - 0 -	$4,673
1240d	Equip. - Att. & Health	45	- 0 -	45
1240g	Equip.-Plant Maint.	600	- 0 -	600
	Total Capital Outlay	$5,318	$ - 0 -	$5,318
	VOCATIONAL EVENING SCHOOL			
	Net Appropriation	$6,684	$6,684	$ - 0 -

(1) Includes $15,000 restored by Councils. See Note (1), TABLE I.

*   *   *   *

The Commissioner has reviewed and considered the findings, conclusions, and recommendations of the hearing examiner and concurs therein. The Commissioner is aware that the budget originally proposed by the Board contains appropriations designed to improve the educational program of the schools or to correct accumulated deficiencies in supplies and equipment. However, the Commissioner is strictly constrained in an appeal of this nature to provide only that which he finds necessary to the maintenance and operation of a thorough and efficient school system. He finds in the hearing examiner's recommendations a compliance with that limitation. The Commissioner therefore finds and determines that in addition to the amounts previously certified to the Camden County Board of Taxation, the additional amounts of $159,510 for current expense and $6,684 for vocational evening school are required for the school year 1970-71. He therefore directs the several respondents to certify these additional amounts to the Camden County Board of Taxation to be raised by local taxation for the support of the Black Horse Pike Regional High School District for the school year 1970-71.

COMMISSIONER OF EDUCATION

July 27, 1970

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In The Matter Of The Tenure Hearing of Fred Brown, School District of the City of Bayonne, Hudson County.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, John J. Pagano, Esq.

For the Respondent, Raymond Brown, Esq.

Fred Brown, (hereinafter "respondent") a teacher in the employ of the Bayonne Board of Education, is charged with conduct unbecoming a teacher. The charges are made by the mother (hereinafter "petitioner") of a 12-year-old girl, (hereinafter "the child") who was in the fifth grade at the Harris School at the time of the alleged improper act. The Board of Education made a determination that the charges, if proved true in fact, would warrant dismissal and certified them to the Commissioner of Education. The mother also filed a criminal complaint with the municipal authorities charging the teacher with impairing the morals of a minor. The Board of Education suspended the teacher without pay and the parties agreed to hold the matter herein in abeyance pending disposition of the criminal charge. The grand jury failed to indict respondent, returning a "no bill," and the criminal charge was dismissed. Petitioner then requested that her charges be pressed before the Commisisoner of Education, and a hearing thereon was held by the Assistant Commissioner in charge of the Division of Controversies and Disputes at the office of the Hudson County Superintendent of Schools, Jersey City, on May 28, 1970.

The charge involves a single incident as follows:

> "That on the 26th day of May, 1969, in the gymnasium at Henry E. Harris School located at Avenue C and 5th Street, Bayonne, Hudson County, New Jersey, the said Fred Brown, a physical education teacher, did force and induce the child, age 12 years, a fifth grade student at Henry E. Harris School, daughter of complainant, to submit to an act which tended to debauch the child or impair her morals; by placing his left hand on her knee and then moving his hand under her panties and then rubbing his hand on her bare stomach."

The testimony in this case is in sharp conflict. According to the child, she and another girl pupil asked to be allowed to return to the gym after their physical education period to assist respondent with a class of younger children. Permission was granted; they returned to help with the smaller pupils and remained in the gym after the class left to assist with some clerical chores. The

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child worked with respondent at his desk where she was seated at his left. Her girl friend was occupied making entries on a wall chart some 15-20 feet away. The child charges that while so engaged respondent put his left hand on her knee and then moved it up her right leg under her dress and under her panties and rubbed her stomach. This activity continued, she testified, for what seemed to her about 25 minutes. She made no attempt to resist or to cry out, she said, because respondent was a teacher, and she was afraid. Respondent also asked her a number of questions, she testified, such as whether she permitted boys such liberties and whether she intended to tell her parents of this occurrence. When she left the gym she started to cry, remained in the corridor for a short while to try to recover her composure and then returned to her classroom. For the next half hour until the noon recess she remained in her classroom weeping and wiping her eyes with a tissue supplied by the homeroom teacher. At noon dismissal she walked home crying, stopping only to answer questions of some other pupils with respect to what had happened to her.

The mother testified that her daughter came home crying at noon, and gave her the details related above of the alleged incident in the gymnasium. She returned to the school with the child but being unable to see the school principal, who was out to lunch, or the accused teacher who had gone home ill, the mother went to the police station where the child gave a statement to a policewoman on duty. After conferring with her husband about the alleged incident, the mother returned to the police station on the following day and signed formal charges against respondent.

Respondent categorically denies committing the alleged offense. He testified that the child and her girl friend had twice requested to return to the gymnasium to help him if he would send a note making that request to the homeroom teacher. Respondent sent the note, and the girls were allowed to go to the gymnasium. No incident of any kind occurred while they were there according to respondent. He testified that he knew of no animus on the part of the child, that she had always been cooperative and helpful and sought opportunities to assist him, and that he had had no occasion to reprimand or discipline her or to give her a failing mark. Respondent admitted to being totally unable to ascribe a reason for the child's making such an accusation against him.

There was no opportunity for any other witness, other than the child's girl friend, to observe the alleged incident, and there is, therefore, no directly corroborative testimony available with respect to these conflicting accounts. The girl friend, who was present in the gym, was not available to testify, but the principal of the school testified that she had reported to him that she had not seen any improper actions by the teacher or any indication of anything out of the ordinary.

The testimony of other witnesses while not addressed to the specific incident to which there were no observers, tends to support the teacher. The homeroom teacher denied that the child appeared upset or distraught when she returned to class following the alleged occurrence in the gym. According to him

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she was not crying or wiping her eyes, but on the contrary was smiling and frolicking and had to be admonished for disturbing the pupils.

Five other teachers and the school principal testified, and their testimony tended generally to discredit the story related by the child. Significant testimony was given by a teacher in charge of the school's Service League, who said that prior to this alleged incident, the child had given her names of two 8th grade boys, members of the school's Service League, and accused them of lifting her dress in the school yard. The child also gave the names of three girls, who she claimed witnessed the incident. When the child was confronted with the two boys, she could not recognize them as her offenders even though these boys were on duty in the area at the time of the alleged incident, nor could she produce her three witnesses. It was pointed out that these boys had previously reported the child for some minor rule infraction. The school principal, after investigating, felt the accusation by the child was untrue and dismissed the incident. Testimony by another teacher witness alleged that the child on another occasion asked one of her girl friends to claim that she had been handled by respondent. The school principal testified that his investigation in the matter of the charge herein revealed nothing that could substantiate the accusation of the child, and that her own playmate could not corroborate her story, although present in the gymnasium at the time of the alleged incident. Another teacher testified that she observed the child with a group of other girls after noon dismissal on a street away from the school on the day in question. According to the teacher there was nothing unusual about the child's appearance, and she was not crying but was laughing and talking with others in the group. Similarly, the testimony offered by the other teachers tended to support the teacher rather than the child.

In this case, a very serious accusation has been made against respondent which, if true in fact, would call for his summary dismissal. On the other hand, the charge rests solely on the word of a 12-year-old child totally unsupported by any other testimony or evidence, categorically denied by respondent, and discredited in a number of significant respects by the observations of several responsible adults. As the Commissioner has noted before, the testimony of children must be examined and weighed with great care:

> "* * * testimony of children, * * *, against a teacher, whose duty it is to discipline them, must be examined with extreme care. It is dangerous to use such testimony against a teacher. It is likewise dangerous not to use it. * * * To determine the capacity and responsibility of an infant witness is the duty of the trial court." *Palmer v. Audubon Board of Education*, 1939-49 *S.L.D.* 183, 188

See also *In the Matter of the Tenure Hearing of Pauline Nickerson, Peapack-Gladstone, Somerset County*, 1965 *S.L.D.* 130. In the instant case the charge against respondent must be determined in large measure upon the credibility of the child complainant.

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It should also be noted that in an action such as this before the Commissioner of Education, it is not necessary to prove the charge beyond the existence of a reasonable doubt as in a criminal matter. The quantum of proof required herein does not extend beyond a preponderance of the credible evidence. After careful examination and study of all the testimony, the Commissioner concludes that the credible evidence is insufficient to support the charge aginst the teacher.

The Commissioner is also impressed by the fact that the act complained of would be extremely difficult and even physically impossible to perform in the manner related by the child in specific detail. While there is no specific evidence of prevarication by the child, no indication of motivation on her part to injure the teacher, and no clue to why such a charge should be fabricated, all of the related testimony favors the teacher. In the Commissioner's judgment, such testimony, respondent's own denial, and all of the other facts in this case establish a preponderance of the credible evidence in favor of the teacher sufficient to deny and dismiss the charge.

The Commissioner finds and determines that the charge of unbecoming conduct as a teacher against Fred Brown has not been proved true in fact, and the charge is dismissed. The Bayonne Board of Education is directed to reinstate respondent in his employment in the school system and to compensate him for any back pay to which he may be entitled in accordance with the applicable statutes and law.

COMMISSIONER OF EDUCATION

July 31, 1970

Board of Education of the Borough of Union Beach,

Petitioner,

v.

Mayor and Council of the Borough of Union Beach, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Peter J. Edwardsen, Esq.

For the Respondent, Blanda & Blanda (Philip J. Blanda, Jr., Esq., of Counsel)

Petitioner, hereinafter "Board," appeals from an action of respondent Borough, hereinafter "Council," certifying to the County Board of Taxation a

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lesser amount of appropriations for current expense purposes for the 1970-71 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were educed at a hearing conducted on July 6, 1970, at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner. The Mayor and Council of the Borough of Union Beach did not attend the hearing but passed a resolution which said in part:

"NOW THEREFORE BE IT RESOLVED, that the Mayor and Borough Council neither consents nor objects to the Petition of Appeal filed by the Board of Education of the Borough of Union Beach pending before the Commissioner of Education of New Jersey and leave the appellant and the Commissioner to their own proofs."

The report of the hearing examiner is as follows:

The Board offered supporting testimony for each of the items cut by Council which reduced its budget by a total of $47,850.

Account No.	Item	Budgeted By Board	Proposed By Council	Reduction
J130b	Bd. Secy's. Off. Exp.	$ 600.00	$ 200.00	$ 400.00
J130f	Supt's. Expense	500.00	- 0 -	500.00
J130n	Misc. Expense for Admin.	300.00	100.00	200.00
J213	Tchrs. Salaries	506,040.00	497,540.00	8,500.00
J230c	A.V. Materials	4,448.72	2,448.72	2,000.00
J250b	Travel Expense	200.00	50.00	150.00
J420a	Supp. for Health Serv.	1,150.00	650.00	500.00
J510a	Sal.-Trans. Coord.	6,150.00	4,350.00	1,800.00
J550	Trans. Maint.	11,000.00	9,000.00	2,000.00
J620	Contracted Serv. for Care of Grounds	1,800.00	- 0 -	1,800.00
J720a	Contracted Serv. for Upkeep of Grounds	5,000.00	4,000.00	1,000.00
J730a	Replace. of Instruct. Equip.	1,500.00	1,000.00	500.00
J730b	Replace. of Non-Ins. Equip.	2,242.00	1,742.00	500.00
J740b	Other Exp. for Repair of Bldg.	1,000.00	500.00	500.00
J870	Tuition	522,750.00	497,750.00	25,000.00
J930	Expend. to Cover Deficit	1,000.00	500.00	500.00
J1010	Sals.-Coaches	2,000.00	1,000.00	1,000.00
J1020	Stu. Body Activ.	2,000.00	1,000.00	1,000.00
	TOTALS	$1,069,680.72	$1,021,830.72	$47,850

In account No. J870, Tuition, the Board was unable to give sound supporting evidence for a projected enrollment increase of 20 students at $950 each. The hearing examiner finds that a more reasonable projection here, based on past experience by the Board, would be ten additional students and recommends that reduction of $9,500 be made in this account.

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On all other items, the Board gave credible supporting testimony which was not contested at the hearing by Council.

Council was directed by the Assistant Commissioner to file an answer to the Board petition pursuant to the ruling by the New Jersey Supreme Court in the case of *East Brunswick Board of Education v. East Brunswick Township Council*, 48 *N.J.* 94 (1966), setting forth the governing body's underlying determinations and supporting reasons for its action to reduce the budget of the Board of Education, Council chose not to follow this Court-established procedure. Therefore, the hearing examiner recommends that the remaining budget items be approved as proposed by the Board

*   *   *   *

The Commissioner has read the report of the hearing examiner and concurs with his findings and conclusions.

It is well established that Council's budget cuts may not be arbitrary, but must be supported by underlying determinations for its actions. See *East Brunswick, supra; Board of Education of the Borough of Haledon v. Mayor and Council of the Borough of Haledon*, decided February 13, 1970; also *Board of Education of the Borough of National Park v. Borough of National Park and the Gloucester County Board of Taxation*, 1968 *S.L.D.* 135.

Absent any reasons for Council's cut in the Board budget or argument for its cuts to be sustained, the Commissioner determines that the balance of the budget will be restored as proposed. The Commissioner orders, therefore, that $38,350 of the $47,850 cut by Council be restored to the school budget for current expense purposes for the school year 1970-71 and that Council certify this additional amount to the Monmouth County Board of Taxation to be added to the tax levy for the school district.

COMMISSIONER OF EDUCATION

August 5, 1970

You are viewing an archived copy from the New Jersey State Library.

Board of Education of Caldwell-West Caldwell,

Petitioner,

v.

Mayor and Council of the Borough of Caldwell and Mayor and Council of the Borough of West Caldwell, Essex County,

Respondents.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Harold M. Kain, Esq.

For the Respondent Borough of Caldwell, Julius Y. Krill, Esq.

For the Respondent Borough of West Caldwell, John J. McDonough, Esq.

Petitioner has appealed to the Commissioner of Education from an action of the respondents reducing the monies to be raised by local taxation to operate the schools of the district for the school years 1970-71 by an amount of $345,000 below the amount proposed by petitioner in its budget. Petitioner contends that the respondents' action in reducing these funds would severely interfere with the thorough and efficient instruction of the school district's students. The respondents deny that the budget reductions will interfere with the thorough and efficient instruction of students but indicate that "necessity," and not "desirability," should be used in the evaluation of each budget item. The respondents point out that the reductions were made only after much inquiry and study.

A hearing on the petition of appeal was conducted on June 11, 1970, at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner of Education. Exhibits prepared by the petitioner, hereinafter "Board," were received in evidence prior to the hearing. A written statement of the reasons underlying each of the recommended economies was submitted at the hearing by respondents, hereinafter "Councils." The report of the hearing examiner is as follows:

At the annual school election on February 10, 1970, the voters rejected the Board's proposal to raise $4,604,959 by local taxes for current expenses and $124,952 for capital outlay. The budget was then sent to Councils for their determination of the amount of local tax funds required to maintain a thorough and efficient school system.

After a review of the budget and consultation with the Board, Councils made their determinations and certified to the Essex County Board of Taxation the amount of $4,384,883 for current expenses and no amount for capital

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outlay for 1970-71. The pertinent amounts may be shown as follows:

	Current Expense	Capital Outlay	Total
Board's Proposal	$4,604,959	$124,952	$4,729,911
Councils' Certification	4,384,883	- 0 -	4,384,883
Reduction	$ 220,076	$124,952	$ 345,028

As part of their determination, Councils suggested items of the budget in which they believed economies could be effected without harm to the educational program as follows:

Account No.	Item	Board's Budget	Councils' Proposal	Amount Reduced
J110	Salaries-Board Secretary's Office	$ 165,000	$ 145,530	$ 19,470
J211	Salaries-Principals & Vice Principals	250,150	230,780	19,370
J213	Salaries-Teachers, Clerks, Aides	3,541,628	3,475,373	66,255
J610	Salaries-Custodians	290,061	283,783	6,278
	Sub-total Reduction-Salaries			$111,373
	OTHER EXPENSE			
J120	Contracted Services	$ 12,550	$ 10,241	$ 2,309
J130A	Board Expense	2,260	1,897	363
J130B	Board Secretary & Expense	4,074	3,708	366
J130F	Superintendent Expense	5,725	5,120	605
J130G	Research & Expense	1,700	- 0 -	1,700
J130L	Personnel Office Expense	890	490	400
J130M	Printing Exp.	4,760	4,138	622
J220	Texts	41,992	41,088	904
J230A	Library Books	31,275	30,464	811
J230B	Library Periodicals	6,459	6,364	95
J230C	A.V. Materials	16,700	13,801	2,899
J230E	Other Library Expense	4,551	- 0 -	4,551
J250B	Travel for Instruction	7,900	7,315	585
J420A	Medical Expense	2,692	1,915	777

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J420B	Other Expense, Medical	2,375	2,194	181
J520A	Contr. Serv-ices-Trans.	96,612	78,830	17,782
J520B	Public Carrier Trans.	12,750	8,882	3,868
J520C	Field Trips	800	366	434
J640	Utilities	58,630	57,642	988
J640	T. & T. Utilities	21,800	16,720	5,080
J650	Supplies-Plant	22,000	21,642	358
J720A,B	Maintenance	109,136	79,877	29,259
J820	Insurance	94,798	85,142	9,656
J830A	Room Rental	14,400		14,400
J1000	Student Activities	66,313	64,303	2,010
J-6200	Summer School	7,700		7,700
	Sub-Total Reductions-Other Expense			$108,703
	CAPITAL OUTLAY			
1200	Capital Outlay	$124,952	--	$124,952

The testimony shows that at the conference of parties held prior to the hearing of June 11 referred to, *ante* the Board had agreed to reductions of $61,051 in Current Expense and $10,900 in Capital Outlay. However, in the opinion of Councils, these reductions were not sufficient and no agreeable compromise could be worked out. Subsequently, the Board appealed all of the reductions established by Councils. Therefore, the hearing examiner must consider each of the items proposed for reduction by Councils. The consideration is based on the order of the items grouped by Councils and attached as schedules to its resolution to the Essex County Tax Board, dated March 12, 1970. The order of consideration, with amounts of reduction, is:

a. Salaries
b. Other Current Expense
c. Capital Outlay

Testimony was offered by the Superintendent of Schools and the President of the Board supporting the Board's contention that its proposed budget appropriations are necessary for a thorough and efficient program of education in the schools of Caldwell and West Caldwell. Comments as to Councils' procedures and reasons in making their determinations or recommendations were given and questions were asked by the Mayor of each of the municipalities.

The findings and recommendations of the hearing examiner with respect to each of the contended reductions are as follows:

Salaries-Secretary Business Manager (110B); Ass't. Secretary, Business Manager (110B); Superintendent of Schools (110F); Ass't. Superintendent of Schools

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(110F); Director of Special Services; Sup't. of Buildings and Grounds (710); Adm. Ass't. to Sup't. (213.1); Director of Continuing Education (J-4110)

Councils' recommendation for reductions from the Board's allocation in the above-listed accounts totaled $19,470, including complete elimination of the budgeted amount of $16,800 for a Director of Continuing Education. Councils state that they are of the opinion that this "is a new position," and "should be entirely eliminated." Testimony and documentation by the Board show that the position was created during the 1968-69 school year and that two-thirds of the salary is reimbursable. It may not be summarily cut out, therefore, by Councils' action. The remaining sum of $2,670 in contention in this account is for salary increments for existing personnel.

It was the testimony of the Superintendent of Schools and the Board President that, pursuant to *Chapter* 303, *Laws* of 1968, the Board had negotiated at length and reached an agreement with its administrative staff to provide the increments budgeted for these positions. The Councils proposed to substitute a 10% increase over present salaries for administrative personnel. Since it is the Board's prerogative and obligation to negotiate in good faith and to establish salaries under the terms of *N.J.S.A.* 18A:29-4.1, and, since the Board did this in this instance, its determination must be given effect and the reduction of Councils must be set aside. The hearing examiner therefore recommends that the whole amount of the reduction be restored in these administrative accounts.

Summary	Proposed Reduction	$19,470
	Amount Restored	19,470
	Amount not Restored	- 0 -

Salaries - Principal - (211) High School Vice-Principal (213.1) Jr. High School Vice-Principal (214B)

Councils proposed the same 10% increment for all 12 staff members in these accounts in lieu of the Board's negotiated schedule for administrators referred to, *ante*. Such a substitution would result in the proposed reduction of $19,370. For the same reasons the hearing examiner recommends that the reduction be set aside.

Summary	Proposed Reduction	$19,370
	Amount Restored	19,370
	Amount not Restored	- 0 -

213.1 - Salaries - Teachers, Clerks (213A), Aides (215)

Councils propose the elimination of ten positions in these salary accounts, as follows, at a saving of $66,255:

a. Six new teachers	$46,800
b. One new librarian	10,150

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c. Two clerks	7,305
d. One aide	2,000
	$66,255

a. It is the testimony of the Board that 7.2 new teachers were budgeted for the 1970-71 year and that two of these teachers were to be assigned to rented quarters in the new Lincoln School in mid-year when it is to be ready for occupancy. Councils argue that the population of the district is scheduled to increase by only six students, and that, since the date of the completion of the new facility is mere conjecture at this point, the Board can "get along" this year without an increase in staff in view of other large budget increases.

Other new teachers were budgeted by the Board to teach:

1. A class for the neurologically impaired.
2. A driver education teacher.
3. A gym-driver ed. teacher.
4. A teacher of music (one-half).
5. A teacher of German-Math (one-half).
6. A speech correctionist.

After review of the testimony and of the enrollment figures for classes in driver education, gym, and speech, it is the conclusion of the hearing examiner that new positions budgeted for German-Math, Music (3/5), gym-driver education (combination) may be eliminated at a saving of $23,600.

The hearing examiner finds that $23,200 must be restored for other new teachers in this account.

b. The Board made no defense of the retention of this position, and, prior to the hearing, had offered to eliminate it if a compromise budget could be worked out with Councils. The hearing examiner recommends that Councils' reduction of $10,150 be upheld.

c. and d. No defense was offered by the Board. It is recommended that these positions be deleted at a saving of $9,305.

Summary	Reduction by Council	$66,255
	Amount Restored	23,200
	Amount not Restored	43,055

610 - Salaries - Custodians

Councils propose to eliminate a new position of custodian for the Lincoln School addition because of its contention that the facility will not be ready to be used this year. There is no contention that the position will not be needed once the new building is in operation. Because of the architect's opinion in written form, and in oral form as late as June 8, 1970, that the building addition

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will be ready for occupancy between November 1 and January 1, 1970, it is the recommendation of the hearing examiner that $3,139 of the $6,278 reduction made by Councils be restored for salary for a custodian for one half of a year.

Summary	Reduction by Council	$ 6,278
	Amount Restored	3,139
	Amount not Restored	3,139

Sub-total Reductions - Salaries		
	Proposed Reduction by Councils	$111,373
	Amount Restored	65,179
	Amount not Restored	46,194

120 - Contracted Services

The Board had proposed an increase of $2,750 in this account to $12,550 for the 1970-71 school year. The principal element of the increase was a fee for consultants to aid the Board in the process of negotiation pursuant to its obligations under the terms of *Chapter* 303, *Laws* of 1968. The Councils propose a flat 4.5% cost increase over present 1969-70 expenses of $9,800 in this account. The hearing examiner determines that the Board's increase in this account is a reasonable one consistent with new obligations and that all of the cut must be restored.

Summary	Reduction by Councils	$2,300
	Amount Restored	2,300
	Amount not Restored	0

230C - Audio Visual Materials

The Board spent $37,193.85 for Libraries and Audio-Visual Materials in the 1968-69 school year, appropriated $51,884 for 1969-70, and proposed to spend $58,985 in 1970-71. The Councils cut $2,899 of this amount from funds specifically allocated for Audio-Visual Materials, but with no testimony as to how such a cut should be made. The Board's testimony is that $2,400 of the funds are for equipping the new Lincoln School addition and other funds are needed for A.V. materials in new curriculum areas. The hearing examiner recommends that $1,000 of the cut be restored to provide for some essential equipment to implement the opening of the new addition in mid-year, but that in view of the large increases in this account in a two-year period, the balance of the cut be sustained.

Summary	Reduction by Council	$2,899
	Amount Restored	1,000
	Amount not Restored	1,099

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230E - Other Library Expenses

The Board's testimony is that Councils mistakenly assumed this was a new account totaling $4,551, but that, in fact, $3,435 was budgeted for the 1969-70 school year. There is no testimony by the Board as to the reasons for an increase of more than $1,100, or that the past year's expenditures were inadequate. In the absence of such testimony, and because of recent large increases in the library account without a parallel increase of students, the hearing officer recommends that the line item of $3,435 be maintained for a second year.

Summary	Reduction by Councils	$4,551
	Amount Restored	3,435
	Amount not Restored	1,116

520 A, B, C - Transportation

The total budget of the Board for transportation services for the 1970-71 school year was $110,162, an increase of approximately 30% over the $84,285 budgeted during the 1969-70 school year. Councils propose to limit the increase to 4.5% over the 1969-70 year expenditures. The Board's testimony included the necessity to meet increasing mandated costs for special education and higher contracted costs from transportation companies. Councils gave no testimony supporting the reasonableness of their cut of the budget items to $88,078.

Part of the transportation expense for the district has, for many years, been for transportation of children who do not live remote from the school. In the most recent year for which figures are available, 1968-69, the total dollar amount for such transportation was $11,070. This expenditure, in the absence of voter approval of the school appropriations, cannot be held to be essential and subject to reinstatement in the appropriations. Therefore, it is recommended that the cut of Councils be sustained in this amount but that the balance of the cut be restored to provide mandated transportation costs.

Summary	Reduction by Councils	$22,084
	Amount Restored	11,014
	Amount not Restored	11,070

640 - Utilities

Councils reduced the total appropriation in this account by $6,065 from the original amount proposed by the Board, and it is Councils' testimony that the remaining sum will, by providing the 1969-70 appropriations, plus 4.5% increase for costs, be sufficient. It is also Councils' feeling that the increase in utility costs, budgeted for the expected opening of the Lincoln School, will not be increased because Councils do not expect the addition to open. A review of the expenditures of the district for utilities in the 1968-69 school year shows that the Board budgeted $65,044 but had actual expenditures of $68,902.22.

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The budget of $71,160 for the 1969-70 school year represents, according to the Board, an attempt "to bring budget appropriations in line with actual expenditures." Assuming that the present 1969-70 budget is realistic, and it appears as though it is, the hearing examiner recommends that it be retained and that the total amount of $2,075 be added to it to provide for the addition of the Lincoln School.

Summary	Reduction by Councils	$6,068
	Amount Restored	2,075
	Amount not Restored	3,993

720 A, 730B, 740A, B - Maintenance of Plant

The Board budgeted $233,392 in these accounts to provide for net increased expenditure totaling $9,790 for the 1970-71 school year when compared with the budget for the 1969-70 school year and after negotiated salary increases have been included. The Board maintains that this total amount is needed to prevent deterioration in plant that will require a larger expenditure of funds in the future. Councils' cut of $29,394 in the 700 account is not detailed in any respect except that salary increments are limited to a 10% increase over those paid during the 1969-70 school year. At the conference prior to the hearing, the Board had indicated that work on tennis courts ($7,200) was not considered essential and that replacement of non-instructional equipment ($2,864), and other supplies for maintenance ($1,321), might be deferred. The hearing examiner, therefore, recommends that the cuts be limited to these items totaling $14,085 and finds, because of testimony of the Board and because of lack of any evidence to the contrary by Councils, that $3,000 must be restored as essential in this account.

Summary	Reduction by Councils	$29,259
	Amount Restored	15,114
	Amount not Restored	14,085

820 - Insurance

The amount budgeted by the Board in this account was $94,798 and according to the testimony of the Board, this amount is necessary because the total "is based on premium cost estimates submitted by the insurance carriers, as well as the estimated cost of employee health insurance premiums for family coverage" in accordance with a negotiated agreement. The Councils reduced the amount to the 1969-70 appropriation, plus 20% increase. The hearing examiner cannot agree that the cut of $9,656.00 has any justification and finds that it must be restored as essential to meet statutory requirements.

Summary	Reduction by Councils	$9,656
	Amount Restored	9,656
	Amount not Restored	- 0 -

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830A - Room Rental

Councils have cut this $14,400 item in its entirety and argue that the schools should not redistrict in September, thereby obviating the need for room rental, in anticipation of the opening of a new addition to the Lincoln School in mid-year. At most, Councils say, the school's opening date is a "guesstimate," and redistricting can well be postponed until September of 1971. The Board's testimony at the hearing and in document form is that the school addition will be ready at the mid-year, and that the rental of rooms on an interim basis is the only practical way to keep class sizes within reasonable limits for the Fall months, while adjusting to the new addition construction.

The hearing officer finds the Board's plan of redistricting to be commendable. He observes that many months ago the voters approved expenditures that made the new structure, and redistricting, possible, and that such a change in class alignment might best be effectuated in September rather than in mid-year. Admittedly, construction completion dates are often delayed, but the Board's decision to procede with original plans is based on architect's and builder's advice, and is a reasonable exercise of Board discretion in response to the expressed will of the people for new facilities. The hearing examiner, therefore, recommends that the full amount of this cut be restored.

Summary	Reduction by Council	$14,400
	Amount Restored	14,400
	Amount not Restored	- 0 -

J-6200 - Summer School

There were no appropriations for a Summer School Program in this district in previous years, although a Summer School had been held on a self-sustaining basis. This year the Board proposed to reimburse the Summer School account by a total of $7,700 because of an anticipated deficit which is expected to arise because total expenses are estimated at $26,750, while tuition is projected at only $19,050. There was no testimony in written or oral form by the Board of Education in justification for the proposal to move from a self-sustaining to a subsidized Summer School. On the other hand, Councils maintain that the program should remain on a self-sustaining basis and all subsidy eliminated. The hearing officer finds that this item has not been proved as essential for the maintenance of a thorough and efficient system of education and recommends that the discretion of Councils, exercised as a result of the vote of the people, be upheld.

Summary	Reduction by Council	$7,700
	Amount Restored	-0-
	Amount not Restored	7,700

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Other Accounts –

		Cut
J130	Board Expense	$ 363
J130B	Board Secretary Expense	366
J130F	Superintendent's Expense	605
J130G	Research Expense	1,700
J130L	Personnel Office Expense	400
J130M	Printing Expense	622
J220	Texts	904
J230A	Library Books	811
J230B	Periodicals	95
J250B	Travel	585
J420A	Medical Expense	777
J420B	Other Medical Expense	181
J650	Supplies - Plant	358
J1000	Student Activities	2,010
		$9,777

The hearing examiner does not find it necessary to examine the merits of each of these cuts, many of them very minor, made by Councils from budget items which, in total will still represent significant increased appropriations over the 1969-70 fiscal year. By the Board's own admission, at the prehearing conference, there is funding for much of these expenditures from other accounts not cut by Councils, i.e., 730B ($2864) and 740A, B ($1321). The Board had also agreed at the conference of the parties that the expenditure of $2010 in account 1000 for student activities might be deferred without harm to the system.

Summary		
	Reduction by Councils	$9777
	Amount Restored	0
	Amount not Restored	9777
	Sub-Total Reduction – Other Expense	
	Proposed Reduction by Council	$108,703
	Amount Restored	59,063
	Amount not Restored	49,640

1200 – Capital Outlay

The Board budgeted a total of $124,952 in Capital Outlay funds for school year 1970-71, with the delineation of this amount itemized by building and totaling as follows:

Remodeling work	$ 61,847
Professional fees	1,200
Improvement – sites	11,491
Equipment	50,414
	$124,952

The Councils cut out the whole appropriation as "non-essential."

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While maintaining at the hearing of June 1970, that all expenditures were essential, the Board had previously agreed to a reduction of Capital Expenditures totaling $10,900, if an agreement on the whole budget could be made with Councils. However, the Board particularly emphasizes the need for an appropriation of $42,037 "for the modification of existing incinerators and acquisition of two new incinerators for control and prohibition of air pollution as required by *Chapter 11* of the *New Jersey Air Pollution Control Code.*" (From written testimony of the Board)

Much of the other testimony on Capital Expenditures by both parties is concerned with the actual status of funds presently available to the Board, which may be available to finance Capital projects. The Board maintains that all funds currently in escrow accounts are specifically allocated as the result of the votes of the people. The Councils maintain that these funds may be reallocated by a simple resolution of the Board, and that they should be used at this time if any of the items of Capital Expenditures are, in fact, necessary.

It is evident to the hearing examiner that a total of at least $44,300 is available for transfer at the discretion of the Board. This sum is comprised of $6,400 in uncommitted funds, $7,900 received from insurance for floor damage and not needed or allocated to this date, and $30,000 for an anticipated connection with Grove Street, which Councils state categorically will not be needed because Councils' funding of this project is a necessary preliminary to an expenditure by the Board, and it will not be funded.

It is the finding of the hearing examiner that the following items are necessary expenditures for Capital Outlay in the 1970-71 school year:

Item	Amount
Incinerator repair and replacement	$42,037
Professional fees to properly plan for correction of damage from water overflow	1,500
Equipment for instruction	15,000
	$58,537

He further determines that a further sum in excess of $40,000 is available to the Board for expenditures as a Capital Outlay, any may be used according to priorities of need established by the Board.

Summary		
	Reduction by Councils	$124,952
	Amount Restored	58,537
	Amount not Restored	66,415

The recommendations of the hearing examiner are summarized in the following table:

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Account Number	Item	Amt. of Cut Proposed	Amount Restored	Amount Not Restored
J110	Salaries-Bd. Sec.	$ 19,470	$ 19,470	$ 0
J211	Salaries-Prins.	19,370	19,370	0
J213	Salaries-Tchrs.	66,255	23,200	43,055
J610	Salaries-Custodians	6,278	3,139	3,139
	Sub-Total	$111,373	$ 65,179	$ 46,194
J120	Contracted Services	$ 2,309	$ 2,309	$ 0
J130A	Bd. Expense	363	0	363
J130B	Bd. Sec'y. Exp.	366	0	366
J130F	Supt. Exp.	605	0	605
J130G	Research Exp.	1,700	0	1,700
J130L	Personnel Office	400	0	400
J130M	Printing	622	0	622
J220	Texts	904	0	904
J230A	Library Books	811	0	811
J230B	Library Periodicals	95	0	95
J230C	A.V. Materials	2,899	1,000	1,899
J230E	Library Exp.	4,551	3,435	1,116
J250B	Travel-Instruction	585	0	585
J420A	Medical Exp.	777	0	777
J420B	Other Medical	181	0	181
J520A,B,C	Transportation	22,084	11,014	11,070
J640	Utilities	6,068	2,075	3,993
J650	Supplies-Plant	358	0	358
J720A,B	Maintenance	29,259	15,174	14,085
J820	Insurance	9,656	9,656	0
J830A	Rental	14,400	14,400	0
J1000	Student Activs.	2,010	0	2,010
J-6-200	Summer School	7,700	0	7,700
	Sub-Total	$108,703	$ 59,063	$ 49,640
	Total Current Exp.	$220,076	$124,242	$ 95,834
1200	Capital Outlay	$124,952	$ 58,537	$ 66,415
	GRAND TOTAL	$345,028	$182,779	$162,249

* * * *

The Commissioner has reviewed the findings and recommendations set forth herein. He observes that few of the restorations recommended are to provide for additional personnel or new services except those restored to adequately provide for redistricting of the schools in September with a subsequent move to a new school facility in mid-year. He observes, too, that the cut of Councils in the transportation account has been reduced by the hearing examiner to an amount equal to that spent by taxpayers of the district for the transportation of non-remote pupils. While the Commissioner has no objection to the Board's policy which provided such transportation in the past, the policy is not mandatory and, in the absence of voter approval of school appropriations, cannot be held to be essential and subject to reinstatement in the appropriations.

The Commissioner concurs with the recommendations of the hearing examiner and finds and determines that an amount of $124,242 for Current Expenses and $58,537 for Capitol Outlay for a total of $182,779 must be added

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to the amount previously certified by the Mayors and Councils of the Caldwell-West Caldwell School District in order to provide sufficient funds to maintain a thorough and efficient school system. He therefore directs the Mayors and Councils of the two constituent municipalities of the Caldwell-West Caldwell School District to add to the previous certification to the Essex County Board of Taxation the sum of $124,242 for Current Expense, for a new total of $4,509,125 for Current Expenses, and $58,537 for Capital Outlay, for a total of $58,537 for Capital Outlay, for expenses of the Caldwell-West Caldwell school district for the 1970-71 school year.

COMMISSIONER OF EDUCATION

August 6, 1970

Board of Education of the Township of Madison,

Petitioner,

v.

Mayor and Council of the Township of Madison, Middlesex County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Wilentz, Goldman & Spitzer (Harold G. Smith, Esq., of Counsel)

For the Respondent, Richard F. Plechner, Esq.

Petitioner, hereinafter "Board," appeals from the action of respondent, hereinafter "Council," taken pursuant to *N.J.S.A.* 18A: 22-37, certifying to the County Board of Taxation a lesser amount of appropriations for school purposes for the 1970-71 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were educed at a hearing conducted on July 2, 1970, at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner.

At the annual school election on February 10, 1970, the voters rejected the Board's proposals to raise $9,149,097 by local taxes for current expenses and $329,300 for capital expenditures. The budget was then sent to Council, pursuant to *N.J.S.A.* 18A:22-37 for its determination of the amount of local tax funds required to maintain a thorough and efficient local school system.

After consultation with the Board and a review of the budget, Council

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made its determination and certified to the Middlesex County Board of Taxation an amount of $8,680,555 for current expenses and $309,300 for capital outlay. The pertinent amounts may be shown as follows:

	Current Expense	Capital Outlay	Total
Board's Proposal	$9,149,097	$329,300	$9,478,397
Council's Certification	8,680,555	309,300	8,989,855
Reduction	$ 468,542	$ 20,000	$ 488,542

The Board makes no charge that Council acted without consideration of the needs of the school system, but does contend that the amount Council certified is insufficient to provide a thorough and efficient system of education for pupils in the school district. The Board appeals to the Commissioner to restore the funds deleted by Council.

As part of its determination, Council suggested items of the budget in which it believed economies could be effected without harm to the educational program as follows:

Current Expense Account	Item	Budgeted By Board	Suggested By Council	Reduction
J110.02	Sal.-Bd. Secy's. Office	$ 118,470	$ 108,470	$ 10,000
J120.02	Legal Fees	10,000	7,200	2,800
J120.04	Other Contr. Serv.	11,000	6,000	5,000
J130.10	Adm. of Bldgs. & Grounds	800	600	200
J130.14	Misc. Exp.-Adm.	7,000	5,000	2,000
J211	Sal.-Principals	406,728	396,728	10,000
J212.01	Sal.-Supvr. of Instr.	27,000	22,000	5,000
J213.01	Regular Tchrs.-Sal.	6,474,859	6,332,859	142,000
J213.01a	Sal.-Sub. Tchrs.	135,000	120,000	15,000
J214.01	Sal.-School Librs.	170,231	160,231	10,000
J214.02	Sal.-Guidance Pers.	268,398	258,398	10,000
J215.01	Sal.-Secy's.-Princ. Office	180,910	170,910	10,000
J215.02	Sal.-Secy's.- Suprvr's. Office	5,000	- 0 -	5,000
J215.03	Sal.-Secy's.-Other	145,840	125,840	20,000
J216	Sal.-Other Instr. Personnel	78,000	53,000	25,000
J230.03	A.V. Materials	36,284	32,000	4,284
J240.01	Instr. Supplies	255,130	235,130	20,000
J250.01	Misc. Supp.-Instr.	41,536	37,549	3,987
J250.02	Travel Exp.-Instr.	9,000	7,500	1,500
J310.02	Sal.-Attend. Clerks	27,840	23,340	4,500
J410.01	Sal.-Drs. & Psychiatrists	18,000	17,000	1,000
J410.03	Sal.-School Nurses	169,625	153,625	16,000
J510.02	Sal.-Pupil Transp.	128,360	115,560	12,800
J520.03	Co-Curr. Activs.	35,000	30,000	5,000

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J550.01	Gasoline-Pupil Transp.	12,980	11,980	1,000
J550.04	Repair Parts	5,000	4,000	1,000
J550.05	Garage Operation	3,500	2,500	1,000
J550.06	Maint.-Vehicles	2,000	1,500	500
J550.07	Rental-Transp. Equip.	2,500	1,500	1,000
J550.08	Misc. Exp.- Pupil Transp.	800	600	200
J610.01	Sal-Custodial Serv.	614,840	602,840	12,000
J610.02	Sal.-Care of Grnds.	66,140	54,140	12,000
J640	Utilities-Except Heat	214,420	205,420	9,000
J650	Supplies-Operation	55,185	50,185	5,000
J710	Sal.-Maintenance	70,600	55,600	15,000
J720	Contr. Serv.-Maint.	81,125	77,625	3,500
J730	Equip.-Replacement	20,005	17,000	3,005
J740	Other Exp.-Maint. of Plant	37,060	33,000	4,060
J810	Retirement Funds	202,465	190,000	12,465
J820	Insur. & Judgments	308,215	298,215	10,000
J830.01	Rental-Land & Bldgs.	30,450	27,450	3,000
J1020.01	Student Body Activities	80,000	77,759	2,241
J1030.01	Exp. to Cover Deficits	7,500	6,000	1,500
J1110	Community Services	50,000	20,000	30,000
	Sub-Total-Current Expense	$10,624,796	$10,156,254	$468,542
	CAPITAL OUTLAY			
L1230	Buildings	40,000	35,000	5,000
L1240.03a	A.V. Equip.	61,100	46,100	15,000
	Sub-Total-Capital Outlay	$101,100	$81,100	$20,000
	TOTAL	$10,725,896	$10,237,354	$488,542

There was agreement on the following items at the hearing:

J120.02 - Legal Fees

Counsel stipulated the original figure of $10,000 proposed by the Board as reasonable. The hearing examiner therefore recommends the restoration of $2,800 in this account.

J410.01 - Doctors and Psychiatrists

Counsel stipulate the $1,000 reduction in this item as reasonable, and the hearing examiner so recommends.

J1110 - Community Services

Council withdrew its cut of $30,000 in this account. The hearing examiner recommends therefore that this amount be restored.

L1230 - Buildings

The Board accepted Council's cut of $5,000 in this account. The hearing examiner recommends that this agreement between the parties be approved.

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The Board testified that it expects an estimated 700 additional students for the 1970-71 school year, and its records show more than a 700-pupil increase per year for the last six years. The Board avers that this phenomenal growth is responsible in part for some of its budget increases. Additional professional and non-professional personnel because of the large pupil increases and negotiated agreements with the recognized employee associations also account for sizeable budget increases on the grounds of competitive necessity.

The Commissioner noted in *Board of Education of the Township of Madison v. Mayor and Council of the Township of Madison*, 1968 *S.L.D.* at p. 142:

> "From his study of this matter the Commissioner concludes that at least part of the reduction made by Council resulted from insufficient and incorrect information. In the Commissioner's judgment the total amount eliminated is excessive and the appropriations as certified will not permit the operation of a thorough and efficient program of education in the school district.
>
> There appears no necessity to deal seriatim with each of the areas in which Council recommended reduced expenditures. The problem is one of total revenues available to meet the demands of a school system which has experienced phenomenal growth. The Commissioner will indicate, however, the areas where he believes all or part of Council's reductions should be reinstated. It must be emphasized, however, that the Board is not bound to effect its economies in the indicated items but may adjust its expenditures in the exercise of its discretion as needs develop and circumstances alter."

The growth pattern in Madison remains very similar today, and the Board noted that the Township moratorium on new housing has been lifted so that even greater pupil additions will be experienced in the future. Council does not deny the lifting of the above-mentioned moratorium, but avere that new housing will not be completed and occupied in time to further affect pupil additions to the school system.

The Commissioner has carefully considered the total budget requests of the Board, the funds available to it, and the economies suggested by Council.

The Commissioner recommends the restoration of the following amounts curtailed by Council so that the Board is adequately funded to operate a thorough and efficient school program for the 1970-71 school year:

Account		Reduction By Council	Amount To Be Reinstated
J110.02	Sal.-Bd. Secy's Off.	$ 10,000	$ 5,450

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J120.02	Legal Fees	2,800	2,800
J120.04	Other Contr. Serv.	5,000	5,000
J130.10	Adm. of Bldgs. & Grnds.	200	- 0 -
J130.14	Misc. Exp.-Adm.	2,000	500
J211	Sal.-Principals	10,000	6,442
J212.01	Sal.-Supvr. of Instr.	5,000	- 0 -
J213.01	Sal.-Regular Tchrs.	142,000	142,000
J213.01a	Sal.-Sub. Tchrs.	15,000	15,000
J214.01	Sal.-School Librs.	10,000	6,344
J214.02	Sal.-Guidance Pers.	10,000	10,000
J215.01	Sal.-Secy's.- Prin's Off.	10,000	5,000
J215.02	Sal.-Secy's. Supvr's. Off.	5,000	- 0 -
J215.03	Sal.-Secy's-Other	20,000	8,500
J216	Sal.-Other Instr.Pers.	25,000	3,000
J230.03	A.V. Materials	4,284	- 0 -
J240.01	Instr. Supplies	20,000	5,000
J250.01	Misc. Supplies-Instr.	3,987	- 0 -
J250.02	Travel Exp.-Instr.	1,500	500
J310.02	Sal.-Attend. Clerks	4,500	3,500
J410.01	Sal.-Drs. & Psychiatrists	1,000	- 0 -
J410.03	Sal.-School Nurses	16,000	8,000
J510.02	Sal.-Pupil Transportation	12,800	7,800
J520.03	Co-Curr. Activities	5,000	- 0 -
J550.01	Gasoline- pupil Transp.	1,000	- 0 -
J550.04	Repair Parts & Supplies	1,000	1,000
J550.05	Garage Operation	1,000	800
J550.06	Maint.-Vehicles	500	500
J550.07	Rental-Transp.Equip.	1,000	1,000
J550.08	Misc. Exp.- Pupil Transp.	200	- 0 -
J610.01	Sal.-Custodial Serv.	12,000	9,000
J610.02	Sal.-Care of Grnds.	12,000	6,600
J640	Utilities-Except Heat	9,000	7,300
J650	Supplies-Operation	5,000	- 0 -
J710	Sal.-Maintenance	15,000	15,000
J720	Contr. Serv.-Maint.	3,500	- 0 -
J730	Equip.-Replacement	3,005	3,005
J740	Other Exp.-Maint. of Plant	4,060	4,060
J810	Retirement Funds	12,465	- 0 -
J820	Insur. & Judgments	10,000	- 0 -
J830	Rental-Land & Bldgs.	3,000	3,000
J1020.01	Student Body Activities	2,241	- 0 -
J1030.01	Exp. to Cover Deficits	1,500	- 0 -
J1110	Community Services	30,000	30,000
	Sub-Total-Current Expense	$468,542	$316,101
	CAPITAL OUTLAY		
L1230	Buildings	5,000	- 0 -
J1240.03a	A.V. Equipment	15,000	15,000
	Sub-Total Capital Outlay	$20,000	$15,000
	TOTAL	$488,542	$331,101

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In summary, the totals may be shown as follows:

	Current Expense	Capital Outlay	Total
Board's Budget	$9,149,097	$329,300	$9,478,397
Council's Certification	8,680,555	309,300	8,989,855
Amount of Reduction	$ 468,542	$ 20,000	$ 488,542
Amount Reinstated	316,101	15,000	331,101
Amount not Reinstated	152,441	5,000	157,441
Council's Certification	8,680,555	309,300	8,989,855
Amount Reinstated	316,101	15,000	331,101
Revised Appropriations	$8,996,656	$324,300	$9,320,956

The Commissioner finds and determines that the certification of the appropriations necessary for school purposes for 1970-71 made by Council is insufficient by an amount of $331,101 for the maintenance of a thorough and efficient system of public schools in the district. He directs, therefore, that there be added to the certification of appropriations for school purposes made by Council to the Middlesex County Board of Taxation, the sum of $316,101 for current expense and $15,000 for capital outlay, so that the total amount of the local tax levy for current expenses of the school district for the 1970-71 school year shall be $8,996,656 and for capital outlay $324,300.

COMMISSIONER OF EDUCATION

August 24, 1970

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Board of Education of the Township of Washington,

Petitioner,

v.

Township Committee of the Township of Washington, Gloucester County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Hyland, Davis & Reberkenny (Richard C. Schramm, Esq., of Counsel)

For the Respondent, Higgins and Trimble (John Trimble, Esq., of Counsel)

Petitioner has appealed to the Commissioner of Education from an action of respondent reducing the monies to be raised by local taxation to operate the schools of the district for the school year 1969-70 by an amount $196,300 below the amount proposed by petitioner in its budget. Petitioner contends that the sum appropriated will not provide funds sufficient for the operation of a thorough and efficient system of education in the district. Respondent denies that the cuts will be detrimental to a thorough and efficient school system, and asserts that its appropriation is sufficient to provide necessary school funds and is part of a total municipal budget compatible with the ability of the City taxpayers to carry the financial tax burden.

A hearing on the petition of appeal was conducted on May 25, 1970, at the State Department of Education, Trenton, before the Assistant Commissioner in charge of Controversies and Disputes.

At the annual school election held on February 10, 1970, the voters rejected the proposals of the Board of Education, hereinafter "Board," to raise $2,840,798 by local taxes for Current Expenses and $215,561 for Capital Expenditures. The budget was then sent to the Washington Township Committee, hereinafter "Committee," pursuent to *N.J.S.A.* 18A:22-37 for its determination of the amount of local tax funds required to maintain a thorough and efficient local school system. The Committee then met with the Board, and subsequently on March 5, 1970, made its determination, and certified to the Gloucester County Board of Taxation an amount of $2,649,498 for Current Expenses and $200,561 for Capital Outlay. The amounts may be shown as follows:

	Board's Budget	Committee's Certification	Reduction
Current Expenses	$2,840,798	$2,649,498	$191,300
Capital Outlay	215,561	200,561	15,000

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Petitioner does not contend that the Committee acted in an arbitrary or capricious manner but that the cuts will not insure a thorough and efficient system of education. The Committee contends the cuts are less than 4% of the total budget, and that this relatively small cut in a budget that was increased 35% over the budget for 1968-69 is not unreasonable.

Subsequent to the Committee's action detailed above, the Board authorized an appeal of $181,300 of the cuts in Current Expenses and of the total reduction of $15,000 in Capital Outlay. The Board did not appeal a cut of $10,000 from Account 510B, which was part of the total cut in Current Expenses of $191,300 listed, *ante*.

As part of its original determination, the Committee listed line items of the budget to be cut and suggested an amount to be appropriated from free balances remaining on June 30, 1969. It later amended the list of suggested cuts. The reductions proposed in the Committee's resolution of March 5, 1970, and subsequently amended are summarized as follows:

Account Number	Cut March 5	Current Expenses As Amended	
J213.1	$ 25,000	$ 50,000	
J213.3	12,000	20,000	
J214a	–0–	5,000	
J214b	27,000	30,000	
J215a	5,000	8,000	
J510	10,000	10,000	
J610a	10,000	10,000	(Not appealed)
J710a	8,300	8,300	
From Balances	94,000	50,000	
	$191,300	$191,300	Total Current Expenses
	15,000	15,000	Total Capital Outlay
	$206,300	$206,300	Total All Reductions
	$196,300	$196,300	Total Appealed

Testimony supporting the Board's contention that its proposed budget appropriations for each of the reduced items are necessary for the support of a thorough and efficient system of public schools was offered by the Superintendent of Schools and the School Business Manager. Testimony as to the Committee's reasons for the reductions it made was given by the Township Mayor and the Municipal Auditor. The findings and conclusions of the Commissioner are as follows with respect to the items at issue:

Item 1 – Unappropriated Balances

The Board reported a free unappropriated balance on June 30, 1969, of $157,818.92, but appropriated $38,000 of this amount to be used in the

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1969-70 school budget so that a balance of $119,818.92 was projected for July 1, 1970. From this, the Board maintains, another $40,393 must be subtracted as the result of a net budget deficit to be incurred in the current 1969-70 year. This deficit will develop, in the Board's view, from a shortage of $98,000 in revenue from impacted Federal Aid funds and a shortage of $26,393 in State Aid. Balancing this total revenue loss of $124,393 is an under-expenditure from line-item accounts of $84,000. From this net deficit of $40,393 during the 1969-70 school year, the Board thus projects a free appropriation balance in Current Expenses, as of July 1, 1970, of $79,425.92. The Board maintains that the budget situation is critical for school year 1970-71 because the extent of Federal and State Aid reductions from estimated revenue are likewise in doubt.

The Commissioner notes that in an appeal of budget cuts by this same Board of Education in school year 1968-69, it was the Board's contention that an appropriation from free balances of $53,000 would leave an estimated $20,860 on July 1, 1970. The Commissioner restored $15,000 to the Board in the decision that followed, which by the Board's estimate should produce a free balance on June 30, 1970, of $35,860. Instead, it is now estimated at $79,425.92 even without $124,000 in previously-expected revenue. From this study of all the data, the Commissioner concludes that the revised proposal of the Committee that an additional $50,000 be appropriated from free balance in Current Expenses for the 1969-70 school year is reasonable and must be given effect.

A free balance of $16,500 is projected by the Board in Capital Outlay for July 1, 1970, and the Committee appropriation of $15,000 from this balance would leave $1,500 in this account for the 1970-71 school year. The auditor testified that in his opinion this was not sufficient in a district of this size.

The Commissioner cannot agree. The total budget in the Capital Outlay account has risen from $87,724 in 1969-70 to $125,561 in school year 1970-71, and the testimony that the increase is necessary because of the insufficiency of a bond issue to equip a new school is no reason for the Commissioner to substitute his discretion in this matter for that of the Committee. He observes that a similar situation existed in *Board of Education of the Township of Madison v. Mayor and Council of the Township of Madison*, 1967 *S.L.D.* 227. In that case, the Commissioner said, at page 232:

"* * * It is obvious that in planning for new schools the proposal submitted to the people has been pared to the minimum amount required to erect the building, and the bond issue to be authorized has not included funds for all the equipment, site work, and other costs necessary to a complete project. The result is that these items are then placed in the annual school budget to be raised in a single year's tax levy rather than being spread over the life of a bond issue. The Commissioner has long questioned the wisdom of such a procedure. * * * The Commissioner believes such a policy to be unwise on two counts. The first is that it does not present a true picture to the electorate who are led to believe that they will be getting a completed school when they authorized the bond

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issue. The second is that it required the annual tax levy to bear the burden of an expenditure which, as a capital outlay, should be spread over a number of years. The result is that the current taxpayers bear the entire expense, and future taxpayers, who will use and share in the advantages of the improvement, are relieved of sharing in the costs."

The Commissioner directs, therefore, that this appropriation from free balances be made as determined by the Committee.

Summary: *Unappropriated Balances*	
Committee's proposal – Current Expense	$50,000
Committee's proposal – Capital Outlay	$15,000
Amounts restored	–0–

J213.1 – Salaries-Teachers

The Board proposes to add 43 teachers for the 1970-71 school year to staff a new school of 21 classrooms, to reduce some class size, and to provide an expanded physical education program by the employment of five teachers in the elementary schools of the district. Included in the overall total are also three new teachers for art and music. The total increase in student enrollment projected for the 1970-71 school year is approximately 650.

The Commissioner cannot find that all of these new positions are necessary for the maintenance of a thorough and efficient school system. An expanded five-teacher physical education program would be desirable, and an additional three teachers in art and music, when added to the four teachers in this field restored last year, would certainly enhance the curriculum; but these eight teachers alone represent a broadening of the total program at a cost of more than $60,000. In view of the budget defeat, the Commissioner must concur with the determination of the Committee.

Summary: *J213.1 – Salaries-Teachers*	
Committee's proposed reduction	$50,000
Amount restored	–0–

J213.3 – Salaries-Teachers

The Board's proposal for an increase of $23,130 for new personnel in this account is to cover the employment of another reading specialist and one and one-half music teachers. While part of the new employment is thought necessary because of the opening of the new Wedgewood Elementary School, one additional music teacher is proposed for work in the high school.

For the reasons given with regard to Account J213.1, the Commissioner is of the opinion that there are sufficient funds in these two accounts to provide a thorough and efficient instructional program. Even by the Board's own figures, there are still funds available for 35 new staff positions. In addition, for each of

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these 35 new positions the Board had budgeted $1,000 over the beginning salary payable in the district. Some of this money will almost certainly not be spent. There will also be an accrual of other funds in the teachers' salary accounts because of the lower cost replacement of teachers who may leave the system because of retirement or for other reasons.

Summary: *J213.3 – Salaries-Teachers*	
Committee's proposed reduction	$20,000
Amount restored	–0–

J214a – Salaries-Librarians

A total of two new librarians was proposed. One of these new positions was to be in the new Wedgewood School. The other position was to be that of a librarian "at large" to help with libraries in other elementary schools of the district.

The cut of $5,000 proposed by the Committee would eliminate funds for the new position of librarian "at large" but would still make it possible to staff and organize the library in the new school in a satisfactory manner. Therefore, the Commissioner will not substitute his judgment for that of the Committee.

Summary: *J214a – Salaries-Librarians*	
Committee's proposed reduction	$5,000
Amount restored	–0–

J214b – Guidance

The Board proposed to add five new guidance positions in the elementary grades of the district and thus inaugurate a new school service. The cost of these five new positions was estimated at $45,000 by the Board, and the Committee's cut of $30,000 would eliminate funds for at least three of the positions.

The Commissioner agrees that a guidance program is desirable in these days but notes that sufficient money has been left by the Committee to provide for at least one new guidance person for work in the elementary schools. He cannot agree that any further additions to the guidance personnel staff are essential, and, therefore, he concurs with the judgment of the Committee.

Summary: *214b – Guidance*	
Committee's proposed reduction	$30,000
Amount restored	–0–

J215a – Secretarial and Clerical Assistants

One new secretarial position for the new school is created in this budget account and is not contested. The Committee does contest $8,000 allocated for the equivalent of two full-time clerks for the other elementary schools and

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proposes that this amount be cut from the budget. The Commissioner concurs with the decision of the Committee.

Summary: *215a – Secretarial and Clerical Assistants*	
Committee's proposed reduction	$8,000
Amount restored	–0–

J610a – Custodial Services

The original budget adopted by the Board and the subsequent cut by the Committee were made before a new contract was ratified. The contract contains restrictions on the number of classrooms that may be cleaned by one man in one day, and salary raises for all employees. There is no budgeted provision for overtime which will almost certainly be needed. Therefore, the Commissioner concludes that all of the budgeted amount will be needed in this account, and he directs that it be restored.

Summary: *610a – Custodial Services*	
Committee's proposed reduction	$10,000
Amount restored	10,000

710a – Upkeep of Grounds

One new position is added in this account at a salary of $5,600 for a man to work on the grounds of the new building and to free other maintenance personnel from the need to cover such services. In view of the new contract referred to, *ante*, and the restriction it contains, the Commissioner regards this new position as necessary to the proper maintenance of the property of the district and directs that $5,600 be restored to this account.

Summary: *710a – Upkeep of Grounds*	
Committee's proposed reduction	$8,300
Amount restored	5,600

In summary, the determination of the Commissioner may be shown as follows:

Account Number	Item	Suggested Economy	Amount Restored	Amount Not Restored
From Unappropriated Balances		$ 50,000	$ –0–	$ 50,000
J213.1	Salaries-Teachers	50,000	–0–	50,000
J213.3	Salaries-Teachers	20,000	–0–	20,000
J214a	Salaries-Librarians	5,000	–0–	5,000
J214b	Salaries-Guidance	30,000	–0–	30,000
J215a	Salaries-Clerical	8,000	–0–	8,000
J510	Salaries-Bus drivers	10,000	–0–	10,000 (by pri
J610a	Salaries-Custodians	10,000	10,000	–0– agreem

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J710a	Upkeep of Grounds	8,300	5,600	2,700
Total Current Expenses		$191,300	$15,600	$175,700
Total Capital Outlay		15,000	–0–	15,000
Total All Items		$206,300	$15,600	$190,700

The Commissioner finds and determines that the amount certified by the Committee is insufficient to maintain a thorough and efficient system of public schools in Washington Township. He directs, therefore, that the sum of $15,600 for Current Expenses be added to the appropriations previously certified to the Gloucester County Board of Taxation by the Committee for the school purposes of the district for the 1969-70 school year.

COMMISSIONER OF EDUCATION

August 24, 1970

Ralph Dill,

Petitioner,

v.

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

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Abe Weitzman, Esq.

For the Respondent, Sevack and Posnock (Michael A. Posnock, Esq., of Counsel)

Petitioner, as a resident of the City of Linden and as President of the local unit of the National Association for the Advancement of Colored People, alleges that the Linden Board of Education maintains and fosters a racially segregated school system and has refused to take any meaningful steps to balance the racial enrollment in its schools. Respondent denies both allegations.

As part of its answer, in accordance with a request of the Commissioner, respondent filed enrollment statistics and other relevant data. Such data revealed that the racial composition of each school on September 30, 1969, was as follows:

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School	White	Black	Other	% of Black	Total
Linden High School	1564	206	5	12%	1775
Soehl Jr. High	679	252	16	27%	947
McManus Jr. High	750	128	1	15%	879
School No. 1	345	28	0	8%	373
School No. 2	288	139	14	32%	441
School No. 3	212	15	27	6%	254
School No. 4	254	332	17	55%	603
School No. 5	61	379	2	86%	442
School No. 6	350	3	3	1%	356
School No. 7	130	1	2	1%	133
School No. 8	375	15	16	4%	406
School No. 9	381	27	0	7%	408
School No. 10	405	45	0	10%	450
TOTAL	5794	1570	103	21%	7467

Examination of respondent's data disclosed that black children comprised approximately 21% of the district's enrollment and that there was an imbalanced concentration of white pupils in some schools and of black children in others. The Commissioner thereupon found that a condition of racial segregation, whether deliberate or adventitious, did exist in the schools of the district, and by Order dated March 12, 1970, directed respondent to prepare and submit a plan by May 1, 1970, for elimination of the racial imbalance. A petition to intervene on behalf of the Open Enrollment and Neighborhood School Committee was denied in the same Order.

In response to the Commissioner's Order, respondent submitted the following proposal dated April 15, 1970:

> "The Board of Education, in compliance with the directive of the State Commissioner of Education and in furtherance of its desire to provide the best educational opportunities to the students of this City, while at the same time preserving the stability of its school system, endorses the following plan as being realistic on a financial and educational basis:
>
> "1. Commencing with the opening of the schools in September, 1970, all pupils in the districts of Schools No. 2, 4 and 5, will be allowed to transfer to any elementary school, other than No. 2, 4 and 5, contingent on the availability of space.
>
> "2. The Board of Education, in order to facilitate the adoption of this plan, will make every effort to provide additional space, as may be required, in the schools to which children will be transferred. The change of location of special classes and Board offices will be undertaken where feasible, to reduce space left vacant by transfers.
>
> "3. Additional classroom space is contemplated by the construction program for School No. 1 and additional construction is being studied with regard to other elementary schools to facilitate their use in this program.
>
> "4. Evaluation of the effect upon racial compostion (sic) will be a consideration in the future locations of new buildings and additions."

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Petitioner protested the plan immediately, alleging that it was wholly inadequate as an acceptable solution and was, in fact, no plan at all but merely a delaying device. Respondent requested opportunity to be heard with respect to its plan. Hearings were held thereafter on May 18 and June 4 before the Assistant Commissioner in charge of the Division of Controversies and Disputes at the Union County Court House, Elizabeth.

The testimony of the witnesses heard served mainly to confirm the data previously submitted, to amplify the proposal of the Board of Education, and to set forth in detail the position of the parties without material alteration of the basic facts already set forth, *supra.* Respondent takes the position that its plan as submitted represents only the initial step in a continuing study and program which it has set in motion and intends to implement in a progressive step-by-step procedure until the problem is resolved. Such an orderly process is necessary and desirable, it urges, in order to provide opportunity for education of and acceptance by the community at large of the need for change, and to avoid the disruption and hostilities which will occur, it avers, if hastily-conceived and ill-chosen remedies are adopted. Respondent concedes that the present imbalance cannot endure and must be remedied, but pleads for acceptance of its proposal herein as an initial step and for time to devise, adopt and execute subsequent measures aimed at a complete resolution of the problem in the entire school district.

Petitioner contends that respondent has known for many years that unacceptable conditions of racial segregation existed in its schools, that it has deliberately refused to recognize or do anything to correct the situation, and that its plea herein is nothing more than a "stalling tactic." He argues that the proposal advanced by the Board for the 1970-71 school year is actually no plan at all and constitutes only token integration falling far short of an acceptable remedy of an unlawful condition. He asks that the plan be rejected and the Board ordered to institute a more comprehensive and adequate proposal which will reflect in the schools the racial composition of the community.

There can be no question that respondent's proposal falls far short of even minimum essentials of a plan which would accomplish the elimination of the unlawful conditions of racial imbalance now present in the school system. The Commissioner must agree with petitioner that the offering of a limited number of opportunities for enrollment at a school outside the normal attendance area under an "open enrollment" or "optional transfer" plan is mere token integration. No guarantee is made, nor can one be offered, that such a proposal will result in altering the racial ratios in any of the schools to any material degree. It may even have an opposite effect if the opportunity to transfer is embraced by a preponderance of white pupils.

But even more than in the proportioning of the races within a school building, the plan fails to comprehend the scope of an adequate program of integration. There is, for instance, no mention of plans for curriculum revision and development in terms of multi-racial needs; for recruitment and assignment

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of faculty; for equal opportunities for participation in extra-curricular activities; for the development of non-racially differentiated guidance programs; and for staff in-service education and supervision aimed at providing equal education opportunities. These and other elements of a program devised to produce racial integration in its full sense, are totally lacking in respondent's proposal. The Commissioner must find, therefore, that the plan proposed by respondent is not sufficient either in depth or scope to achieve the equal educational opportunity for all children required under the laws of New Jersey.

At the same time, the Commissioner is aware of the imminence of the ensuing school year, the need for time to conceive sound plans, and the desirability of public involvement in and understanding of a search for a comprehensive solution, as eloquently pleaded by counsel for respondent. He is also willing to accept in good faith respondent's assertion that it is not resorting to "stalling tactics" and that it will proceed to develop and implement programs to achieve a complete racial integration in its schools. The Commissioner will, therefore, accept respondent's present plan tentatively and temporarily and subject to the following conditions:

1. Respondent will implement fully the proposal outlined in its statement dated April 15, 1970, for the 1970-71 school year.
2. The Commissioner is convinced that there are ways in which the racial imbalance in the Linden Schools can be ameliorated immediately to a greater extent than respondent's proposal will accomplish. Certainly the balance between Soehl and McManus Junior High Schools is amenable to improvement. The effect of respondent's proposal is to be determined and reported to the Commissioner within ten days after the opening of school in September 1970. Thereafter, respondent is required to devise and implement further measures by which the racial imbalance can be improved quickly and without waiting upon the development of a long-range solution. Such means are to be put into effect as soon as possible and in any case prior to the second half of the 1970-71 school year.
3. The survey of the school district for which respondent has engaged a consultant will begin immediately and will be pursued with all possible diligence. Progress reports and findings of the survey will be furnished to the Commissioner as he may require.
4. Respondent will begin immediately to develop a comprehensive plan for the elimination of racial imbalance and the achievement of racial integration in its schools and will formulate and implement elements of such program as quickly as feasible and without delay.
5. The Board of Education and its administrative staff will seek the consultation and advice of the staff of the Office of Equal Educational Opportunity periodically in the formulation of its plans.
6. Respondent shall submit to the Commissioner, at intervals of not more than three months, a detailed report of all of its activities, programs and

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other steps taken, aimed at the goal of a racially-integrated school system.

The Commissioner will retain jurisdiction in this matter pending the accomplishment of a racially-integrated school system in the City of Linden which, in his opinion, meets the standards required under the laws of New Jersey.

COMMISSIONER OF EDUCATION

August 26, 1970

Board of Education of the Borough of Berlin,

Petitioner,

v.

Borough Council of the Borough of Berlin, Camden County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Aiken and Lake (James G. Aiken, Esq., of Counsel)

For the Respondent, Rudd, Laskin & Madden (Lee B. Laskin, Esq., of Counsel)

Petitioner, hereinafter "Board," appeals from the action of respondent, hereinafter "Council," taken pursuant to *N.J.S.A.* 18A:22-37, certifying to the County Board of Taxation a lesser amount of appropriations for school purposes for the 1970-71 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were educed at a hearing conducted on June 23, 1970, at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

Council, after reviewing the budget with the Board, made its determination and certified $552,700 to the Camden County Board of Taxation, a reduction of $67,800 from the amount proposed for current expense by the Board to be raised by local tax levy. Meetings between the Board and Council and the Camden County Superintendent of Schools failed to resolve the issue, and the Board appealed to the Commissioner to restore the funds deleted by the Council so that it could operate an adequate system of education for the pupils of the school district.

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Council suggested that economies could be effected in the following items without harm to the educational process:

Current Expense Account		Budgeted By The Bd.	Suggested By Council	Reduction
J100	**Administration**			
110B	Sal.-Bd. Secy's. Clerk	$ 5,000	$ 4,500	$ 500
110C	Sal.-Cust. of Sch. Monies	425	400	25
110F	(a) Sal.-Supt.	17,000	16,000	1,000
	(b) Sal.-Supt's. Secy.	5,165	- 0 -	5,165
120B	Legal Fees	600	400	200
130N	Misc. Expenses	675	475	200
J200	**Instruction**			
213	Sal.-Teachers	311,500	290,500	21,000
215	Sal.-Secretary & Clerical Asst.	3,510	3,100	410
215	(a) Sal.-Playground	1,100	- 0 -	1,100
240	Teaching Supplies	7,500	6,800	700
J400	**Health Services**			
410C	Sal.-Part-time Psychol.	3,500	1,000	2,500
J800	**Fixed Charges**			
820	Judgments	4,500	2,000	2,500
870	Tuition	30,000	28,000	2,000
*840	Interest on loans	50,000	25,000	25,000
J1100	**Community Services**			
1111	Salaries	4,500	- 0 -	4,500
1121	Other Expenses	1,000	- 0 -	1,000
	TOTALS	$445,975	$378,175	$67,800

*Transferred to S-13310B

The Board offered testimony supporting its budget and the contested line-item accounts, and Council testified justifying its reasons for the suggested cuts as follows:

J 110B Salary-Board Secretary's Clerk

The Board testified that the additional $500 in this account is for a clerical assistant to help with the many routine functions of Board of Education business and specifically to do the work involved in typing and filing the minutes of Board of Education meetings and that it is not a new item.

Council avers that this is a new budget item and is not for the Board Secretary, but rather an allocation of $500 more for an employee already hired in another position, and that its sole purpose is to pay her for taking Board of Education minutes.

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The hearing examiner agrees with the Board in that this account was budgeted last year, and considers the $500 a reasonable fee for the service as described and recommends that this cut be restored.

J 110C Salary-Custodian of School Monies

Council avers that the Board has already agreed to this cut. The hearing examiner agrees. He finds no compelling reason for an increase here of $25 and recommends that this amount be cut from the budget.

J 110F (a) Salary-Superintendent

Council cut the Superintendent's salary by $1,000, alleging that his position should be that of school principal rather than Superintendent of Schools. Council contends that their cut, if maintained, will still allow for a salary increase of $1,000 for the Superintendent.

The Board defended the position of Superintendent of Schools in the district and declared that his proposed salary is in line with the guidelines set up for the State by the New Jersey Federation of District Boards of Education.

The hearing examiner finds that the Board has a right to establish the position of Superintendent pursuant to *N.J.S.A.* 18A:17-15 and the Rules of the State Board of Education. The Superintendent's proposed salary is certainly within the guidelines set for similar school districts, and it is recommended that this $1,000 cut be restored.

J 110F (b) Salary-Superintendent's Secretary

The Board established the fact that this is a continuing position and not a new one. The $5,165 cut proposed by Council would eliminate this position, and the Board avers that the proposed $5,165 is the contractual salary agreement with the secretary for this position.

Council contends that the Board has sufficient secretarial help without this position, that it is excessive and the Superintendent does not need a private secretary.

The hearing examiner is convinced that the position is functional and needed as described by the Board and that the salary is appropriate with other salaries for similar positions within the County, and he recommends that the $5,165 be restored to the budget.

J 120B Legal Fees

Council stipulates the restoration of $200 previously cut from this

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account, and the hearing examiner recommends that the $200 be restored to the budget.

J 130N Miscellaneous Expenses

The Board proposed $675 for this account to be used primarily for a public relations newsletter mailed to parents four times a year and other such necessary activities that promote good school-teacher-community relations. Council contends that this amount is not necessary and that the Board agreed to a $200 cut at a preliminary hearing.

The hearing examiner determines that this $200 cut can be absorbed without a marked effect on the budget and recommends that the cut be maintained as agreed in the preliminary hearing.

J 213 Salaries-Teachers

The Board proposed $21,000 for three additional teachers, one each in grades four, five and six at an estimated salary of $7,000 per teacher. Current enrollment and anticipated increase in these grades were given as supporting reasons. Council contends that there should be a moratorium on the hiring of additional teachers and that the regular staff should handle the anticipated nominal increase of students.

The hearing examiner notes that the current enrollment figures for next year's grades four, five and six are too large even without accounting for the anticipated enrollment. Without the additional teachers requested, these classes would be too large for the maintenance of a sound instructional program, and, with their inclusion in the school budget, these classes would be only average in size. The hearing examiner recommends that $21,000 for three additional teachers be restored to the budget for the purposes stated by the Board.

J 215 Salary-Secretary and Clerical Assistant

Council contends that an increase here is unnecessary and no assistant clerical help is needed. The Board argued that this is not a new position and that only a nominal increase was made in this account.

The hearing examiner finds that the increase over the expenditure in this account during the 1969-70 school year is very nominal. He recommends that the position be maintained and that the $410 cut by Council be restored to the budget.

J 215 (a) Salaries-Playground

The Board offers this extra-curricular program after regular school hours for all children in the district and maintains that this is a continuing program,

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not a new position. Council recommends that the position be eliminated, arguing that regular teachers can handle playground supervision.

The description of the program given by the playground supervisor was thorough. The hearing examiner finds that such a program is indeed beneficial and worthy of continuing and recommends that the $1,100 be restored to the school budget.

J 240 Teaching Supplies

Council's asserted reason for a $700 cut in this account is based on prior Board expenditures. Council asserts that $6,800 is adequate in that the school enrollment is essentially the same and that this amount was adequate for the 1969-70 school year. The Board avers that higher prices and increased enrollment will make a difference and that the cut cannot be maintained if they are expected to make adequate supply provisions for all existing classes and the three proposed additional classes, if approved by the Commissioner.

The hearing examiner finds that this modest increase is necessary in considering his recommendation to the Commissioner for three additional classrooms, and the overall increases in the cost of all supply items. The hearing examiner, therefore, recommends that $700 be restored to this account.

J 410C Salary-Part-time Psychologist

The Superintendent testified that $3,500 was needed for a part-time psychologist, that the service of identifying handicapped children was required by statute and that the Board presently met their obligation by paying a psychologist $35.00 per case. Council avers that the cut will not affect the service rendered by the school and that $2,500 of the proposed amount is unnecessary for maintenance of an adequate system of education. Council avers also that the Board agreed to this cut at a preliminary meeting.

The hearing examiner finds that the part-time position, while highly desirable, is not necessary and recommends that Council's cut of $2,500 be sustained.

J 840 Interest on Loans

The Board testified that the $50,000 previously budgeted in this account has been transferred to Account No.S1330-B and that Council has reduced this amount by $25,000. The Board now avers that only $22,000 is necessary for this interest requirement and Council agrees with this new estimate. Therefore, the $22,000 revised figure for this temporary loan, plus the $16,066 already budgeted for prior debt service, necessitates a total expenditure in this account of $38,066.

The hearing examiner recommends that this revised amount be approved

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in Account No.S1330-B.

J 820 Judgments and J 870 Tuition

Council withdrew its proposed cuts in these items after the Board gave its reasons for their inclusion.

The hearing examiner recommends that the amounts of $2,500 and $2,000 be restored to the proposed budget.

J1111 and J1121 Community Services

The Board identified this service as a continuing program. Council suggests that it is completely unnecessary as a Board function.

The hearing examiner determines that there is merit to such programs but recommends a $1,500 cut in the Board's proposed budget which allows for an expenditure equivalent to last year's.

*　　*　　*　　*

The Commissioner has examined the report of the hearing examiner and concurs with his findings and recommendations. The table of the Board's proposals, Council's reductions and the Commissioner's restorations reads as follows:

Current Expense Account		Budgeted by Board	Restored by Comm.	Amount of Reduction
J100	**Administration**			
110B	Sal.-Bd Secy's. Clerk	$ 5,000	$ 500	$ - 0 -
110C	Sal.-Cust. of Sch. Monies	425	- 0 -	25
110F	(a) Sal.-Supt.	17,000	1,000	- 0 -
	(b) Sal.-Supt's. Secy.	5,165	5,165	- 0 -
120B	Legal Fees	600	200	- 0 -
130N	Misc. Expenses	675	- 0 -	200
J200	**Instruction**			
213	Sal.-Teachers	311,500	21,000	- 0 -
215	Sal.-Secretary & Clerical Asst.	3,510	410	- 0 -
215	(a) Sal.-Playground	1,100	1,100	- 0 -
240	Teaching Supplies	7,500	700	- 0 -
J400	**Health Services**			
410C	Sal.-Part-time Psychol.	3,500	- 0 -	2,500
J800	**Fixed Charges**			
820	Judgments	4,500	2,500	- 0 -
870	Tuition	30,000	2,000	- 0 -
840	Interest on Loans	50,000	*	*
J1100	**Community Services**			
1111	Salaries and			
1121	Other Expenses	5,500	4,000	1,500
	TOTALS	$445,975	$38,575	$32,225

*Transferred to Account No.S1330B and reduced by $28,000.

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Therefore, the Commissioner orders the amounts specified in the table, *supra*, restored in the budget for the school year 1970-71 for the operation of a thorough and efficient system of the public schools in the Borough of Berlin. The Commissioner further directs that the sum of $38,575 be added to the current expense certification previously made by Council to the Camden County Board of Taxation.

COMMISSIONER OF EDUCATION

September 4, 1970

John A. Fochi,

Petitioner,

v.

Board of Education of the Borough of Lodi, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Louis F. Treole, Esq.

For the Respondent, Gerald P. LoProto, Esq.

Petitioner, who is a resident of Lodi, Bergen County, charges that he was improperly denied an opportunity by the Lodi Board of Education to have his name on the ballot for the annual school election held on February 10, 1970, because of the Board's delay in accepting the resignation of one of its members. Petitioner alleges that this delay by the Board of Education was a deliberate and planned action designed to maintain a vacancy which the Board could then fill pursuant to the provisions of *N.J.S.A.* 18A:12-15.

Petitioner, therefore, requests that the Commissioner investigate this matter, restrain the Board from conducting school business and cause the Board to place petitioner's name on the February 10, 1970, ballot for the election of School Board members.

A hearing in this matter was conducted in the office of the Bergen County Superintendent of Schools on June 24, 1970, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

Counsel for respondent moved to dismiss the petition on the following grounds:

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1. That there is no relief which can be given to petitioner at this time.
2. That a cease and desist order against the Board of Education is untimely and not applicable here.
3. It is not possible to place petitioner's name on the ballot for the February 10, 1970, election.
4. Laches. Petitioner filed his name for the ballot out of time for the election.

The decision on the motion to dismiss was reserved for the Commissioner of Education.

Counsel stipulate the official Board of Education records to date from December 11, 1969, the date of the first Board meeting after the resignation letter of Mr. Sireci. Counsel agree on the essential facts in the case which are as follows:

"I. *FACTS AND ACTION OF THE BOARD OF EDUCATION*

"1. *Letter of Resignation* of Steven S. Sireci, dated Sunday, *November 23, 1969.*

"2. *Regular Board Meeting – December 11, 1969.*
- A. Secretary read off Sireci's letter of resignation of November 23, 1969.
- B. Action of Board – Motion (Patire & Werlock): to refer letter to Board as a whole for study, since no explanation was given, and to confer with Sireci to determine what prompted him to turn in official resignation.

"3. *Board Letter to Sireci – dated January 5, 1970.*
Asks Sireci to confer with Board on January 6, 1970, at an executive session of Board to discuss resignation.

"4. *Sireci Letter to Board* – dated January 5, 1970.
States he felt it is not necessary to confer with Board; resignation stands and is due to personal health.

"5. *Regular Meeting of Board – January 8, 1970.*
- a. Second letter from Sireci read off - affirming resignation.
- b. *Resolution of Board* (Volpe & Patire) - accepts resignation, and declares vacancy in Board to exist.

"6. *Special Meeting of Board – March 4, 1970.*
Resolution (Capizzi & Quatrone) - appoints Vito Bellini to fill vacancy on Board for term to Monday after Annual School Election in February 1971."

The questions to be answered then are these:

1. Did a vacancy on the Board of Education exist on November 23, 1969, which is the date of Mr. Sireci's resignation or on January 8, 1970, when the Board formally accepted this resignation?
2. Did the Board delay too long in accepting Mr. Sireci's resignation?

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Counsel for petitioner educed testimony which revealed that the Board did discuss in caucus possibilities for Mr. Sireci's replacement after receipt of his resignation letter and that individual Board members discussed and tried to gather support for a particular replacement. Petitioner avers that these actions of the Board while in caucus and its individual member's actions outside of regular meetings, in attempting to find a suitable replacement for Mr. Sireci, are proof of the existence of a vacant seat on the Board of Education on November 23, 1970; and that, therefore, these actions would take precedence over the formal action of the Board in accepting Mr. Sireci's resignation on January 8, 1970. Petitioner alleges, therefore, that respondent illegally denied him an opportunity to place his name on the ballot for the vacant seat on the Board of Education and that he applied within the time period required by *N.J.S.A.* 18A:14-9.

Respondent does not deny that the Board may have discussed replacements, but says that only official actions of the Board taken in public have any meaning and that discussions of possible replacements in caucus and by individual Board members outside of the regular meetings are meaningless.

Respondent asserts that the Board of Education acted properly and promptly in accepting the resignation of the member in question, that the Board did not violate any statute or procedure and that the new member was properly appointed by the Board subsequent to the annual school election. Respondent further asserts that only 28 days elapsed from the time of the next regular meeting of the Board on December 11, 1969, after receipt of the letter of resignation, and the Board's formal acceptance of that resignation by unanimous vote on January 8, 1970. Respondent states that this short period of time cannot be construed as a delay by the Board, and, therefore, petitioner has no basis for any claim for relief by the Commissioner of Education. The Board wrote to Mr. Sireci on January 5, 1970, and asked him to withdraw his resignation. He refused on the same day and thereafter the Board voted to accept his resignation at the regular meeting on January 8, 1970. This was the second regular meeting pursuant to Mr. Sireci's written resignation on November 23, 1970.

Respondent further asserts that the Board acted promptly, that the 28 days which elapsed from the date of the resignation letter to the formal acceptance of that letter by the Board of Education is not an inordinate time period, and that the Board did not delay the acceptance of this resignation letter to be self serving.

* * * *

The Commissioner has read the report of the hearing examiner.

Respondent's motion to dismiss is denied on the grounds that petitioner's allegations present a justiciable issue which must be considered by the Commissioner. The salient issues in the instant matter, therefore, are set forth as follows:

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1. When is a resignation effective?
2. Did the Board delay too long in accepting Mr. Sireci's resignation?

N.J.S.A. 18A:12-15 reads in part as follows:

"Vacancies in the membership of the board shall be filled as follows: ***c. By the board in all other cases ***."

The first regular meeting of the Board of Education after the submission of the resignation on November 23, 1969, was held on December 11, 1969. The Board could not be expected to act prior to this next regular meeting, nor was this resignation of sufficient severity to cause the holding of a special meeting of the Board. Petitioner's allegation that the Board deliberately delayed the formal acceptance of the resignation in question has not been proved.

Furthermore, 78 *C.J.S.* 881 and 882 states that:

"*Acceptance.* Resignations of school district officers are covered by the common-law rule that a public officer cannot resign his office without the consent of the body which appointed him or which has power to fill the vacancy. Accordingly, in order to be effective, the resignation of a school officer must be accepted by the proper authority ***.

"*Withdrawal.* The mere tender of a resignation by a member of a school board, which he states shall take effect at once, does not immediately create a vacancy in the office, and such a resignation may be withdrawn at any time before it is accepted or acted upon by the appointive power, *even without consent of the latter* ***." (Emphasis added.)

There can be no question that the Board attempted to get Mr. Sireci to withdraw his resignation on January 5, 1970, and upon his refusal the Board acted promptly on January 8 to accept his resignation. Certainly, Mr. Sireci had a right to withdraw his resignation. See 78 *C.J.S.* 881, *supra.*

The Commissioner determines, therefore, that the resignation of a board member is effective only when accepted by a formal vote of the remaining members of the board of education.

The time period between Mr. Sireci's resignation and the acceptance of that resignation by the Board has been cited as illustrative of the Board's deliberate attempt to delay a formal acceptance of Mr. Sireci's resignation.

The Commissioner cannot condone the deliberate manipulation of a member's resignation letter by a board of education seeking only a self-serving advantage, but petitioner has not proved his allegation that this was the case in the instant matter. This was a matter solely for the Board to resolve, and it was resolved in a reasonable time.

The Commissioner finds, therefore, that petitioner's allegations are groundless. The Board is properly constituted and is not in violation of any

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procedural rules in its present formation.

The petition is dismissed.

COMMISSIONER OF EDUCATION

September 9, 1970

In the Matter of "T," by her parents and natural guardians,

Petitioners,

v.

Board of Education of the Borough of Tenafly, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

Decision on Remand

For the Petitioners, Daniel I. Lubetkin, Esq.

For the Respondent, Tennant and LaSala (George G. Tennant, Jr., Esq., of Counsel)

Petitioners are the parents of a handicapped daughter, hereinafter "T," who have appealed from the determination of respondent Board of Education to provide for "T's" education in a special class in a nearby school district. In a decision dated April 25, 1968 (1968 *S.L.D.* 87), the Commissioner held that "T" was properly classified by respondent for educational purposes as trainable mentally retarded, and as such was placed by respondent in a class for trainable children. *Id.*, page 89

Petitioners appealed from the Commissioner's dismissal of their petition. On February 5, 1969, the State Board of Education remanded the case to the Commissioner, and in a subsequent determination dated April 2, 1969, affirmed its previous decision to remand, as follows:

> "We remand to the Commissioner of Education, after hearing the appeal presented before the State Board of Education on April 2, 1969, with the suggestion that an examination of the child would be helpful and that he arrange the examination."

There followed extensive correspondence from counsel concerning the recommended examination. The Commissioner determined that the examination

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should be conducted by a County Child Study Team *(cf. N.J.S.A.* 18A:46-4,5) and designated the Morris County Child Study Team to perform this function. The said Team consisted of the County School Psychologist, County School Social Worker, Learning Disabilities Specialist, and a Neuro-Pediatrician. The examination consisted of a neurological examination, numerous and varied psychological and achievement tests, a social history, and observation of "T" in a learning situation with a teacher privately employed by the petitioners. On July 6, 1970, the Commissioner received the report of the Child Study Team, including the separate reports of each of its members, and a Team summary, which reads as follows:

> "Chapter 46, Public Laws of 1968, is specific in requiring the identification and classification of all handicapped children not necessarily for the purpose of categorizing them or for special class placement, but to determine the appropriate educational program which will best serve the child. Diagnosis and classification should include a medical examination, a psychological evaluation, and educational assessment and developmental history.
>
> "On the basis of the team evaluation, educational assessment, psychological evaluation, social history and medical examination, it is our opinion that "T" be classified as a multiply-handicapped child. It is recommended that she receive instruction in a class that would offer specific programs to meet her needs. These would include remedial assistance in basic tool subjects, perceptual-motor training and intensive speech correction. The possibility of residential school placement should also be explored.
>
> "This report is based on the examinations, tests and interviews undertaken and completed in May and June, 1970, by the undersigned.
>
> Morris County Child Study Team"

Careful review and consideration having been given to the report and recommendations of the Team, the Commissioner finds that "T" is a multiply-handicapped child who now functions above the trainable mentally retarded level which the Commissioner's prior decision affirmed. The Commissioner therefore concludes, and so finds, that placement in a trainable mentally retarded class does not provide an adequate education program to meet "T's" needs. He therefore directs that respondent place "T" in a class that would offer specific programs to meet her needs, including remedial assistance in basic tool subjects, perceptual-motor training, and intensive speech correction. He further recommends that, in the interests of both "T" and her family, the possibility of a residential school placement should be explored.

To assist respondent Board in the fulfillment of this directive, the Commissioner recommends that respondent arrange with the Morris County Superintendent of Schools to utilize the consultative services of the Morris County Child Study Team.

September 9, 1970 COMMISSIONER OF EDUCATION

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Board of Education of the Borough of Manville,

Petitioner,

v.

Mayor and Council of the Borough of Manville and Somerset County Board of Taxation, Somerset County,

Respondents.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Raymond R. and Ann W. Trombadore (Raymond R. Trombadore, Esq., of Counsel)

For the Respondent, Chase and Chase (Donald Chase, Esq., of Counsel)

Petitioner, hereinafter "Board," appeals from the action of respondent "Council," taken pursuant to *N.J.S.A.* 18A:22-37 as amended by *Chapter* 250, *Laws* of 1969, certifying to the County Board of Taxation a lesser amount of appropriations for school purposes for the 1970-71 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were educed at a hearing in Trenton on June 8 and 17, 1970, and August 6, 1970, before a hearing examiner appointed by the Commissioner.

At the annual school election on February 10, 1970, the voters rejected the Board's proposals to raise $1,974,315 for currents expenses and $25,890 for capital outlay. The budget was then sent to Council pursuant to *N.J.S.A.* 18A:22-37, *supra*, for its determination of the amount of funds required to maintain a thorough and efficient local school program.

Thereafter, following a conference with the Board on February 18, 1970, Council adopted a resolution on March 12, 1970, certifying the amount of the tax levy for current expenses at $1,893,350, a reduction of $80,965. The capital outlay item was certified in the amount of $13,855, a reduction of $12,035. Council further resolved that $27,000 should be allocated to income out of anticipated surplus. The Board contends that the amount certified is insufficient to provide an adequate system of education for the pupils of the school district and appeals to the Commissioner to restore the funds deleted by Council.

In the case of *Board of Education of East Brunswick v. Township Council of East Brunswick*, 48 *N.J.* 94 (1966), the Court laid down guiding principles for the review of twice-rejected school budgets by the municipal governing body as follows:

> "***The governing body may, of course, seek to effect savings which will not impair the educational process. But 'its determination must be

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independent ones properly related to educational considerations rather than voter reactions. In every step it must act conscientiously, reasonably and with full regard for the State's educational standards and its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community. Where its action entails a significant aggregate reduction in the budget and a resulting appealable dispute with the local board of education, it should be accompanied by a detailed statement setting forth the governing body's underlying determinations and supporting reasons.***" (at page 105)

The Court also defined the function of the Commissioner when after the governing body has made its determination, the Board appeals from such action:

"***the Commissioner in deciding the budget dispute here before him, will be called upon to determine not only the strict issue of arbitrariness but also whether the State's educational policies are being properly fulfilled. Thus, if he finds that the budget fixed by the governing body is insufficient to enable compliance with mandatory legislative and administrative educational requirements or is insufficient to meet minimum educational standards for the mandated 'thorough and efficient' East Brunswick school system, he will direct appropriate corrective action by the governing body or fix the budget on his own within the limits originally proposed by the board of education. On the other hand, if he finds that the governing body's budget is not so inadequate, even though significantly below what the Board of Education had fixed or what he would fix if he were acting as the original budget-making body under *R.S.* 18:7-83, then he will sustain it, absent any independent showing of procedural or substantive arbitrariness." (at page 107)

The testimony reveals a series of meetings between the Board and Council and an attempt at settlement before the Somerset County Superintendent of Schools.

On the third day of the hearing in Trenton, the Board introduced a new budget-status summary (Exhibit P-10) which was current as of August 6, 1970, because of their recently completed audit. This new document itemized funds which have already been "committed" for expenditure by the Board for salaries, new positions, and positions which have been increased, and it specifies amounts required for restoration by the Commissioner if the Board is to meet its obligations.

With a prepared statement, Council objected to the Board's action of awarding contracts and increasing positions in areas in which Council proposed that savings could be made. Council's further objections were that the Board had in fact increased expenditures in areas Council had not previously cut; that it had not received this new document prior to the third hearing and did not have time to examine it carefully; that the Board's own budget totals do not add up

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correctly; and that the Board's action in expending funds prior to the Commissioner's decision, and despite the cuts it recommended, was improper.

The Board avered that this latest budget document is current, that it should be helpful to Council and the Commissioner, and that it does not restrain the Commissioner from making a decision. The Board further asserted that its surplus is sufficient to meet the expenditures committed.

Thereafter, Council excused itself from the hearing, and the remainder of the hearing constituted a Board presentation defending its proposal, with the hearing examiner only questioning the need for the expenditures.

DETAILED STATEMENT OF BUDGET REDUCTIONS
CURRENT EXPENSES

Account		Budgeted by Board	Recomm. by Council	Reduction
J120d3	Payroll	$ 1,500	$ -0-	$ 1,500
J120d4	Contractual Orders	1,450	-0-	1,450
J213.1	Sal.-Teachers	1,490,450	1,463,400	27,050
J214.c3	Speech Therapist	9,600	5,600	4,000
J214.c4	Social Workers-Sal.	5,760	4,810	950
J215a	Sal.-Secretaries	45,600	43,910	1,690
J230c8	County Assessment	3,200	3,100	100
J250b2	Recruiting of Teachers	200	50	150
J250c6	Recruiting of Personnel	100	50	50
J250c4d	Dept. Chmn.-Expenses	150	100	50
J250c4a	Principals-Expenses	450	350	100
J250c8	Safety Patrol Equip.	200	-0-	200
J250c9	Assemblies	360	-0-	360
J410a2	Sal.-School Nurses	41,300	38,810	2,490
J420e	Psych. Exams.	2,500	2,000	500
J520al	Atypical Children	10,000	5,000	5,000
J620.4	Stage Curtains	700	-0-	700
J610a3	Matrons-Sal.	4,800	-0-	4,800
J710b2	Summer Help	3,500	2,500	1,000
J720a4	Sidewalks	1,000	-0-	1,000
J720a2	Parking Lots	500	200	300
J720b1	Clocks	725	500	225
J720b3	Doors	2,800	1,400	1,400
J720b6	Cafeteria	400	-0-	400
J720b7	Windows & Blinds	2,360	-0-	2,360
J720b8	Repair of Roof	2,000	-0-	2,000
J720b19	Dimmer-H.S. Switchboard	450	-0-	450
J720b20	Boilers	1,100	-0-	1,100
J720b21	Regulators	2,635	1,000	1,635
J720b22	Wall Repairs	2,600	-0-	2,600
J720b23	Lighting	250	-0-	250
J720b24	Steps	2,500	-0-	2,500
J720b25	Leaks (W)	500	-0-	500
J720b26	Leaks (H.S.)	1,800	-0-	1,800
J720c2a	Board Office Equip.	1,140	810	330

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J730a10	Mats	700	- 0 -	700
J730b2	Shades	350	250	100
J730b3	Seats-H.S. Auditorium	2,000	- 0 -	2,000
J730b5	Chair Glides	200	- 0 -	200
J730b8	Shades	350	50	300
J730b10	Football Markers	125	- 0 -	125
J740b1	Painting of Bldgs.	800	300	500
J740b8	Floor & Ceiling Tile	400	- 0 -	400
J740b9	Repair of Fence	300	- 0 -	300
J740b11	Repair of Lockers	450	100	350
J820a	Property Insurance	9,000	7,000	2,000
J1010	Sal.-Stud. Act.	2,350	1,350	1,000
J1111	Recreational Activities	3,000	1,000	2,000
TOTAL	Current Expenses	$1,664,605	$1,583,640	$80,965

CAPITAL OUTLAY

Account		Budgeted by Board	Cut By Council	Amount Restored
L1200c1	Playground	$ 3,000	$ - 0 -	$ 3,000
L1200c2	Assessments	7,100	1,420	5,680
L1230c1	Wiring	400	- 0 -	400
L1240b2	Air Conditioner	450	- 0 -	450
L1240b3	Cabinets	100	- 0 -	100
L1240c2a	Phonographs	355	- 0 -	355
L1240c2c	Screens	120	- 0 -	120
L1240c3	Physical Educ.	1,815	915	900
L1240c5	Furniture	365	- 0 -	365
L1240c6j	Typewriter	180	- 0 -	180
L1240c6o	Miscellaneous	690	290	400
L1240dl	Bulletin Boards	85	- 0 -	85
TOTAL	Capital Outlay	$14,660	$2,625	$12,035

CURRENT EXPENSES REDUCTION	$80,965
CAPITAL OUTLAY REDUCTION	$12,035
TOTAL REDUCTION BY COUNCIL	$93,000

The burden of proof of necessity to restore budget funds cut by Council must be borne by the Board of Education, and the determination is based on necessity, not desirability. In the instant matter, the Board made its determinations of necessity and expended funds prior to the Commissioner's decision. The Board avers that its surplus is sufficient to off-set any monies committed for expenditures. The Board must realize, however, that the committment of surplus funds is their decision, and the Commissioner will not be bound in any way to restore them.

The Commissioner does not deem it necessary to consider each of the contested items separately and to record his evaluation in detail on each suggested economy. Suffice it to say that from his study of the hearing examiner's report, the Commissioner considers the following items to be essential to the adequate functioning of the school program for the school year 1970-71:

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CURRENT EXPENSES

Account		Budgeted by Board	Cut By Council	Amount Restored
J120d3	Payroll	$ 1,500	$ 1,500	$ - 0 -
J120d4	Contractual Orders	1,450	1,450	- 0 -
J213.1	Sal.-Teachers	1,490,450	27,050	22,800
J214.c3	Speech Therapist	9,600	4,000	3,850
J214c4	Social Workers-Sal.	5,760	950	950
J215a	Sal.-Secretaries	45,600	1,690	1,690
J230c8	County Assessment	3,200	100	50
J250b2	Recruiting of Teachers	200	150	- 0 -
J250c6	Recruiting of Personnel	100	50	- 0 -
J250c4d	Dept. Chmn.-Expenses	150	50	- 0 -
J250c4a	Principals-Expenses	450	100	- 0 -
J250c8	Safety Patrol Equip.	200	200	- 0 -
J250c9	Assemblies	360	360	- 0 -
J410a2	Sal.-School Nurses	41,300	2,490	- 0 -
J420e	Psych. Exams.	2,500	500	- 0 -
J520a1	Atypical Children	10,000	5,000	- 0 -
J620.4	Stage Curtains	700	700	700
J610a3	Matrons-Sal.	4,800	4,800	4,350
J710b2	Summer Help	3,500	1,000	- 0 -
J720a4	Sidewalks	1,000	1,000	- 0 -
J720a2	Parking Lots	500	300	- 0 -
J720b1	Clocks	725	225	- 0 -
J720b3	Doors	2,800	1,400	1,400
J720b6	Cafeteria	400	400	- 0 -
J720b7	Windows & Blinds	2,360	2,360	2,360
J720b8	Repair of Roof	2,000	2,000	2,000
J720b19	Dimmer-H.S. Switchboard	450	450	450
J720b20	Boilers	1,100	1,100	1,100
J720b21	Regulators	2,635	1,635	1,635
J720b22	Wall Repairs	2,600	2,600	2,600
J720b23	Lighting	250	250	- 0 -
J720b24	Steps	2,500	2,500	2,500
J720b25	Leaks (W)	500	500	500
J720b26	Leaks (H.S.)	1,800	1,800	1,800
J720c2a	Board Office Equip.	1,140	330	- 0 -
J730a10	Mats	700	700	700
J730b2	Shades	350	100	100
J730b3	Seats-H.S. Auditorium	2,000	2,000	2,000
J730b5	Chair Glides	200	200	100
J730b8	Shades	350	300	300
J730b10	Football Markers	125	125	- 0 -
J740b1	Painting of Bldgs.	800	500	500
J740b8	Floor & Ceiling Tile	400	400	400
J740b9	Repair of Fence	300	300	300
J740b11	Repair of Lockers	450	350	350
J820a	Property Insurance	9,000	2,000	2,000
J1010	Sal.-Stud. Act.	2,350	1,000	- 0 -
J1111	Recreational Activities	3,000	2,000	- 0 -
TOTAL	Current Expenses	$1,664,605	$80,965	$57,485

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CAPITAL OUTLAY

Account		Budgeted by Board	Cut By Council	Amount Restored
L1200c1	Playground	$ 3,000	$ 3,000	$ - 0 -
L1200c2	Assessments	7,100	5,680	5,680
L1230c1	Wiring	400	400	400
L1240b2	Air Conditioner	450	450	- 0 -
L1240b3	Cabinets	100	100	100
L1240c2a	Phonographs	355	355	355
L1240c2c	Screens	120	120	120
L1240c3	Phys. Educ.	1,815	900	1,815
L1240c5	Furniture	365	365	- 0 -
L1240c6j	Typewriter	180	180	180
L1240c6o	Miscellaneous	690	400	- 0 -
L1240dl	Bulletin Boards	85	85	85
TOTAL	Capital Outlay	$14,660	$12,035	$8,735

	Current Expenses	Capital Outlay
Budgeted by Board	$1,664,605	$14,660
Council's Reductions	80,965	12,035
Amount Restored	57,485	8,735
Certified Tax Levy	$1,893,350	$13,855
Additional Amount To Be Raised by Taxes	17,485	8,735
To Be Allocated from 1969-70 Surplus as Required	40,000	-0-
TOTALS	$1,950,835	$22,590

Considering the current expenses surplus of $82,391.48 as being more than adequate, with respect to the total school budget, the Commissioner directs, therefore, that $40,000 of the current expenses surplus be allocated for expenditures as indicated in the current expenses "Amount Restored" column, *supra.*

Additional monies in the amount of $26,220 ($17,485 for current expenses and $8,735 for capital outlay) must be added to those funds already certified to the Somerset County Board of Taxation by Council for the thorough and efficient operation of the Manville school system for the school year 1970-71.

COMMISSIONER OF EDUCATION

September 10, 1970

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Board of Education of the Borough of Manville,

Petitioner,

v.

Mayor and Council of the Borough of Manville and Somerset County Board of Taxation, Somerset County,

Respondents.

COMMISSIONER OF EDUCATION

Order

For the Petitioner, Raymond R. Trombadore, Esq.

For the Respondent, Donald C. Chase, Esq.

It has been brought to our attention that the $1,893,350 listed as certified by the hearing examiner in the Commissioner's decision of September 10, 1970, was in fact not certified to the Somerset County Board of Taxation. Rather, $1,866,350 was so certified.

The Commissioner's decision was clearly based on the understanding that an amount of $1,893,350 was certified to the Somerset County Board of Taxation by the Manville Borough Council.

Therefore, the municipal governing body of the Borough of Manville, is hereby ORDERED to certify the shortage, $27,000, to the Somerset County Board of Taxation.

COMMISSIONER OF EDUCATION

March 26, 1971

Pending before Superior Court, Appellate Division.

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Board of Education of the City of Hackensack,

Petitioner,

v.

Board of Education of the Township of Rochelle Park, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, John F. Butler, Esq.

For the Respondent, Murphy and Skelley (Joseph T. Skelley, Esq., of Counsel)

Petitioner, who received high school pupils in the school year 1960-61 and 1961-62 from respondent's school district, seeks the payment of a sum alleged to be due it for each of the years because of a difference between the tuition rate set for those years and the actual rate that was subsequently determined by the State Department of Education. Respondent denies it has any obligation for additional tuition payments.

Many of the facts in this matter are stipulated. A hearing was held before a hearing examiner designated by the Commissioner on June 23, 1970, at the office of the Bergen County Superintendent of Schools, Wood-Ridge. The report of the hearing examiner is as follows:

In the school years prior to 1960-61, it was customary for petitioner to send a letter to sending districts in late fall of each year establishing an approximate tuition rate for the succeeding year. This was a tentative rate, and was subject to change dependent on the State-audited costs for the school year that ended on the 30th day of the following June. The following text of a letter from the Secretary of the Hackensack Board of Education, sent in November of 1958, was typical of the letter sent during the years prior to, and during, the years in contention:

> "In going over the financial records of the Board of Education, roughly it would appear that the tuition rate for Senior High School for the school year 1959-60 will be approximately $510.00, and Junior High School, $528.00. I suggest you use this figure in making provisions for tution (Sic) in your budget. An accurate figure, which will be the actual charge, will be sent to you as soon as the figures are confirmed by the State Department, based on actual costs for the school year 1958-59."

It is to be noted from this letter that the "accurate figure" of costs for tuition purposes to be charged for the 1959-60 school year awaited the audit

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report of the State Department of Education, and that it was to be based on "*costs for the school year of 1958-59,*" the preceding year.

In the fall of 1959, following usual practice, petitioners sent an estimate of costs for the 1960-61 school year to respondent, and it was estimated that the costs would be $615 for senior high school pupils and $630 for junior high school pupils. However, in the spring of 1961, audit costs were received from the State for the 1959-60 year, the preceding year, and the cost per pupil was listed as $590.56 for junior high school pupils and $557.96 for senior high school pupils. Because these costs were lower than the estimated and billed costs, respondent had earned a credit, and petitioner deducted the amount of the credit from the tuition due and payable during the school year that ended on June 30, 1961. To this point in time the usual practice had been followed. The tuition rate had received the customary adjustment, and presumably the final tuition rate for the year had been established.

It was just one year later, in April of 1962, that respondent received another billing for the 1960-61 school year. This one was a departure from customary practice in that, for the first time, and without consultation or notice to respondent, it assessed a tuition rate based on established costs for a given school year as determined by the State Department of Education for that year instead of assessing costs for a given year on the basis of a previous year's costs. However, the bill in the amount of $13,386.66 was paid by respondent.

After a year of reflection, respondent determined it had paid the revised bill in error, and opined that the money had not been a proper assessment since no notice had been given of a change in the method of tuition billing. Consequently, when respondent's fourth-quarter tuition bill for 1962-63 came due, the sum of $13,386.66 was deducted from the payment to petitioner.

It is now petitioner's contention that it had a right to charge actual costs for the 1960-61 school year and that respondent's first payment of the sum in question was a recognition that the change in billing procedure was in order.

On the other hand, respondent argues that there was a change in Board Secretaries at the time, and that it should be allowed to rectify an error which a new Secretary had made.

For approximately the same reasons outlined, *supra*, the sum of $20,440.20 is in contention for the 1961-62 school year. Prior to that year, in a letter dated December 8, 1960, respondent was told that the tuition estimate for 1961-62 was the same one which had been estimated for the previous year of 1960-61. Subsequently, in the spring of 1962, the rate was adjusted to actual costs per pupil for the preceding year of 1960-61. These costs were $556.70 per pupil for junior high school and $651.53 for senior high school. When, in March of 1963, respondent was sent another bill with the assessment at the rate applicable for actual costs for 1961-62, the bill for a difference of $20,440.20 was not paid. Thus, this amount, plus the $13,386.66 in contention for the

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1960-61 school year (a total of $33,826.66), is the subject of this petition.

Subsequent to the 1962-63 school year, an agreement was reached between the two Boards, and all tuition adjustment payments for that year and for the years since that time have been based on actual cost figures for each of the years and not on the preceding year's costs.

New rules of the State Board of Education pertaining to payment for tuition pupils were adopted on June 25, 1958. Described as Rule 1101, (now *N.J.A.C.* 8:20-15 (d), (1)-(4)) the pertinent parts read as follows:

> " '*** (d.) A tentative tuition rate may be set by agreement between the receiving district and the sending district, and such tentative rate shall be based upon the estimated cost per pupil for the ensuing school year, as to be reflected in the proposed budget of the receiving district.***
>
> " ' (2) If the sending district and the receiving district cannot reach an agreement on the estimated cost per pupil by January first, then the tentative tuition rate shall be based upon the actual cost per pupil for the completed school year immediately preceding.
>
> " ' (3) If the Commissioner later determines that the tentative tuition rate was greater than the actual cost per pupil during the school year for which the tentative rate was charged, the receiving district shall return to the sending district the amount by which the tentative rate exceeded the actual cost per pupil, or, at the option of the receiving district, shall credit the sending district with the amount by which the tentative tuition rate exceeded the actual cost per pupil.
>
> " ' (4) If the Commissioner later determines that the tentative rate was less than the actual cost per pupil during the school year for which the tentative rate was charged, the receiving district may charge the sending district all or part of the amount by which the actual cost per pupil exceeded the tentative rate, to be paid not later than during the second school year following the school year for which the tentative rate was paid.' "

It seems clear, in the instant matter, that the petitioner had not proceeded under the new rule revision to implement a new "agreement between the receiving district and the sending district," prior to the 1960-61 school year. Petitioner could have done this under the rule's permissive sentence, "A tentative tuition rate may be set *by agreement*," and they could legally then have charged actual costs for the school year in question pursuant to the subsequent provision of the rule, if they had notified the Commissioner to this effect. The letter which was sent by petitioner to respondent in December 1959 reads in part as follows:

> "***roughly it would appear that the tuition rate for Senior High School for the school year 1960-61 will be approximately $615.00 and Junior High School $630.00.

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> "I suggest you use this figure in making provisions for tuition in your budget. An accurate figure, *which will be the actual charge,* will be sent to you as soon as the figures are confirmed by the State Department, based on *actual costs* for the *school year 1959-60.*" (Emphasis supplied.)

This, in the opinion of the hearing examiner, was not a "new" agreement. It was an "old" procedure.

Again in December of 1960 there was no indication that the method of assessment of final costs for the 1961-62 school year was to change. The letter sent at that time reads in part:

> "***It appears that the estimate given to you for 1960-61 of $615.00 for Senior High School and $630 for Junior High School will be adequate as the figures for *1961-1962.*
>
> "I suggest you use this figure in making provisions for tuition in your budget. An accurate figure, which will be the *actual charge,* will be sent to you as soon as the figures are confirmed by the State Department, based on actual costs for the school year 1960-61." (Emphasis supplied.)

By announcing that actual charges were to be those based on costs for the *preceding school year* in each of these two cases, petitioner had clearly stated, in the opinion of the hearing examiner, that it had chosen to ignore the permissive procedures of the State Board Rule which defined, in a new way, a tentative and final rate of tuition payment, and that petitioner chose to continue with the methods it had followed in previous years. In the absence of notification to the Rochelle Park Board and any "agreement" by Rochelle Park as required by the Rule, it is the opinion of the hearing examiner that Hackensack was estopped from imposing a new method of calculating the final costs for tuition for the years 1960-61 and 1961-62.

* * * *

The Commissioner has reviewed and considered the findings of the hearing examiner as reported above. He notes a similarity between this petition and the petition in the matter of the *Board of Education of the City of Cape May v. Board of Education of the Township of Lower, Board of Education of the Borough of West Cape May,* and *Board of Education of the Borough of Cape May Point, Cape May County,* 1963 *S.L.D.* 48. In that case, however, the contention was concerned with an arbitrary designation of a rate as "tentative" when the custom had been to regard it as "fixed." The Commissioner said, at page 52:

> "***In the face of petitioner's customary procedure in setting and announcing a rate, and in the absence of any overt conduct indicating petitioner's intention to utilize a right to fix the rate as tentative, respondents were justified in regarding the announced rate to be as fixed and final as it had been for many previous years***."

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In the instant matter, it had been the customary procedure of petitioner to send notice of tuition-cost expectancy in the fall of the year, and to base final cost figures of each year on the preceding year's State-audited costs. Respondent had every right to expect that the same procedures were to be followed in the years 1960-61 and 1961-62, since the letters appearing in the report of the hearing examiner for those years were the same as letters of prior years, and no contrary agreement had been promulgated.

Therefore, the Commissioner finds that petitioner fixed the tuition rate for pupils sent to its high school by respondent in essentially the same manner during the 1960-61 and 1961-62 school years as it had in previous years, and that no agreement to change this procedure was ever made pursuant to procedures prescribed by the State Board of Education. Therefore, he determines that the rate payable for each of the two years was the actual audited costs of the preceding year, and that petitioner is barred from claiming additional tuition in the amount of $33,826.66.

The petition is denied.

COMMISSION OF EDUCATION

September 10, 1970

Robert Davidson, an infant, by his Parents, Stephen J. and Sandra F. Davidson,

Petitioners,

v.

Board of Education of the Borough of Glen Rock, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioners, *Pro Se*

For the Respondent, Parisi, Evers & Greenfield (Irving C. Evers, Esq., of Counsel)

Petitioners are parents of an infant son who is being denied admission to school in September, 1970, because he is ten days under-age. This matter was submitted to the Commissioner on briefs of counsel. Argument of counsel was heard in the office of the Bergen County Superintendent of Schools on July 30, 1970, by a hearing examiner appointed by the Commissioner.

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Petitioners argue that their infant son will be five years of age on October 11, 1970, and that he is a handicapped child. The cut-off date for kindergarten entrance pursuant to *N.J.S.A.* 18A:38-5 is October 1. Petitioners aver that this provision does not apply to handicapped children, but that a more applicable statute is *N.J.S.A.* 18A:46-14, which states in part:

> "***The board of education *may* also furnish: (a) the facilities or programs provided in this article to any person over the age of 20 who does not hold a diploma of a high school approved in this state or in any other state in the United States, (b) suitable approved facilities and programs for children under the age of five." (Emphasis added.)

Petitioners also contend that *N.J.S.A.* 18A:38-5 permits boards of education to admit children early, that the legislative intent of early admission for younger children is to provide specifically for the very special needs of handicapped infants, and absent that interpretation, the statute is meaningless. Petitioners further contend that the Glen Rock Board of Education provides a special kindergarten for handicapped children and that their infant son has a right to be admitted to use those facilities.

Respondent Board of Education acknowledges the facts in the instant matter as set forth in petitioners' argument, but says that this issue is a matter of law, and that no child under the age of five on October 1 must be admitted to school in September. Respondent states that the Board policy is to follow the provisions of *N.J.S.A.* 18A:38-5, and that any exceptions to its adopted policy would invite charges of favoritism and discrimination. Respondent further avers that *N.J.S.A.* 18A:33-1 states in part that:

> "Each school district shall provide, for *** all pupils between the ages of five and 20 years ***."

and that *N.J.S.A.* 18A:46-6 states that:

> "Each board of education shall identify and ascertain, according to rules prescribed by the commissioner with the approval of the state board, what children between the ages of five and 20 in the public schools of the district, if any, cannot be properly accommodated through the school facilities usually provided because of handicaps."

Respondent claims, therefore, that pursuant to the applicable statutes, ***supra***, petitioners have no legal basis for a claim for early admission for their infant son.

* * * *

The Commissioner has reviewed the report of the hearing examiner and considered carefully the argument of counsel.

This matter was submitted for a decision solely on the basis of the

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interpretation of the relevant statutes on the admission age of school children, since counsel agree on the facts in the instant issue.

The Commissioner determines that the statutes are clear, and that petitioners unfortunately have no claim for early admission that can be supported by law. *N.J.S.A.* 18A:38-5 reads in part as follows:

> "No child under the age of five years *shall* be admitted to any public school, except such as may be provided pursuant to law for children of his age. ***but the board *may* in its discretion admit any such pupil*** (Emphasis supplied.)

The legislative intent here of the words "shall" and "may" is definitive. This provision makes early kindergarten entrance permissive, and the Commissioner cannot construe the statute, *supra*, otherwise.

N.J.S.A. 18A:46-6 charges boards of education with the responsibility of identifying:

> "***children *between the ages of five and 20 in the public schools of the district****" (Emphasis supplied.)

who cannot be accommodated because of their handicaps. Therefore, to be eligible for the statutory provisions made for handicapped children, *all* children must first qualify for school admission pursuant to the provisions of *N.J.S.A.* 18A:38-5.

Statutory limitations, therefore, deny petitioners the early entrance they seek for their son, and the Glen Rock Board of Education's policy makes no exceptions for the early admission of the handicapped.

The petition is dismissed.

COMMISSIONER OF EDUCATION

September 11, 1970

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Board of Education of the Township of Franklin,

Petitioner,

v.

**Township Committee of the Township of Franklin,
Hunterdon County,**

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Wesley L. Lance, Esq.

For the Respondent, *Pro Se.*

Petitioner, hereinafter "Board," appeals from the action of respondent, hereinafter "Committee," taken pursuant to *N.J.S.A.* 18A:22-37, certifying to the Hunterdon County Board of Taxation a lesser amount of appropriations for school purposes for the 1970-71 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were educed at a hearing conducted on June 22, 1970, at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner. The report of the hearing examiner follows:

At the annual school election held on February 10, 1970, the voters rejected the Board's proposal to raise $266,654 by local taxes for current expenses and $3,000 for capital expenditures. The budget was then sent to the Committee pursuant to *N.J.S.A.* 18A:22-37 for its determination of the amount of local tax funds required to maintain a thorough and efficient local school system.

After consultation with the Board and a review of the budget, the Committee made its determination and certified to the Hunterdon County Board of Taxation an amount which reduced the appropriation for current expenses by $29,420, for capital outlay by $3,000, and for debt service by $10,000, for a total reduction of $42,420. However, it is apparent that the cut by the Committee of $10,000 from interest for debt service was not given effect by the Hunterdon County Board of Taxation, and that the total sum of $55,497 required by the bonded indebtedness of the district will be raised in the coming school year. Therefore, the total cut by the Committee subject to the adjudication of this appeal is, in effect, limited to a total amount of $32,420 for current expenses and capital outlay.

The Committee suggested line items of the budget in which it believed economies could be effected without harm to the educational program. The Board contends that any curtailment of the amounts it proposed will not provide sufficient funds to maintain a thorough and efficient system of

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education for the pupils of the school district. It appeals to the Commissioner to restore the deleted amounts contested. The following table is a summary of the budget line items in dispute:

Acct. No.	Item	Board's Budget	Committee's Proposal	Reduction
CURRENT EXPENSES				
J120b	Legal Fees	$ 4,000	$ 3,500	$ 500
J211	Sal.-Principal	14,000	13,000	1,000
J213	Sal.-Teachers	185,350	167,230	18,120
J215	Sal.-Secretarial	6,080	5,080	1,000
J220	Textbooks	6,000	5,000	1,000
J230	Library Books	3,500	2,500	1,000
J213	Sal.-Nurse	7,700	7,500	200
J520	Transportation	23,000	22,000	1,000
J610	Sal.-Operation	14,500	12,500	2,000
J640	Utilities	5,000	4,800	200
J720	Contr. Serv.-Maint.	8,100	5,100	3,000
J730	Repl. of Equipment	3,000	2,600	400
TOTAL	CURRENT EXPENSES	$280,230	$250,810	$29,420
1200	Capital Outlay	$ 3,000	$ -0-	$ 3,000
1300	Debt Service	55,497	45,497	10,000
TOTAL		$338,727	$296,307	$42,420

Written and oral testimony was offered by both parties on the line items in contention. The hearing examiner's findings, conclusions and recommendations are as follows with respect to each of the Committee's proposed reductions:

J120b -- Legal Fees

A review of the budgets of the district in recent years shows an increase in this account as follows:

1968-69	Actual	$ 450
1969-70	Budgeted	2,000
1970-71	Anticipated	4,500 (Board's budget)

The Committee had originally considered cutting this item drastically, but moderated its position after a meeting with the Board. The Board had noted costs incurred pursuant to its obligation under *Chapter* 303, *Laws* of 1966, and other obligations. The Board's position is that even the relatively small cut of $500 might cause difficulty.

The hearing officer notes that the cut of the Committee was not an arbitrary one, but was made after a discussion and joint review, and that the testimony of the Board deals largely with expenditures that may not prove to be necessary. It is certainly possible that negotiations may prove more amicable in the 1970-71 year, and that there may be a solution of a possible case in Special Education, short of court action. In any event the hearing examiner sees no reason why the judgment of the Committee should be set aside.

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Summary:		
	Proposed Reduction	$500
	Amount Restored	- 0 -
	Amount not Restored	500

J211 – Salary - Principal

The Board's testimony is that the budgeted salary increase of $1,500 to a new total of $14,000 for the principal is not high for the area, and is justified in any event because his duties have increased with the addition of six classrooms, a new gymnasium and three new staff members. The Committee maintains that student enrollment has not risen proportionate to this increase in salary, and that the salary increments of 41.1 per cent between 1967-68 and 1970-71 cannot be justified by any measure. The Committee, therefore, proposes a cut of $1,000 in this account.

The hearing examiner notes that this salary was set in the advertised budget, as a result of the Board's obligation, pursuant to *Chapter* 303, *Laws* of 1966, to negotiate terms and conditions of employment for its employees, and he sees no reason to countermand the judgment of the Board in this matter. The salary is certainly not out of line with a proposed top teacher's salary of $11,600, when the responsibilities of the principal's position, and its time demands, are made a part of the total equation, nor is it high when compared with other similar positions in the area. The hearing examiner, therefore, recommends that the cut be restored.

Summary:		
	Proposed Reduction	$1,000
	Amount Restored	1,000
	Amount not Restored	-0-

J213 – Salaries - Teachers

The total cut proposed by the Committee from this account is $18,120. Of this total the cuts for specific positions are detailed as follows:

(a) Music - Instrumental	$ 2,100
(b) Physical Education, Health	7,700
(c) Remedial Reading	3,400
Sub-Total	$13,200
Other salaries	4,920
TOTAL	$18,120

(a) The program in instrumental music, while an expansion of a past offering, is also designed to make it possible to hire a full-time person. The difficulty in the past year has been to hire a teacher for the half-time position in general music. The Committee feels that the expansion of this offering is not essential, and that instrumental music should be an expense borne by parents if it is to be borne at all.

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The hearing examiner feels that while the instrumental portion of the salary cannot be held to be essential, and, therefore, not subject to restoration, the practicalities of the employment of a half-time person in a small community are so great that the employment of anyone for music may well be precluded. He would regard this as a lamentable deletion. He does believe that, even without restoration of funds for this position, it may be possible for the Board to hire a full-time person from funds which will accrue in the salary account by virtue of the fact that seven teachers have resigned at an average salary of approximately $9,100, and may be replaced at salaries that will average much less. This matter is remanded to the discretion of the Board.

(b), (c) The testimony on the employment of teachers for physical education and remedial reading is rather extensive, and the hearing examiner concludes from it that funds must be restored for each of these positions. The people of the district voted funds for a new gymnasium which is now completed, but will presumably be without a person to supervise its use, properly care for its equipment or be entrusted with a unified program in health and physical education, if the cut of the Committee is allowed to remain. The hearing examiner recommends the restoration of this amount of $7,700. The supplemental program in reading, now on a three-day-a-week basis, is proposed for five days a week in September. The Committee would retain the *status quo*, despite the need of 35 children for work in remedial reading, who are not now being afforded such opportunity. The amount of this cut is considered by the hearing examiner as essential for an offering in this subject to all children who may profit from it.

(d) The hearing examiner concludes that no finding on the merits of the remaining cut of the Committee in the salary account is necessary because funds will be available to cover them for the reasons given in "a" above.

Summary:	Proposed Reduction	$18,120
	Amount Restored	9,800
	Amount not Restored	8,320

J215 – Salaries - Secretarial

At the present time the one school secretary serves more than 400 pupils, about 20 teachers and the principal in day-to-day operation. She also serves the Board of Education by the preparation of budget materials and other reports as the result of new negotiation procedures made mandatory by *Chapter* 303, *Laws* of 1966. The Board proposes a budget of $1,080 to assist her with this work. The Committee proposes a flat cut of $1,000 since, in its judgment, a rise of 2.6 per cent in student population is not proportionate to the increase in this account set by the Board.

The hearing examiner concludes that the increase provided by the Board for secretarial assistance is proportionate to the increase of workload demanded by recent new legislation and for normal increments, and that the total budget

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of $6,080 for such assistance is reasonable and essential and must be restored.

Summary:	Proposed Reduction	$1,000
	Amount Restored	1,000
	Amount not Restored	-0-

J220 – Textbooks

The Board proposes new textbook adoptions in the following fields for 1970-71:

Science	grades 1 and 2
Math	grades 1,2,3,7,8
English	grades 3-8
Health	grades 1, 2, 4, 5, 7
Remedial Reading	for new enrollment
Literature	grades 7 and 8
Reading	grade 7
Social Studies	grade 7

In addition, other money is budgeted for replacement and for supplementing present services because of enrollment increases. The Committee believes that balances are available to pay for some of these books, and that the amount budgeted should be reduced by $1,000.

The hearing examiner has examined the three pages of testimony by the Board pertinent to this account, and concludes that the number of new adoptions scheduled over a one-year period is unusually large for a school this size, and might better be definitely programmed over a two-year or three-year period. He is of the opinion that, even with the cut proposed by the Committee, the most essential of the textbook replacement needs may be met, and that the balance of these purchases may, without harm, be deferred to a succeeding year.

Summary:	Proposed Reduction	$1,000
	Amount Restored	-0-
	Amount not Restored	1,000

J230 – Library

It is evident from the testimony that an increasing effort has been made by the school to make the library a true adjunct of the classroom learning environment. PTA volunteers and the County's library extension specialist have all aided in the project. Old books of no value have been weeded out, space doubled and the collection evaluated in terms of some national standards. The Board feels its budgeted increase of $970 to a new account total of $3,500 is moderate.

The Committee feels that there is a duplication of effort since there is a County Library service, and that the amount to be spent for audio-visual

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materials cannot be justified when viewed in the context of increased expenditures for other learning materials such as textbooks and library books.

The hearing examiner recommends that the budgeted sum of $2,000 for library books be retained, providing, as it does, for about one book per pupil, but that the audio-visual aids account be cut from the projected $1,500 to $1,000. This will allow payment of $410 to the County Audio-Visual Aids Fund, and still leave a sum greater than this for the purchase of other audio-visual aids to supplement the present collection.

Summary:	Proposed Reduction	$1,000
	Amount Restored	500
	Amount not Restored	500

J213 – Salary - Nurse and J640 – Utilities

These two accounts were reduced $200 each by the Committee – the first account with no specific supporting reasons, the second because it was thought the telephone budget was too high. The hearing examiner recommends the restoration of both of these small cuts as essential – the first needed as part of a contracted salary, the second because the school has the bare minimum of one trunk line with extensions at small cost, and some money must be budgeted for toll calls.

Summary:	Proposed Reductions	$400
	Amount Restored	400
	Amount not Restored	-0-

J520 – Transportation

The cut of the Committee of $1,000 in this account to a new total of $22,000 is intended by the Committee to be limited to that part of the account applicable to field trip programs. The Board's position is that such trips are desirable as corollary learning experiences. The hearing examiner agrees with the Board about the desirability of these trips, but cannot hold that they are essential to the maintenance of an adequate educational program, in view of the vote of the people and the Committee's action.

Summary:	Proposed Reduction	$1,000
	Amount Restored	-0-
	Amount not Restored	1,000

J610 – Salaries - Operation

The Board had budgeted $14,500 in this account to provide for two full-time janitors, for part-time help, and overtime pay as required by the Fair Labor Standards Act Amendment of 1966. As part of the planning involved, the Board analyzed the need for janitorial service in terms of quality and quantity

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and "feels it will not be possible to maintain the school property for next year" if the cut is upheld. The Committee's judgment is based on a comparison of today's staff and building with those of years ago, and an assumption that a doubling of staff in that period should be adequate.

The hearing examiner cannot agree. The building has also been approximately doubled in size; facilities such as the gym require more meticulous attention for proper maintenance; and Federal laws have for all practical effect reduced the work week from the five and one-half days customary before 1966 to the present five days. For these reasons he recommends that this cut be restored.

Summary:	Proposed Reduction	$2,000
	Amount Restored	2,000
	Amount not Restored	-0-

J720 – Contracted Services

The Board proposes these items for repair and replacement:

(a) Fencing	$2,000
(b) Lighting	2,200
(c) Replacement of gutter	–
(d) Venetian blinds	2 A.V.A. rooms
(e) Plumbing fixtures	1,000

The Committee cut out the fence cost of $2,000 and proposed another $1,000 cut to be made at the discretion of the Board.

The hearing examiner, after a review of the testimony, believes the fence ought to be replaced or torn down, but cannot find that it is essential for a thorough and efficient system of education in view of the vote of the people and the action of the Committee. He does recommend that items "b" and "e", programmed by the Board, are necessary for proper repair and maintenance of the physical plant and that "d" is essential to a proper instructional program employing audio-visual aids.

Summary:	Proposed Reduction	$3,000
	Amount Restored	1,000
	Amount not Restored	2,000

J730 – Replacement - Equipment

The Committee reduced this item by $400 on the assumption that there would be a surplus of $500 in the account as of June 30, 1970. The Board maintains the assumption was incorrect and that the money is needed to replace desks and chairs that "are missing rungs" and "are not safe;" to provide files, and cabinets; and to obtain a door for the boiler room as a replacement for one "falling off its hinges."

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The hearing examiner does not regard this expenditure as other than one of orderly replacement of old equipment, certainly essential, and recommends that the amount be restored.

Summary:	Proposed Reduction	$400
	Amount Restored	400
	Amount not Restored	–0–

1200 – Capital Outlay

The Board's budget for capital equipment items totaled as follows in prior years:

1968-69	Actual	$ 9,165
1969-70	Budgeted	10,000
1970-71	Anticipated	3,000

Projected equipment expenditures were for the itemized areas below:

Science	$1,000
Library	1,000
Health	500
Remedial reading	500

The Committee proposed to cut the whole $3,000 proposed by the Board. Absent testimony on critical needs in science or in health, the hearing examiner finds that this equipment has not been firmly established as essential. However, he is persuaded that the library must have a minimum of equipment, if it is to be properly used as a learning facility, and that the remedial reading program enlargement must also be funded in a minimum way to implement the decision relative to Account J213. Therefore, he recommends restoration of these cuts.

Summary:	Proposed Reduction	$3,000
	Amount Restored	1,500
	Amount not Restored	1,500

1330 – Debt Service

The Committee proposed a reduction of $10,000 in interest on indebtedness of the district. This amount may not be cut, and the cut was not made by the County Tax Board so the decision regarding this item is academic. It is inserted to insure the completeness of the record.

Summary:	Proposed Reduction	$10,000
	Amount Restored	10,000
	Amount not Restored	–0–

The recommendations of the hearing examiner are summarized as follows:

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CURRENT EXPENSE

Account No.	Item	Committee's Reduction	Amount Restored	Amount Not Restored
J120b	Legal Fees	$ 500	$ -0-	$ 500
J211	Sal.-Principal	1,000	1,000	-0-
J213	Sal.-Teachers	18,120	9,800	8,320
J215	Sal.-Secretarial	1,000	1,000	-0-
J220	Textbooks	1,000	-0-	1,000
J230	Library Books	1,000	500	500
J213	Sal.-Nurse	200	200	-0-
J520	Transportation	1,000	-0-	1,000
J610	Sal.-Operation	2,000	2,000	-0-
J640	Utilities	200	200	-0-
J720	Contr. Serv.-Maint.	3,000	1,000	2,000
J730	Repl. of Equipment	400	400	-0-
TOTAL – CURRENT EXPENSES		$29,420	$16,100	$13,320
1200	Capital Outlay	$ 3,000	$ 1,500	$ 1,500
1330	Debt Service	$10,000	$10,000	$ -0-
	GRAND TOTAL	$42,420	$27,600	$14,820

The Commissioner has reviewed the findings and recommendations of the hearing examiner set forth herein. He notes particularly the disputed items bearing directly on costs incidental to the opening of a new physical education facility and concurs in the findings pertinent to such opening.

The Commissioner therefore finds and determines that an additional $27,600 is necessary for the maintenance and operation of a thorough and efficient system of education in the Township of Franklin, Hunterdon County, for the 1970-71 school year. He therefore directs that the sums of $16,100 for current expenses, $1,500 for capital outlay and $10,000 for debt service be added to the previous certification of appropriations for school purposes for the 1970-71 school year made by the Franklin Township Committee to the Hunterdon County Board of Taxation.

COMMISSIONER OF EDUCATION

September 11, 1970

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Pearl Seiber,

Petitioner,

v.

Board of Education of the Freehold Regional High School District, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Peter S. Falvo, Esq.

For the Respondent, Dittmar, Dittmar, Goldberg, Cerrato & O'Connor, (Dominick A. Cerrato, Esq., of Counsel)

Petitioner seeks reinstatement in a position as assistant to the cafeteria manager, or a position similar to and entailing the same duties, alleging that she was a tenured employee deprived of her employment without good cause. Respondent, while denying petitioner was a tenured employee, maintains that, in any event, her position was lawfully abolished as part of a general reorganization of its cafeteria operations, and that no comparable job exists.

The facts of the matter were established through the testimony of witnesses and documents at a hearing conducted on August 31, 1970, at the office of the Monmouth County Superintendent of Schools, Freehold, by a hearing examiner appointed by the Commissioner. Both parties waived the filing of briefs and submit the issues for adjudication on the record and the pleadings. The report of the hearing examiner is as follows:

Petitioner has been employed in respondent's school system for a period of approximately sixteen years. During the most recent ten-year period ending on June 30, 1970, she held the position of assistant cafeteria manager with responsibilities for various phases of the food service operation in the cafeterias of the district. However, on June 29, 1970, respondent voted to abolish the position petitioner had held in these latter years, and petitioner maintains she was not offered another position. It is petitioner's contention that she had acquired tenure in the district under the terms of *N.J.S.A.* 18A:17-2 because much of her work was clerical in nature. She further maintains that the abolishment of the position was a mere subterfuge to dismiss her.

Respondent, on the other hand, denies that petitioner was engaged in work that was clerical in nature, and asserts her position as assistant to the cafeteria manager was one that embraced the duties of that office and that these duties were supervisory or managerial in nature. Respondent argues that no tenure could accrue since there is no statutory authorization for the accrual of tenure in such a position. In any event, respondent contends, the position was abolished in good faith in the interest of efficient operation and as part of a

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general reorganization involving all staff assignments in the district schools.

At the hearing on August 31, 1970, respondent introduced five contracts, or letters of contract, that were given to petitioner during five of the past years of her employment. (R-2) The last of these was for the school year 1968-69, but it was stipulated that a similar contract was executed for the 1969-70 school year. Each of the contracts, or letters, was offered and accepted for a one-year term. The letter of June 27, 1967, was typical. It said:

> "At a special meeting of the Board of Education of the Freehold Regional High School District, Monday, June 26, 1967, you were employed as Assistant Cafeteria Manager for the school year August 15, 1967, to June 30, 1968 at a salary of $5,500.00."

The statement of employment for 1968, while more formal, said that petitioner was "reappointed." There was thus an implied acceptance, during those years, that petitioner was employed on a yearly-term basis and that such employment required a new appointment each year.

Petitioner's recital of the list of duties assigned to her position would generally confirm, in the opinion of the hearing examiner, that petitioner had performed, in some aspects of her work, as a clerical employee. She had made ledger entrees, compiled daily work records of employees, made milk reports, and deposited bank money. However, the hearing examiner concludes that these clerical chores were incidental to the supervisory or management duties of the office. For instance, petitioner supervised food preparation in the kitchens of the schools each day, and she conferred with the manager on menu formulation. She participated in the decisions involving low-bid items. She spent a period of time, estimated at up to an hour a day, in discussion with vendors.

It was the testimony of the Superintendent of Schools that the pupil population was expanding at an accelerating rate and that he had been charged by the Board with the planning necessary for expansion of the district from one with three senior high schools to one with five. As part of this planning, he testified, various staff members had assisted him over a long period of time in development of a new organizational chart (R-4) which up-dated existing staff assignments, added two new positions, and eliminated the position held by petitioner. He said, in specific reference to cafeteria operation, that the duties of the cafeteria manager were not to be delegated to cook-manager in each of the buildings, and their responsibility will be directly to the cafeteria director. The decision to realign cafeteria operation in this manner was, in part at least, influenced by the present director of cafeterias who has worked in this manner in previous assignments. The move to decentralize cafeteria operation will receive impetus this fall when one school receives new food-preparation equipment. This will end its former role as a distributor of food prepared elsewhere.

After a review of the testimony and exhibits, the hearing examiner has

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concluded that petitioner has been employed on a yearly-term basis as an assistant cafeteria manager and that the position has been supervisory rather than clerical in the main elements of responsibility. He further concludes that the position was abolished in good faith as part of a general reorganization and realignment incidental to district expansion and that the abolishment was not a subterfuge to dismiss petitioner. He notes that counsel for petitioner cites the case of *Barnes v. Board of Education of Jersey City,* 85 *N.J. Super.* 42, 45 (1964) to buttress his contention that the statute *N.J.S.A.* 18A:17-2 was meant to be construed in a liberal manner, so as to embrace all kinds of positions with duties of a clerical nature in whole or in part. The hearing examiner believes that such a construction applied to this case would leave the distinction between employees and management as a distinction without a difference, since all management personnel must perform certain tasks incidental to the managerial function which might be classified as clerical in nature.

There is one additional fact of note. The Secretary of the Board testified that when he talked with petitioner about the Board's abolishment of her position, he asked her whether or not she would be interested in the position of cook-manager in one of the cafeterias. She said that she would be interested if there was no reduction in salary. Subsequently, no such position was offered to her since her last salary was at an annual rate of $6,200, and the salary of cook-manager in each of the schools is approximately $3,800 per year.

The Commissioner has carefully considered the report and the conclusions of the hearing examiner and notes particularly that the central issue raised by this petition is whether or not petitioner, by virtue of duties performed, had acquired tenure in the schools of respondent as a "clerical" employee. He holds that she had not, and that the duties of the office of "assistant cafeteria manager" in the schools of respondent were those of a person actively engaged in the management phase of cafeteria operation. Therefore, petitioner could not have acquired tenure status in accordance with the terms of *N.J.S.A.* 18A:17-2, which provides tenure for persons "***(b) holding any secretarial or clerical position or employment under a board of education of any school district or under any officer thereof ***." The Commissioner knows of no other statute under which petitioner could have acquired a status of employment protected by tenure. To the contrary, the employment status of petitioner has clearly been that guaranteed only by the terms of her annual contract, which was renewed each year and which expired most recently on June 30, 1970.

It is settled law that, except as limited by a contract of employment, by the Federal and State Constitutions, by the Teachers Tenure Act and by other legislation, such as the law against discrimination, the local board "has the right to employ and discharge its employees as it sees fit." *Zimmerman v. Board of Education of Newark,* 38 *N.J.* 65, 71 (1962) In the instant matter the Board chose not to employ petitioner in her former position for the school year 1970-71, and, in the exercise of this right, its discretion is not abridged by statute and may not be abridged by the Commissioner. The Board's contract with petitioner for the year 1969-70 expired on June 30, 1970, and there is no

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allegation that there was infringement of any of its provisions. The Commissioner, therefore, finds no genuine issue of material fact in this case, although there are allegations in the petition of appeal which are denied by respondent. These allegations deal with the Board's decision to abolish the position of assistant cafeteria manager and are not relative and material to the central primary issue defined by the Commissioner, *ante*. Therefore, the Commissioner finds no cause for action on which relief can be granted. *Ocean Cape Hotel Corporation v. Macefield Corporation*, 63 *N.J. Super.* 369 (*App. Div.* 1960)

In view of the foregoing finding that petitioner had not acquired tenure status in respondent's district and that there was no obligation by respondent to rehire petitioner for the 1970-71 school year in any position, there is no necessity to pass upon the issues raised relative to the abolition of the position. For the reasons stated the petition herein is dismissed.

COMMISSIONER OF EDUCATION

September 18, 1970

David Harris,

Petitioner,

v.

The Board of Education of the Township of Teaneck, County of Bergen, Dr. Melvin Michaels, as Principal of Teaneck High School, Joseph Cervino, as Director of Athletics, Teaneck High School, Arthur Christensen, as tennis coach, Teaneck High School,

Respondents.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Ronald B. Atlas, Esq.

For the Respondents, Parisi, Evers & Greenfield (Irving Evers, Esq., of Counsel)

Petitioner is a student in respondent Board of Education's Teaneck High School, who alleges he was denied permission to participate on the High School tennis team because of the length of his hair. A plenary hearing was held in the office of the Bergen County Superintendent of Schools on July 28, 1970, before a hearing examiner appointed by the Commissioner. Counsel also filed briefs. The report of the hearing examiner is as follows:

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Counsel for respondents acknowledges the fact that petitioner was denied permission to play on the High School tennis team because he would not cut his hair to a conventional length. The High School tennis coach defined a conventional-length haircut as one in which the hair does not grow over the ears or fall over the eyes or the shirt collar.

The tennis coach testified that:

1. Petitioner signed the training-rule pledge required of all the athletes.
2. All the boys on the team were admonished to obey the curfew rules and not to drink, smoke, use drugs or attend wild or late parties.
3. The boys were told that they were individually responsible for noting any and all information posted daily on the team bulletin board.
4. The rule on conventional haircuts was not a written rule, but was agreed upon by all the coaches employed by respondent Board.
5. The coaches in turn were instructed by the athletic director to review the long-hair rules with their players.
6. All the boys who had signed up for the team agreed to abide by the rules and regulations set by all the coaches for members of all of respondents' school teams.
7. The regulations were designed to instill discipline and provide conformity in dress and hair style.

Petitioner alleges that the reasons given for ordering a conventional haircut were health, safety and conformity. Petitioner avers that he successfully refuted the health and safety issues with school officials, but that the athletic officials were adamant on their view of conformity.

Many court cases were cited by petitioner, as dealing with the problems of student rights, discipline, long hair and other matters of student dress, in support of his argument. Petitioner cited, also, decisions of the Commissioner of Education and the State Board of Education in upholding the right of students to regulate their own hair length.

With respect to the decision denying him the right to play on the tennis team, petitioner prays, therefore, that the Commissioner:

"(1) declare said decision unconstitutional,

(2) declare said decision as against the policies of the New Jersey Education System,

(3) declare that the length of a student's hair, his personal appearance and his mode of dress are not causes for refusal to allow a student to participate in school-sponsored interscholastic sports."

Respondent Board of Education argues that this matter does not involve the suspension or expulsion of a pupil from school for failure to cut his hair, but only his participation in an extracurricular activity offered by the school. Respondent avers that the State Board of Education, in the case of *Pelletreau v.*

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Board of Education of New Milford, 1967 *S.L.D.* 35, 45, and the Commissioner of Education in the cases of *Bertin, et al. v. Boyle et al.*, 1968 *S.L.D.* 24, and *Sylvester v. Board of Education of Watchung Hills Regional High School*, decided by the Commissioner May 20, 1969, (which cases were also cited by petitioner) dealt with the question of the right of students to pursue their academic studies and not the particular problem posed by the case *sub judice*. Respondents' brief states that they do not:

> "*** argue with the rulings that a student cannot be denied the right to participate in an academic program because of the length of his hair so long as there is no disorder or other problems posed by reason of that situation. What we do say is that the cases dealing with the expulsion or suspension of pupils who do not cut their hair have no applicability in the instant case.***"

Respondents concede that students have a constitutionally-guaranteed right to a free public education, but contend that they do not have a similar legally-recognized right to be members of varsity teams. Respondents aver that petitioner is not being denied the right to a free public education by reason of his hair length, and if he seeks to exercise the privilege of being a varsity team member, he should be required to accede to the reasonable requirements of his coach.

Respondent tennis team coach opined that players must be ready to accept discipline when they join school teams, and that petitioner's refusal to cut his hair is proof that petitioner was not willing to accept this discipline. The coach further opined that failure of the coaches to enforce discipline in this matter would threaten their effectiveness in enforcing all other matters pertaining to athletic rules which players must follow.

Respondents stipulated that David is a good student and has not been a discipline problem. Respondents further stipulated that petitioner has not caused disruptions of any kind because of his hair length, and that his present hair style is shorter than it had been at the time of his being denied the right to play on the team.

Counsel agree that the sole issue in this appeal is whether or not an athletic coach has the authority to require a team member to cut his hair to a conventional length as a prerequisite for participation in interscholastic athletics.

The hearing examiner finds, however, that other questions relative to student participation in athletics in the public schools are appropriately raised here and must be considered as significant adjuncts in the instant matter. These questions are:

a. Is it within the scope of authority of a coach or a teacher, assigned to direct an activity, to determine reasonable eligibility criteria for pupil participation, or should these determinations be made by the

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local board of education?

b. Do hair length and style fall within such reasonable criteria?

The hearing examiner finds further that there are conflicting decisions in the matters of hair style and dress by other jurisdictions and that cases can be cited on either side of the question. He suggests, therefore, that the substantive issues are posed in the questions, *supra*, and that the Commissioner's determination be made on the basis of those issues after reviewing the arguments of counsel.

The Commissioner has reviewed the report of the hearing examiner.

In the instant matter, respondents' concern about long hair causing a break-down in the discipline of school athletes to the detriment of the other team members is merely speculative. No factual instances are presented to support this conclusion, and it was stipulated by counsel that petitioner is a good student and has not caused any school disturbances of any kind.

With respect to the questions posed by the hearing examiner, *N.J.S.A.* 18A:11-1 states in part:

"The board shall –

***c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools ***.",

and 78 *C.J.S.* 908, §121 states:

> "Subject to certain limitations, the Board of Education ordinarily has general power to make reasonable rules and regulations for the convenient dispatch of its own business, and for the administration of the schools and the conduct of the affairs of the district."

Accordingly, the Commissioner determines that the establishment of rules and regulations pertaining to the *eligibility* of students to participate in school athletics is the responsibility of respondent Board of Education. There can be no differentiation of the Board's authority to govern academic programs on the one hand, and athletics on the other. Intra-school and interscholastic athletics are integral parts of the total school experience. Athletic programs are authorized and financed by the Board, and the Board, therefore, is the authority which must make all rules and regulations pertaining to student eligibility for participation in athletics as they make rules of eligibility for other authorized school programs.

The Commissioner recognizes, however, that the Board's coaches, too, must make special rules that set the framework in which athletes must cooperate for the purposes of teamwork and organization. Such rules, however, should be

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procedural in design and limited to practice sessions, training rules, and uniform requirements, and in general should encompass other rules already set down by respondent Board's coaches. Establishment of rules and regulations concerning a student's *eligibility* is a matter lying solely within the province of respondent Board of Education.

In *Smith et al. v. Board of Education of Paramus*, 1968 *S.L.D.* 62 at page 64, the Commissioner said:

> "*** In determining the curriculum to be offered the board is not and should not be limited to a designation of the specific courses of study to be pursued in a formal classroom setting. Certain elements of the curriculum such as United States History, New Jersey history and geography, and physical education are mandated by statute, *N.J.S.A.* 18A:35-1 *et seq.*, 18A:6-2 and 3. But the public school curriculum is not restricted to the few areas of study which the Legislature has prescribed. Boards of education are free to determine whatever other learning experiences are suitable to the pupils to be served and will best achieve the aims and objectives of the schools.***"

and on pages 65 and 66:

> "*** The existence of a broad and well-developed program of student activities is an essential factor in the approval or accreditation of any secondary school. The Commissioner notes that the 'Guidelines for Approval Through Self-Study for New Jersey Secondary Schools', a manual developed by the Office of Secondary Education for use in the evaluation and approval of New Jersey secondary schools, pursuant to *N.J.S.A.* 18A:45-1, clearly demonstrates that a full and well-conducted program of student activities is a vital element in the assessment of the effectiveness of the school program. Similarly the *Evaluative Criteria*, 1960 Edition, of the National Study of Secondary School Evaluation, which provides the basis for accreditation of New Jersey secondary schools by the Middle Atlantic States Association of Colleges and Secondary Schools, devotes a full section to the student activity program (pages 241-256), and states as one of the 'guiding principles' (page 241):
>
> > " 'The school provides for two general kinds of educational experiences, the regular classroom activities and those called extracurricular or cocurricular. Together they form an integrated whole aimed toward a common objective ***.'
>
> "In the Commissioner's judgment, therefore, boards of education are not only permitted under the law, but have an affirmative duty and responsibility to develop a broad program of pupil activities beyond formal classroom instruction as an essential part of the curriculum offered.***"

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Having the duty, therefore, to develop co-curricular programs, respondent Board of Education must also establish the rules and regulations for student *eligibility* in this as in all phases of the total school program.

It is well established that athletic coaches have the authority and the duty to select team members based on individual competence. The opportunity to try out for a team or activity should be open to all; however, selection should be based on talent and potential contribution to the team. The reasonable limits of any rules of eligibility should not include regulations on hair style and length, which are matters of personal taste, unless it can be shown that such styles create classroom disorder, present a clear and present danger to the student or his fellow participants or are detrimental to good health and hygiene.

Attention is called to the following statement of the National Association of Secondary School Principals on page 9 of its bulletin "The Reasonable Exercise of Authority," published in 1969:

> "The courts have clearly warned that freedom of speech or expression is essential to the preservation of democracy and that this right can be exercised in ways other than talking or writing. From this generalization, it follows that *there should be no restriction on a student's hair style or his manner of dressing unless these present a 'clear and present' danger to the student's health and safety, cause an interference with work, or create classroom or school disorder."*

Conventions change the time, and the conventional hair styles of today are shallow reasons for denying otherwise eligible students from participation in any school programs. Absent any compelling reasons, therefore, for denying petitioner permission to play on the Teaneck High School tennis team, the Commissioner determines that the regulation governing the hair length of team members is invalid and cannot be supported.

The Commissioner orders, therefore, that the regulation governing hair length of team members be rescinded.

COMMISSIONER OF EDUCATION

September 30, 1970

Pending before State Board of Education.

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In the Matter of the Application of the Board of Education of the Borough of Franklin to Terminate the Sending-Receiving Relationship with the Board of Education of the Township of Vernon, Sussex County.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Honig and Kovach (Emanuel A. Honig, Esq., of Counsel)

For the Respondent, Dolan and Dolan (Robert H. Lee, Esq., of Counsel)

For many years the Franklin Borough Board of Education, petitioner, has received the grades 9, 10, 11 and 12 pupils of the Board of Education of Vernon Township, respondent, as tuition students in its high school. Now, because of the growth of the resident-pupil population of Franklin Borough, petitioner seeks to terminate the sending-receiving relationship with respondent in order to avoid more severe overcrowding of its facilities. Respondent agrees that it is essential at this time that each of the parties undertake prompt action to provide adequate education, and it is, in fact, taking steps to provide its own high school.

At a conference of counsel held on July 16, 1970, it was agreed that this matter would be submitted on the basis of the pleadings and a stipulation of facts drawn up with the concurrence of both of the parties.

The statute relevant to the termination of sending-receiving relationships is *N.J.S.A.* 18A:38-13, which reads as follows:

> "No such designation of a high school or high schools and no such allocation or apportionment of pupils thereto, heretofore or hereafter made pursuant to law shall be changed or withdrawn, nor shall a district having such a designated high school refuse to continue to receive high school pupils from such sending district except for good and sufficient reason upon application made to and approved by the commissioner, who shall make equitable determinations upon any such applications."

The facts in this case are as follows:

The basis of petitioner's application is that its own rate of growth, combined with that of respondent, has been so rapid that the school enrollment has overburdened the available schoolhouse facilities. To cope with this enrollment, petitioner has maintained classes in two portable classrooms, and two kindergartens are housed in a municipal building. Five elementary classes are held in a church. The overall housing picture will brighten somewhat when present plans to build and open a new elementary school reach fruition in September 1973. At that time, present elementary classes, now housed with high school classes in the one building in the district, will be withdrawn, and three

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more approved standard classrooms will be available for high school use. The total high school classrooms projected for the year 1973 is 44. These rooms will have an estimated functional capacity of 1200 students.

However, a projection of high school enrollment for a seven-year period shows that no relief from overcrowding of petitioner's high school will be afforded, even with completion of the new elementary school, if the sending-receiving relationships between Franklin Borough and its sending districts are preserved *in toto* as they presently exist within the given area. The projection of enrollment for grades 9-12 may be shown in the table below:

Year	Total Enrollment	Functional Capacity of H.S. Bldg.	From District of Respondent
1970-71	1040	1100	245
1971-72	1321	1100	303
1972-73	1427	1200	339
1973-74	1549	1200	406
1974-75	1641	1200	493
1975-76	1619	1200	558
1976-77	1733	1200	695

With these facts at hand, petitioner adopted a resolution on June 16, 1969, requesting the Commissioner to terminate the sending-receiving relationship with Vernon Township, effective June 30, 1974.

It is apparent from a review of the table that prompt action is needed to restructure the present school attendance patterns in Franklin Borough and Vernon Township if "suitable educational facilities" are to be provided students of both districts, pursuant to *N.J.S.A.* 18A:33-1. In this regard, many solutions, including regionalization, have been explored by the two boards of education. However, respondent's remoteness from Franklin High School is an argument against such a solution, with respondent as one of the partners. It also seems clear that the rapidly rising enrollment in respondent's district will soon result in a student body large enough in grades 9-12 to support a broad curriculum.

The Commissioner, after reviewing all the facts, finds and determines that the present and planned facilities at Franklin High School will be inadequate, beginning in September 1974, to provide a thorough and efficient system of secondary education for its own students and those of all its sending districts. He directs, therefore, that the sending-receiving relationship between the school districts of the Borough of Franklin and the Township of Vernon, Sussex County, be terminated, effective September 1974. This determination is subject to modification with regard to withdrawal of those pupils who may enter Franklin High School in the years prior to 1974, if there is mutual agreement between the respective parties in this regard. Therefore, the Commissioner remands this detail for further consideration. Pending this consideration and the decision of the Franklin Borough and Vernon Township Boards of Education regarding the schedule of withdrawal of Vernon Township pupils now in Franklin High School, the Commissioner will retain jurisdiction in this matter.

October 14, 1970 — COMMISSIONER OF EDUCATION

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William T. Burke by his parent and natural guardian Ruth B. Burke and Ruth B. Burke individually; Ellen Gould, by her parent and natural guardian John Gould and John Gould individually; Susan Hershenson by her parent and natural guardian Lawrence Hershenson and Lawrence Hershenson individually; Jan Lisa Huttner by her parent and natural guardian Helene Huttner; Nureth Notarius by her parent and natural guardian Harold Notarius; and Nancy Segal by her parent and natural guardian Muriel Segal and Muriel Segal individually.

Petitioners,

v.

Board of Education of the Township of Livingston, Essex County, and Julius C. Bernstein,

Respondents.

COMMISSIONER OF EDUCATION

Decision

For the Petitioners, Annamay T. Sheppard, Esq.

For the Respondents, Riker, Danzig, Scherer & Brown (Peter N. Perretti, Jr., Esq., of Counsel)

Petitioners are, or were during the 1968-69 school year, pupils in Livingston High School. This action is brought in their behalf by their parents, and by their parents individually. They complain that because of a policy of the school barring the distribution within the school of written material "without prior censorship and approval," they are denied rights guaranteed them by the Constitutions of the United States and of New Jersey and the New Jersey school law. They also complain that the said policy, and the threat of suspension for violation thereof, are designed to abridge and restrict the right of students of the school to free speech, and have the effect of chilling the exercise by such students of their constitutionally-guaranteed right of free speech. Respondents deny that they have violated petitioners' constitutional rights as alleged.

A hearing in this matter was conducted on December 4 and 5, 1969, at the office of the County Superintendent of Schools, East Orange, by a hearing examiner appointed by the Commissioner. Memoranda of counsel have been submitted. The report of the hearing examiner is as follows:

It is stipulated that since the filing of the petition herein on June 5, 1969, four of the petitioners are no longer enrolled in Livingston High School, and that only petitioners Burke and Notarius remain. It is also stipulated that respondent Bernstein, who was principal of the High School at the time of the filing of the petition, is now Assistant Superintendent of Schools, and the petition is amended to include Charles V. Winters, now acting principal, as a party respondent. It was further stipulated that the depositions of Jan Huttner and

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Ellen Gould, originally among the petitioners and now attending colleges outside of New Jersey, are made a part of the record herein.

The hearing examiner finds that:

Livingston High School is operated as a three-year senior high school with grades 10, 11 and 12, and enrolls approximately 1,900 pupils.

During the spring of 1968 a group of pupils prepared, published and circulated within the school, without prior approval by, or permission of school authorities, a five-page mimeographed publication entitled "The Coalminer." (P-R-1) The circulation was accomplished by pupils offering the document for sale to those wishing to buy it at five cents per copy, in the corridors of the school, during school hours. There was no evidence that the circulation of the publication resulted in littering, disruption of corridor traffic, or incitement to any disorderly act on the part of the pupils of the school.

Subsequent to the aforesaid circulation, several pupils were suspended from school because, allegedly, the act was unauthorized, and the publication contained material characterized by the principal as obscene and scurrilous. The principal testified that even without obscene, scurrilous, or other offensive characteristics, the distribution of "The Coalminer" without prior approval would have been proscribed by the school's policy.

Thereafter, two of the pupils, who had been suspended, submitted to the principal copy for a second issue of "The Coalminer" and asked for his suggestions. The material was returned to the pupils without suggestions.

On June 7, 1968, the principal addressed the following letter to the two pupils who had previously asked for suggestions: (P-1)

"Dear Paul and William:

"As you probably know, you are no longer alone in wishing to express yourselves and your differences with the school, our society, prominent figures, and some established mores.

"Faced with a proliferation of publications, I must come up with some reasonable policy with which all of us can live. It seems to me that if students wish to publish their thoughts, however conforming or rebellious, but without faculty involvement, they had best do so among themselves, outside the school.

"However, in light of the apparent number of students who want to publish their thinking along dissenting lines within the school itself, I shall make it my business, come September, to set up some channel whereby such expressions can be written, published, circulated, and sold within the school. I am quite sure that this can be done without abrasive restrictions on the students and within the areas of acceptable social patterns.

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> "For the present, I shall have to adhere to the policy that only those publications which are school-sponsored and school-structured can be sold and distributed within the building. If you wish to publish your paper and distribute it among your fellow-students away from the school, that's up to you. I believe that you should be sure of your facts and avoid unfortunate connotations.
>
> "We'll go on from there next September."

No action such as that mentioned in the third paragraph of the letter (P-1, *supra*) was initiated by the principal in September 1968 or thereafter. The principal testified that he "never got to it," and pupils did not press him for action.

Four issues of "The Coalminer" have been published and circulated since the original one, but circulation has in each case been carried on off the school property where, the pupils testified, they cannot reach all the intended audience.

In March 1969, a group of pupils, including petitioners, conceived the idea of an "independent" publication, and shortly thereafter four students, including three of the present or former petitioners, consulted with the principal and vice-principal about whether the policy governing unauthorized distribution of written materials was still in effect. The pupils were told that it was, and that if they wanted the policy changed they should ask the Board of Education to change it.

In April several pupils attended a Board meeting, where they were told that the problem was in the principal's area of responsibility, and that the Board would take no action until it received a report from the principal. Although no further response was given by the Board to the pupils, at a subsequent meeting with the principal, the pupils were informed by him that the challenged policy was still in effect.

Late in the spring of 1969, three pupils associated with the publication of "The Coalminer" were dropped from the staff of "The Lance," a school newspaper produced under faculty sponsorship. The reasons given to the pupils by the faculty sponsor for their dismissal were that they had made insufficient contributions to the paper, they used the paper for a "soap box," and they were members of a staff of a competing paper. One of the dismissed pupils was later reinstated. The action of the faculty advisor was sustained by the high school principal, who, however, denies that their participation with respect to "The Coalminer" was a reason for their dismissal.

A fourth pupil submitted to the student council a resolution seeking the reinstatement of the aforesaid three pupils to the staff of "The Lance." Two days later he too was dismissed from the staff and called "two-faced." He was also dropped from the journalism class which trains pupils for service on "The Lance." However, he was later granted academic credit for membership in the class.

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The aforesaid publication, "The Lance," is a related product of the instruction in journalism, under the direction of the journalism teacher, who defines the purpose, range and approach of this publication, organizes the staff, and presumably cooperatively decides with the staff on the content of the newspaper. While there is no practice, policy, or directive to operate political censorship of material, the faculty advisor is expected to censor obscenity, scatology and scurrility, and to assure complete factual accuracy of published materials. In recent years the school has also provided faculty sponsorship of "The Squeaking Wheel - A Journal of Dissent," and "Potpourri," a literary publication, neither of which publications is now in existence.

Pupil witnesses testified that they had sought unsuccessfully to find faculty sponsorship for a student publication and a student discussion group. The policy of the school is to assist in securing such sponsorship, but there is no evidence that such assistance was provided in these instances.

Petitioners offered expert testimony designed to show that with respect to sexually-oriented magazines, a group of psychiatrists and psychologists found no statistically significant relationship between such published materials and human behavior. (P-4) A second expert, a clinical psychologist, testified to the effect that at the high school level exposure to is better than insulation from ideas, activities and the exhortation "to do something." The school, he said, must balance its social role of protectiveness against constriction, and in seeking such a balance subtle or implicit censorship resulting from the pupil's showing his written product is helpful. The best situation, he testified, is the free availability of help, but an absolute ban undermines the educative process.

Petitioners and their witnesses testified that they believe that a publication of free comments, discussion, and criticism such as contemplated by "The Coalminer" or a similar publication is impossible to achieve under the kind of faculty supervision required by the school's policy.

Respondents' witness, the former principal, testified that there is no specific written statement of policy barring unauthorized publications and their distribution in school, but affirms the existence of such an "understood" policy, as applied to the situation herein. Respondents' witness cited as instances of adverse student reactions a gathering of about 250 pupils to protest the school's dress code, and reports of instances of oral threats on "armband day." He also testified to recurrent instances of fighting at certain athletic events, asserting that certain writings in "The Lance" contributed to these incidents. He testified further that absent such a policy of control as that contested herein, the total cumulative effect on the operation of the high school could lead to conflict. He believes that there would be a plethora of published materials, including malicious gossip, evaluation of teachers which could have a demoralizing effect, improper political and religious comment, incitement to pupil actions such as strikes and boycotts, sales of books and printed materials, and hate literature – all of which, he testified, would impede the operation of a thorough and efficient school system. He differentiated "symbolic speech," as an act of

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individual expression for which the identified individual could be held accountable, from publications which provide a medium for multiple expressions for which accountability is more difficult.

Respondents' witness further testified that high school pupils lack experience and balance necessary for an unsupervised publication. He also believes that the existence of school guidelines for such publications would result in pupils' misinterpretation of such guidelines because of their lack of maturity of judgment. The effect of permitting unsupervised publications would be to disperse the energies of the school from its adopted program, he testified.

Petitioners do not object to reasonable time, place and accountability regulations governing the publication and distribution of written materials not produced under school supervision. However, they contend that the absolute ban on such publication and distribution as exists under the school's present policy denies them their well-established constitutional right to freedom of expression. *Near v. Minnesota*, 283 *U.S.* 697, 75 *L. Ed.* 1357 (1931); *Joseph Burstyn, Inc. v. Wilson*, 343 *U.S.* 495, 503-504, 96 *L. Ed.* 1098 (1952); *Lovell v. City of Griffin*, 303 *U.S.* 444, 451, 452, 82 *L. Ed.* 949 (1938) That pupils have such a right is supported, petitioners aver, in *Tinker v. Des Moines Independent School District*, 393 *U.S.* 503, 509, 511, 512-513, 21 *L. Ed. 2d* 731 (1969). There has been no showing herein, petitioners assert, that the right they seek to exercise would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Tinker*, *ibid.* at page 509 Petitioners propose a set of guidelines which they believe would protect the good order of the school and the rights of individuals.

Respondents deny that the operation of their policy effects a denial of the constitutionally-guaranteed right of free speech, calling attention to the fact that the pupils were permitted to distribute "The Coalminer" off the school grounds, without interference. But the right sought here, respondents assert, goes beyond the right of passive symbolic speech protected by *Tinker*, *supra*. Respondents emphasize that they "***do not seek to assume the role of censor; respondents fully recognize the crucial, if not paramount, importance of the preservation of a market place for the free expression of ideas in the educational process. Rather, respondents merely seek to bar from the public schoolhouse *conduct* in the nature of the mass distribution of printed material by students and others lawfully therein because such conduct is, in the expert opinion of respondents, per se disruptive of the maintenance of an orderly atmosphere for the operation of a thorough and efficient school system***." (Respondents' Post-Trial Memorandum, pages 8-9) Respondents urge that the distinction here made between protected "free speech" and "free speech plus conduct," is supported by *Tinker*, *supra*, 21 *L. Ed. 2d* at 741; *Burnside v. Byars*, 363 *F. 2d* 744, 748 (*5th Cir.* 1966); *Scoville v. Board of Education of Joliet*, 286 *F. Supp.* 988 (*U.S.D.C. Ill.* 1968); *Schwartz v. Schuker*, 298 *F. Supp.* 238 (*U.S.D.C., E.D. N.Y.* 1969); and *Cox v. Louisiana*, 13 *L. Ed. 2d* 487, 492 (1965). Clearly, respondents argue, these cases hold that speech accompanied by disruptive conduct cannot be protected.

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With respect to the proposal made by the Commissioner in *Goodman v. Board of Education of South Orange and Maplewood*, decided by the Commissioner June 18, 1969, that the Board establish guidelines by which the appropriateness of published materials can be judged, respondents contend that such guidelines would place the school administration squarely in the business of censorship and would not work. Thus, respondents urge, the Commissioner should correct what they assert to be the constitutionally untenable position taken in *Goodman* and "permit the public schools to completely and even-handedly close the doors to mass distribution conduct on the ground that it is per se disruptive." (Respondents' Post-Trial Memorandum, page 25)

The Commissioner has reviewed and considered the report of the findings of fact and arguments of counsel as set forth above.

The fundamental issue raised in this matter does not differ essentially from that which the Commissioner considered in *Goodman et al. v. Board of Education of South Orange and Maplewood, supra.* It turns on the question, to what extent, if at all, may school authorities exercise prior control of literature published and distributed by pupils? The statement of the question, as it was considered in *Goodman* and as it will be dealt with here, gives to the term "literature" a broad generic construction, and will not be concerned with publications clearly produced under the sponsorship and support of the school as a function of its curricular and co-curricular programs.

In *Goodman* the Commissioner held:

> "***To the extent that the contested regulation constitutes an outright interdiction of any distribution of printed materials it is suppressive. It is, therefore, an improper encroachment upon freedom of expression, and as such, it cannot be sustained.***"

He therefore proposed the establishment of guidelines, cooperatively developed by pupils and faculty, which "would define the times and places when materials could be distributed without interfering with the work of the school. They would also include criteria by which the appropriateness of the material to be handed out can be judged."

The Commissioner observes that in the instant case petitioners frankly agree to reasonable regulations governing the time, place and manner of distribution of materials they wish to publish. Moreover, counsel's brief on behalf of petitioners suggests, on pages 18 and 19, guidelines which counsel contends could be reasonably understood and honored by high school pupils. While the Commissioner finds no need to comment on the adequacy of petitioners' proposal, nor was it offered for such purpose, he finds in petitioners' position a clear acceptance of their willingness to abide by reasonable conditions short of a requirement that all materials to be published at respondents' high school be prepared under faculty supervision and – by implications at least – control.

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The Commissioner further finds nothing in the factual situation to support a conclusion that the distribution of "The Coalminer" in any way materially or substantially interfered with school work or discipline. Rather, it was respondents' fear of what *might* occur, or the plethora of undesirable publications which *could* result if the bars were let down, that was at the center of their concern. On this the Courts have spoken frequently. In *Tinker v. Des Moines Independent Community School District, supra*, the Court said:

> "***But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom or on the campus, that deviates from the views of another person, may start an argument or cause a disturbance. But our Constitution says we must take this risk, *Terminiello v. Chicago*, 337 U.S. 1 (1949); and our history says that it is this sort of hazardous freedom – this kind of openness – that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious society." *Ibid.*, 393 *U.S.*, at pages 508, 509

The Commissioner notes that a recent decision of the U.S. District Court, District of Connecticut, in the case of *Eisner et al. v. Stamford Board of Education et al.* (Civil No. 13220, July 2, 1970), deals with a situation closely akin to that presented in the instant case. Pupils at a Stamford high school were threatened with suspension if they continued to circulate on school grounds a newspaper not previously approved by the school administration. There, as here, the pupils conceded the right of school authorities to regulate the time, place, and manner of the distribution of the newspaper. Moreover, the pupils did not challenge the Board of Education's right to issue guidelines on the permissible content of the newspaper, or its "duty to punish 'conduct by the student, in class or out of it, which for any reason - whether it stems from time, place, or type of behavior - materially disrupts classwork or involves substantial disorder or invasion of the rights of others * * *.' *Tinker v. Des Moines School District*, 393 *U.S.* 503, 513 (1969)." The Court thus concerned itself only with the constitutional validity of the requirement that the *content* of the literature be submitted to school officials for approval prior to distribution. The Court held that:

> "Viewing the regulation in question solely on its face, it seems clear to the Court that the regulation is a classic example of prior restraint of speech and press which constitutes a violation of the First Amendment.* * *"

Further, while recognizing that the right of freedom of expression is not absolute, and holding that free speech is subject to reasonable restrictions as to time, place, manner and duration, the Court found in *Eisner, supra*, none of the conditions "which would justify the infringement of the students' constitutional rights to be free of prior restraint in their writings." Finally, the Court expressed

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its conviction that reasonable rules could be devised that at the same time would prevent disturbances and distractions at the school and would secure to the pupils their right to express their views through their newspaper. But, the Court held,

> "***This right and duty does not include blanket prior restraint; the risk taken if a few abuse their First Amendment rights of free speech and press is outweighed by the far greater risk run by suppressing free speech and press among the young.***"

The Commissioner is convinced that it is not only possible but probably essential for schools to develop reasonable regulations, consistent with constitutional safeguards, governing the time, place and manner of the distribution of published materials by pupils on school property (*cf. N.J.S.A.* 18A:11-1), together with guidelines or criteria which will serve to protect the legitimate concerns of the school administration for orderly operation of the educational program.

The Commissioner finds and determines that respondents' policy to restrict publication and circulation on school property to literature prepared under school sponsorship and supervision constitutes an unlawful and improper restraint upon pupils' rights of free expression. He directs the respondent Board of Education to enunciate by appropriate rule the time, place, and manner under which petitioners and other pupils so motivated may publish and circulate printed materials protected by constitutional guarantee, within such reasonable limits and in harmony with such principles as are set forth herein.

COMMISSIONER OF EDUCATION

November 4, 1970

Pending before State Board of Education.

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Ruth Burstein, Gwendolyn Carpenter, Orlaida Galagarza, Alex Kuchar, Susan Stern, Barbara Yarbro, Englewood Cliffs Teachers' Association, Carol Schmidt, Leonard Brand, Henry P. Lerner, Englewood Cliffs Homeowners Association, Robert M. Livingston and S. Raymond Gambino,

Petitioners,

v.

Board of Education of the Borough of Englewood Cliffs, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION ON MOTION TO DISMISS

For the Peititioners, Francis X. Hayes, Esq.

For the Respondent, Shenier, Gilady and Harwood (Daniel Gilady, Esq., of Counsel)

Petitioners are a group of six teachers who after one, two or three years of employment respectively in respondent's schools were not reappointed. They are joined in the petition by a group of citizens of Englewood Cliffs, by the Englewood Cliffs Teachers' Association and by the Englewood Cliffs Home Owners Association as interested parties. They jointly allege that the respondent Englewood Cliffs Board of Education, hereinafter "Board," arbitrarily disregarded the professional evaluations of its school administrators and substituted petty considerations in arriving at the judgment which resulted in the decision to deny renewal of contracts to the teachers. Respondent denies that the actions herein recited were improper and moves to dismiss the petition on the grounds that the decision to employ non-tenure teachers is vested solely in the Board as an exercise of its discretion pursuant to *N.J.S.A.* 18A:11-1 and 18A:27-4. The motion to dismiss is presented in briefs of counsel.

The undisputed facts of the teachers' employment in respondent's district are listed in the table below:

Name	Date First Employed
Ruth Burstein	September 1968
Gwendolyn Carpenter	September 1968
Orlaida Galagarza	September 1969
Alex Kuchar	September 1969
Susan Stern	September 1968
Barbara Yarbro	November 1967

All of the six teachers possess proper certification for their respective positions. None of them had acquired tenure status at the completion of the

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1969-70 school year. None of them was given a contract by respondent for the 1970-71 school year, and none was given reasons for the Board's decision not to renew the employment.

Petitioners maintain that the decision to hire, or not to hire, teachers is one involving and requiring the professional judgment and evaluation of school administrative and supervisory personnel. They allege that, in the instant case, the evaluations of the professional educators were arbitrarily ignored and that the Board substituted instead the frivolous, capricious and petty considerations of individual Board members. These considerations were said to be based on unsubstantiated and uninvestigated complaints or on political obligations. Petitioners conclude that the Board's action thus ignored the paramount rights of the general public and the school children in the district. As a result of the alleged arbitrary action, there is said to be an environment of fear and a generally low morale in the school system. Finally, petitioners claim that they have been denied due process of law and equal protection, and they allege that the Board's actions were additionally unlawful in that the votes of the Board members on the proposed appointments were never made in a public meeting or publicly recorded, and were in violation of the codes of ethics of the New Jersey School Boards Association.

The petitioners pray, therefore, that the Commissioner order the Board to award contracts to the six teachers or, in the alternative, direct the Board to hold another meeting for the purpose of acting lawfully on the award of contracts to the petitioners. In the meantime, petitioners request that the Board be restrained from entering into any contracts of a binding nature with replacement teachers.

Respondent grounds its motion for dismissal on a series of decisions of the Commissioner and of the Courts, which have held that until a teacher has achieved tenure in a school district, his employment rights are defined by, and limited to, those established by the terms of his contract, and, unless otherwise specified therein, he has no right to renewal of his contract or a statement of the Board's reasons for its decision not to renew. *Gibson v. Board of Education of Collingswood, et al.*, decided by the Commissioner of Education April 30, 1970 *Zimmerman v. Newark Board of Education*, 38 *N.J.* 65 (1962); Ruggiero v. Board of Education of Greater Egg Harbor Regional High School District decided by the Commissioner of Education March 17, 1970; *Michael J. Keane v. Flemington-Raritan Regional Board of Education, Hunterdon County*, decidec by the Commissioner of Education May 14, 1970; *James V. Hopper*, 410 *F.* 2c 1323 (*U.S. Court of Appeals, Tenth Appeals, Tenth Circuit*, 1969)

The Commissioner notes little to distinguish this appeal from the case cited, *supra*, with regard to the basic issues involved. These issues were agreed, a a conference of counsel, to be:

(a) As a matter of general theory does a citizen have the right to test o question the good faith of the Board in hiring procedures?

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(b) May a non-tenure teacher inquire into an act of the Board and request a hearing on the subject matter of the action?

(c) Did the Board act within its rights in refusing to hire teachers, who had not attained a tenure status, without a hearing?

Inherent within issue (c) is a question with regard to the right of a Board to substitute its discretion in the employment of personnel for that of its own professional administrators.

The powers of all boards of education are delineated in *N.J.S.A.* 18A:27-4 as follows:

> "Each board of education *may make rules*, not inconsistent with the provisions of this title, *governing* the *employment*,***promotion and dismissal***of teaching staff members***." (Emphasis supplied.)

In the instant matter it is clear that petitioners were not dismissed. They simply were not reemployed. Nor was a contract breached, since all contracts with petitioners expired by their terms on June 30, 1970. Although respondent then took no action to renew the contracts, and gave no reasons for such non-renewal, the Commissioner opines that no action or reasons were called for. Perhaps this opinion was best expressed in *George A. Ruch v. Board of Education of the Greater Egg Harbor Regional High School District, Atlantic County*, 1968 *S.L.D.* 7, 9;

> "*** The Commissioner knows of no statute or rule which requires a board of education to take some formal action with regard to the non-renewal of a probationary contract which has expired. The employment of teachers who have not achieved tenure status in the district is a matter lying wholly within the discretionary authority of the Board.***"

See also *Taylor and Ozman v. Paterson State College*, 1966 *S.L.D.* 33. In the case of *Parker v. Board of Education of Prince George's County*, 237 *F. Supp.* 222, 228 (*D.C. Md.* 1965) the Court said:

> "* * * unless there is a statute to the contrary, probationary teachers' contracts may be terminated by the school authorities at the end of any contract year prior to the time tenure is gained, with or without cause and without a hearing." (at page 227)

It is clear from these and other decisions cited, *supra*, that the basic issue of this petition is *res judicata*, and that the Board has no obligation to hire petitioners, to give reasons for non-renewal of employment or to grant a hearing to petitioners. It is clear, too, that while boards of education commonly receive evaluation reports from administrators concerning teaching personnel, they need

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not be bound to a course of action by the recommendations contained therein or recognize compulsion to substitute the judgment of others for their own collective judgment in any of the matters where they have clear mandate.In *Victor Porcelli et al. v. Franklin Titus, Superintendent of the Newark Board of Education and the Newark Board of Education, Essex County*, 1968 *S.L.D.* 225, 229 the Commissioner said:

> "*** the Legislature *** has invested each board of education with certain powers, and those powers can be neither increased nor diminished except by the Legislature. *Burke v. Kenny*, 6 *N.J. Super.* 524 (*Law Div.* 1949) A board of education *** cannot abdicate or delegate the obligations and responsibilities imposed upon it by law or surrender the authority conferred upon it to enact or amend such rules and regulations as may be needed for the proper and effective operation of the schools ***."

This statutory mandate for boards of education to exercise their own discretionary powers, where such powers are so clearly enunciated as in the instant matter, may not be abridged by bare allegations of political motivation or arbitrary action. *U.S. Pipe and Foundry Company v. American Arbitration Association*, 67 *N.J. Super.* 384 (*App. Div.* 1961) The Board evidently had available to it reports from administrators and supervisors in the school system. It had the opinions of local citizens, freely expressed in open meeting and in other ways. The weight that the Board gave to each of the evaluations, opinions and recommendations that it had was a matter of its own discretion, and this discretion need not be abridged because the decision was an unpopular one with some persons. This is so because the Board alone is empowered to employ personnel pursuant to the statutes recited, *ante*, and, if the Board chooses not to reappoint, it would be an usurpation of its powers for the Commissioner to do so.

Therefore, for the reasons given above, there are no issues of this petition which provide a cause on which relief may be provided.

The motion is granted and the petition is accordingly dismissed.

COMMISSIONER OF EDUCATION

September 23, 1970

Pending before State Board of Education.

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Randolph Bramwell, by his parent and guardian ad litem, Randolph C. Bramwell,

Petitioner,

v.

Board of Education of the Township of Franklin, Somerset County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Mandel, Wysoker, Sherman, Glassner, Weingartner & Feingold (Jack Wysoker, Esq., of Counsel)

For the Respondent, Leonard N. Arnold, Esq.

Petitioner, a member of the junior class in respondent's high school, alleges that he is denied the right to participate fully and completely in the school's band program because of respondent's rule regarding hair styles for males. He prays for the right to such participation during all band rehearsals and appearances, both during and after the regular school day. Respondent denies that its rule is unreasonable, but it has granted *pendente lite* relief for petitioner's participation during the regular school day while continuing its proscription on his participation in all after-school activity in the band program.

Concurrently with the filing of the petition herein, petitioner moved for an order granting full participation during and after school hours *pendente lite.* Argument on the motion was combined with a hearing on the facts in dispute, conducted on October 6, 1970, at the office of the Somerset County Superintendent of Schools in Somerville by a hearing examiner appointed by the Commissioner. The motion was subsequently denied pending an early decision on the merits of the issues raised herein. Counsel waived the filing of briefs and submitted the issues for adjudication on the record. The report of the hearing examiner is as follows:

The uncontested facts are as follows:

1. Petitioner is a boy of 16 who is qualified to be a member of his high school band in all respects but one; namely, that his shoulder-length hair is in violation of respondent's regulation governing personal appearance for band members. This regulation is found on page 15 of the band manual (P-R-1), and the pertinent part reads:

> "Clean shaven faces and haircuts are in order at all times. Hair must be above the ears on sides and above the collar in back.***"

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This band manual was developed by the band director. It was not an official policy pronouncement of respondent Board of Education.

2. Petitioner was advised, on September 18, 1970 of the following decision made by respondent Board on the previous evening:

> "Effective September 18, 1970 Randolph Bramwell will fully participate in all classroom instruction, field instruction, and concerts and rehearsals conducted during the school day.
>
> "He will not be permitted to perform with the Band in any public performance not occurring during the school day."

3. Petitioner intends to pursue music as a major interest and field of study in the future.

4. There are no allegations that petitioner's long hair is unclean, or that his appearance with the band in public performance would be likely to cause harm to the good order or discipline of the school.

5. There are no school dress codes regulating hair style or hair length, and there are students in attendance in respondent's high school who wear their hair as long as petitioner's without penalty or proscription.

Petitioner contends that the right to participation in the band program should not be abridged by the proscription contained in the band manual if students are otherwise qualified. Such a proscription, in his view, is violative of the right of all students to a public education and those basic rights of academic freedom, free expression, due process and equal protection under the First, Ninth, and Fourteenth Amendments to the United States Constitution. In support of these contentions petitioner cites a long list of previous court decisions, but he points particularly to past decisions of the New Jersey Commissioner of Education and to the case of *Tinker v. Des Moines Independent Community School District et al.*, 21 *L. Ed.* 2d 731 (1969).

Respondent, on the other hand, defends the band director's rule pertinent to hair length as necessary. It avers that such a rule is essential to insure uniformity of appearance, a basic requirement in State and National band competitions, and that an infringement of the rule would be contrary to the best interest of other members of the organization, the school and the community. Respondent further maintains that petitioner's original application for membership in the band was also an agreement to abide by its rules. It cites many opinions to buttress its contentions; particularly, *Ferrell v. Dallas Independent School District*, 261 *F. Supp.* 545 (*D. Ct. N.D. Texas* 1966); *Corley v. Danhour*, 312 *F. Supp.* 811 (1970). This latter decision by a United States District Court in Arkansas dealt with a similar issue and upheld the contention that the adoption of rules and regulations governing hair length of band

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members was a reasonable exercise of discretion by a band director and a board of education since uniformity of appearance is a principal ingredient of success in the performance of marching bands. Respondent avers that the distinctions between the curricular and extracurricular activities of a marching band are distinctions without a significant difference. Respondent's prayer, therefore, is for permission to exclude petitioner entirely from the band program, pursuant to the rule detailed in part, *ante.*

Petitioner testified that he was not allowed to participate in band activities during the current year prior to the employment of, and intervention by, his attorney. Following this intervention, he said, he was allowed to play during regular rehearsals. He testified that he was also allowed to march with the band to practice sessions but that he could not participate in actual drill formations. However, subsequent to September 30, 1970, all such restrictions on full participation *during* the *school day* were removed *pendente lite.* It is now only the proscription against after-school activities that remains in force.

The band director of the school during the prior eight-years' period testified that the rule regulating hair length was necessary to achieve uniform appearance. He opined that hair such as petitioner's would affect the band's rating in future competition to the extent that such competition might be precluded, since the band would no longer be unique. On cross examination he did admit that he was not aware of any "written" qualifications regulating hair style in any of the rules governing national competition or contests that the band entered in the past.

* * * *

The Commissioner has carefully reviewed the report of the hearing examiner concerning the issues in contention in this case. He observes that previous cases involving a clash between the rules of school officials on the one hand, and the rights of students to wear non-conforming hair styles on the other hand, have rendered the basic prayer of respondent in this case *res judicata* in New Jersey. *Francis Joseph Pelletreau v. Board of Education of the Borough of New Milford, Bergen County,* 1967 *S.L.D.* 35, reversed by the State Board of Education 48; *Micah Bertin et al. v. Board of Education of the Township of Edison, Middlesex County,* 1968 *S.L.D.* 24; *Raymond Sylvester v. Board of Education of the Watchung Hills Regional High School, Somerset County,* decided by the Commissioner May 20, 1969; *David Harris v. the Board of Education of the Township of Teaneck, Bergen County,* et al., decided by the Commissioner September 30, 1970 These successive decisions may be cogently synthesized in one sentence of the *Harris* decision, *supra,* which says in part:

> "***the conventional hair styles of today are shallow reasons for denying otherwise eligible students from participation in any school programs."

In all of these findings the Commissioner and the State Board of Education have consistently recognized the wide divergence of opinions in other courts with regard to similar petitions, and the Commissioner in *Pelletreau, supra,* gave weight to *Ferrell v. Dallas Independent School District, supra,* which upheld the

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right of a board of education to regulate the appearance of pupils. The State Board of Education also acknowledged this diversity of views in *Pelletreau, supra,* when it reversed the decision of the Commissioner. In the three-years' period subsequent to that decision of the State Board of Education, there have been no decisions by the New Jersey Courts with contrary findings in the field of student rights. However, the decision of the United States Supreme Court in the *Tinker* case, *supra,* was cited as a compelling force in the *Sylvester case, supra,* and is applicable in the matter, *sub judice:*

> "***In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.* * *"

In the instant matter, the penalty for a failure to conform to a rule is not suspension from *school,* as in *Tinker,* but from a *part* of the school's program. This suspension is justified by respondent on the basis of an alleged unique emphasis placed on uniform appearance in band appearances and competition.

The Commissioner holds that such emphasis cannot abridge the right of a student to eligibility for full participation in all of the programs offered by a school.

The band of any public school is part of the school's total instructional program. Requirements for eligibility for participation should be restricted only to the school's general regulations for student control, in addition to specific skill prerequisites.

The Commissioner finds and determines that respondent Board of Education has authority to adopt reasonable rules and regulations for the government of its schools. He also finds, however, that its endorsement of the rule on personal appearance promulgated by the band director was unreasonable and arbitrary in that it imposed a standard of appearance for band members separate and apart from that expected of all other students. In so doing, it denies the right of full participation in a part of the school's program to petitioner and is in direct contravention of his right to a free education. The Commissioner holds that such rights are inclusive of all elements of the curricular offerings of the schools and may not be abridged by reason of a deviation from a code regulating hair style or length, absent a preponderant weight of evidence that such regulation would be the cause of harm for the student or those with whom he associates. Respondent is, therefore, directed to admit petitioner to all phases of its band's activities, including the designated extra-curricular activities heretofore proscribed.

COMMISSIONER OF EDUCATION

November 10, 1970
Pending before State Board of Education.

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In The Matter Of The Tenure Hearing of Consuelo Garcia, School District of Midland Park, Bergen County.

COMMISSIONER OF EDUCATION

Decision on Motion to Dismiss

For the Petitioner, Balk, Jacobs, Goldberger & Mandell (Jack Mandell, Esq., of Counsel)

For the Respondent, McDonald, Podesta & Meyers (Gerard V. Podesta, Esq., of Counsel)

Written charges against respondent, a teacher, of inefficiency in the performance of her teaching duties were certified to the Commissioner by the Board of Education of Midland Park by resolution, dated December 15, 1969. A copy of the charges and the resolution were served on respondent on December 16, 1969.

On December 31, 1969, respondent was directed by letter to file and serve her answer to the charges, or, in the alternative, to indicate that she did not intend to enter a defense. Subsequently, an answer was filed on January 9, 1970. On January 23, 1970, a notice of motion for dismissal of the charges was filed by respondent, and a hearing on the motion was held on February 3, 1970, at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner of Education. The motion for dismissal was denied, and the parties were directed to proceed to a hearing on the merits of the charges.

The hearing began on April 27, 1970, and continued for 11 additional days over a three-months' period ending on July 20, 1970, at which time petitioner had completed his case. Respondent then filed this second motion for dismissal on the grounds that testimony by witnesses for petitioner did not constitute a *prima facie* case, and that, to the contrary, such testimony was to the effect that respondent had corrected the alleged inefficiencies within the 90-day time period allowed for such correction by *N.J.S.A.* 18A:6-12. On the other hand, petitioner avers that while some inefficiencies had been corrected the teacher was still performing in an inefficient manner as a teacher at the end of the 90-day period.

Testimony and documentary evidence, including 65 exhibits, were presented at the hearing sessions before the hearing examiner at the office of the Bergen County Superintendent of Schools, Wood-Ridge, New Jersey. Counsel also filed briefs. The report of the hearing examiner follows:

Respondent was first employed as a teacher in the Midland Park schools during the school year 1960-61 and thus acquired tenure in the district in September 1963, since her service during that period of time had been

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continuous. The observation reports pertinent to her work during these and later years were introduced into evidence (P-62, P-63, P-64, P-65) and numbered 32 in all. Included in these reports were those made by the head of the foreign language department, who was on a sabbatical leave during almost all of the 90-day period provided respondent for correction of the alleged inefficiencies, by present and former principals of the school and by the present vice-principal. The department head's reports (P-64), when examined closely, were generally favorable to the teacher during the period prior to her suspension. Some examples of such favorable reports are as follows:

> "There is a relaxed alertness here that is wonderful to see." (September 26 - year unknown)
>
> "Miss Garcia does not waste a moment. Nothing escapes her attention." (November 15, 1962)
>
> "Repetition of vocabulary and sentences was very thorough." (May 29 - year unknown)
>
> "Teacher appears incapable of fatigue." (February 26, 1964)
>
> "Offers good model for correct pronunciation." (February 26, 1964)
>
> "Good behavior from the students. Students make real effort to respond." (May 10, 1968)
>
> "Good class participation. Class seemed very occupied with the work." (March 7, 1969)

The suggestions listed in all of the department head's reports centered mainly around the length of drill periods but were not basically unfavorable in specific ways or in their general tone, in the opinion of the hearing examiner. Reports of a former supervisor (P-63) were also generally laudatory and contained no allegation of inefficiency.

The observation visits of the present principal of the school were limited to two, made prior to service of charges on respondent. The report of these observations was included with the report of two other such visits made subsequent to the service of charges on May 26, 1969, and combined in a summation report made at a later date. This report was critical. It said in part:

> "No assignments were given during the week."
> "No written work was collected."
> "No evaluations were recorded."
> "There was very little evidence of more than superficial involvement of the students."

Following the two initial observations by the principal, charges were

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served on respondent involving some of the criticisms made by the principal and other statements of alleged inefficiencies taken from the teacher's personal record file. Subsequent to the service of charges, the principal observed respondent on September 22, 23, 24 and October 30, 31, 1969. The vice-principal observed respondent's class in session on May 28, and October 17, 1969.

It is noteworthy that, during almost all of the 90-day period given to respondent in accordance with the statutes (*N.J.S.A.* 18A:6-12) for correction of the inefficiencies, the department head was in Europe, and no supervisory reports are in the file from him during that period. There is no evidence that any specific consultations on teaching methods, *per se*, were held during that period, or that the help given to the teacher to assist her in correcting the alleged pedagogical weaknesses was other than that found in the seven observation reports mentioned, *ante*.

A review of the charges and the testimony pertinent thereto shows that there was testimony and/or documentation on 18 of the 19 major charges and on all but one of the 14 sub-sections of Charge No. 15. These will be considered *in seriatim* and as a whole by the hearing examiner.

CHARGE NO. 1

> "She has been chronically late in arriving at school which often necessitates that other teachers supervise her class in addition to their own responsibilities. Despite many warnings and reprimands she has failed or refused to correct this situation."

Testimony concerned with this charge was given by the principal, vice-principal and two teachers. The principal and vice-principal said that, prior to the service of charges in May 1969, respondent had been late in arriving at school on an average of twice a week over a period of years and that they, personally, had substituted for respondent on many occasions or assigned other teachers to carry out her duties. Each of the teachers corroborated the testimony of the principal and vice-principal that he had been assigned respondent's duties on numerous occasions and had personal knowledge that the respondent had been tardy in arriving at school to an unusual extent. (P-1, P-3)

All four witnesses had no knowledge of tardiness by respondent during the 90-day period subsequent to the service of charges. The principal testified that respondent had "improved her chronic late arrival after the preferment of charges," and that he had told the Superintendent of this improvement. The vice-principal testified that he had no personal knowledge that respondent's lateness continued subsequent to the service of charges. Neither of the teachers had been called on to substitute for respondent during the 90-day period provided for correction of this alleged inefficiency.

It is the conclusion of the hearing examiner that the weight of the

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evidence implies that a *prima facie* case exists for the truth of the charge relevant to the period prior to the service of charges on May 26, 1969. However, there was no evidence of any kind that the alleged inefficiency continued after that date. To the contrary, the evidence clearly indicates that the inefficiency had been corrected by respondent.

CHARGE NO. 2

"She has on several occasions left her classes unattended and unsupervised despite many warnings and reprimands from school authorities."

The vice-principal offered testimony relative to this charge to the effect that he had seen respondent go from her school to her car, and return to school; on one occasion during 1966 (P-3) and that school was in session at the time. He testified also that respondent had left school in a similar manner on one other occasion but the date and circumstances were not given. The principal testified that he had warned respondent about leaving a class unsupervised after the 1966 incident referred to, *ante*, and had occasion to issue additional warnings in a memo dated February 18, 1968, (P-8) and in a subsequent conference.

There was no testimony by either of the school administrators that the alleged inefficiency implicit in this charge was repeated during the 90-day period subsequent to the service of charges on respondent. To the contrary, the principal said that he had indicated to the Superintendent that respondent had improved with regard to this alleged inefficiency during that period.

It is the conclusion of the hearing examiner that the weight of the evidence implies that a *prima facie* case exists for the truth of some parts of this charge prior to the service of charges on respondent in May 1969, but that these alleged inefficiencies did not occur on more than two occasions during the teacher's ten-year tenure in the district, and not at all during the 90-day period provided for remedy of the inefficiencies.

CHARGE NO. 3

"She has on several occasions eaten in class in violation of school regulations and has also permitted her students to eat in class. She has been reprimanded or warned for the same on at least three different occasions."

Both the principal and vice-principal testified that on several occasions it was reported that respondent, in violation of regulations, had sent students to the cafeteria to purchase food for her, had eaten in class herself, or had permitted students to eat in class. (P-1, P-9, P-11, P-12, P-16) However, the principal, on cross examination, said that he had never observed any of these things personally and that he had no further complaints in this regard subsequent to the service of charges. The vice-principal said that he had intercepted students, on two occasions, with trays, bound for the Spanish classroom of respondent while class was in session. One of these incidents occurred in the 1967-68 school year and one in the year following. He testified

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that on one other occasion (P-16), he saw a student eating what he assumed was part of a pink cake which another teacher had reported was being eaten in the room by students.

The hearing officer considers this charge to be flimsy in that it is supported only in some minor respects by the weight of the creditable evidence with regard to the period prior to the service of charges on May 26, 1969, and that it is totally unsupported by evidence for the period subsequent to that.

CHARGE NO. 4

"She has sent students on personal errands in school to deliver notes, letters and messages, pick up items, buy lunches for her, etc., which often disrupts other classes, and for occasionally dismissing students late from her classes thereby causing them to be late to their next class."

It is noted that this charge has two parts which should be considered separately. The charges are summarized in part as follows: (a) "she sent students on personal errands * * *."

The principal and vice-principal testified to a profusion of notes on a wide miscellany of topics sent to them by respondent over a period of years. They said that many of the notes were delivered by students during class time. Despite suggestions by the principal that other methods of communication would be more effective and that many of the notes were unnecessary, the notes evidently continued up to the time that charges were served on respondent. (P-1 and P-13) This testimony was corroborated by one teacher who said that notes from respondent interrupted her class on an average of eight times a year and that the notes were concerned with possible field trips, pertinent T.V. programs, announcements of films, etc. There was no testimony that the profusion of notes continued subsequent to the service of charges. To the contrary, the principal testified that he had had no memos of complaint addressed to him since that time and that he had "noticed improvement."

The hearing officer concludes that the weight of the evidence implies that a *prima facie* case exists for the truth of the first part of this charge (abbreviated as (a) *ante*) prior to May 1969, but that there is evidence that the teacher had corrected such inefficiencies subsequent to the service of charges.

(b) "dismissed students late * * *."

The principal testified that late dismissal of students had been a problem during the period from April 1961 to May 1969, but that he "noticed an improvement" subsequent to the service of charges. He said that complaints had come to him from many teachers during those years, even though respondent had evidently given passes to students when such late dismissal occurred. The vice-principal's testimony was cumulative in most respects with regard to this charge, except that part of his testimony was based on the personal knowledge gained as a teacher prior to the time of his appointment as vice-principal. During

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the time he was a teacher, he testified, students had arrived late at his class from respondent's class. However, in response to a direct question on cross examination, he said he had no knowledge of a repetition of this alleged inefficiency during the 90-day period furnished for correction, and he opined that the charge had been "corrected."

Three teachers also testified with regard to this charge. All of them said that their students had arrived late from respondent's class on occasions. One teacher said that she had shared classrooms with respondent over a period of years and had often had to wait with her class for respondent's class to be dismissed. While saying that this late dismissal was more of a problem in some years than in others, she also said that it continued into the 90-day period subsequent to the service of charges on respondent. On cross examination, however, her testimony on this point was that the alleged inefficiency happened on only one occasion during that period. The second teacher, while testifying that students had arrived late at his class from respondent's class, gave no testimony with regard to the period subsequent to the service of charges on respondent. The third teacher's testimony was also limited in extent to one year prior to 1968, and she professed no knowledge of late dismissal by respondent since that time.

The hearing examiner concludes that the weight of the evidence implies that a *prima facie* case exists for the truth of some parts, or all, of this charge prior to the service of charges on respondent in May 1969, and with regard to one occasion subsequent to the filing of the charges.

CHARGE NO. 5

"She has on two different occasions during the current school year phoned in sick at 7:15 a.m. in violation of school regulations and much too late to give adequate time to secure a substitute."

Respondent admits, in the answer to the petition, to calling in late for a substitute on one occasion but says the phone was busy prior to the time she was able to get the call through. The procedure in the district was to call in sick as soon after 6 a.m. as possible. On one occasion, the vice-principal said, he got a call at 7:15 a.m. during a year when teachers were to be on duty at 7:30. This late call-in was repeated on a subsequent occasion. (P-6 and P-14) There was no testimony to the effect that this alleged inefficiency had occurred subsequent to the service of charges.

The hearing officer concludes that the weight of the creditable evidence implies that a *prima facie* case exists that the respondent did in fact call in late on two occasions for a substitute teacher. However, the hearing examiner can find no clear evidence of inefficiency that should cause this charge, by itself, and in the context of a long span of years of service as a teacher, to be considered either singly or in context with other charges as reason for dismissal.

CHARGE NO. 6

"She collected money from her students for a field trip, but upon an

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accounting it was discovered that the amount collected was short $8.75. Miss Garcia attributed this error to her oversight in taking some of the money home and forgetting it."

The principal was the only witness to testify with regard to this charge. He did not allege that respondent had stolen the money, but he said that the accounting methods used by the teacher were improper, and that respondent had not followed school procedures when she collected money and neglected to deposit it with the school secretary. The incident occurred in 1964 (P-15), and there was no testimony (except for that in Charge No. 7) that a similar incident happened again. At any rate the money was replaced on this occasion by respondent.

The hearing examiner concludes that the evidence with regard to this charge implies that a *prima facie* case exists for the truth of the charge.

CHARGE NO. 7

"She collected money from the students in one of her classes for a Christmas pinata, which she failed to supply or account for until reprimanded by school authorities for not having it or returning the money."

Respondent had evidently collected money for a pinata, a bag of candy which is opened by blows of the hands in a traditional ceremony, for a number of years prior to and since the incident here in question. However, on this occasion, it is alleged, she collected money from a class that met in thirds of a year. The class ended sessions in late November after one third,but the Christmas pinata was not given to them nor was the money returned. (P-17, P-18 and P-19) The principal said that the school had furnished funds to mitigate student disappointment but that respondent had eventually reimbursed the school. He also said that respondent maintained that she had left money in the office but had not been given a receipt. No one in the office had a recollection of ever having received these funds. This incident occurred in 1966, and there was no testimony that other incidents similar to it had occurred before or since that time. The pinata was held that year for all other classes.

The hearing examiner concludes that the weight of the evidence implies that a *prima facie* case exists for the truth of this charge, but that the incident did not reoccur during the 90-day period provided for overcoming the inefficiencies. He points out that, as with Charge No. 6, this was a voluntary activity sponsored by the teacher as an adjunct to the regular classroom program.

CHARGE NO. 8

"She permitted a student to be physically abused in her class by other students with the result that his clothes were torn, without intervening to prevent this."

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Testimony on this charge was limited to that given by the principal. The student, allegedly abused in respondent's class in a year prior to 1966, had been placed by respondent in a seat between two other boys in an effort to keep him out of trouble. On one occasion, the teacher left the room, and the student, prone to trouble, got into a fight in which his shirt was torn. (P-20) Restitution for the torn shirt was made later by the family of the boy who tore it.

In the opinion of the hearing examiner, the charge is faulty in that no permission could possibly have been given by the teacher for the alleged abuse. There is no evidence to prove that she was even in the room. If the charge was basically that the teacher left the room without permission or without being first assured of proper teacher supervision in her absence, it should have been included as a sub-division of Charge No. 2. Standing alone, as it does here, the charge that the teacher "permitted a student to be physically abused" is not supported by any *prima facie* proof, and in the opinon of the hearing examiner it should be dismissed.

CHARGE NO. 9

"On one occasion she was absent and failed to have either teaching plans or seating charts available for the substitute."

Testimony on this charge was also limited to that given by the principal. On one occasion, in April 1967, a substitute indicated on an evaluation sheet that seating charts and plans of respondent were either not available or not specific (P-21) The teacher later wrote a letter to the principal in explanation. (P-22) The letter said that she had taken the plans and seating charts home during the Easter vacation, and that she was taken sick during that time and did not return on the first day following the vacation period. The principal indicated he doubted the truth of respondent's explanation.

The hearing examiner regards the exhibits and testimony as *prima facie* proof that, on one occasion over a span of ten years, the teacher did not make available to a substitute the detailed plans and directions which were required. There is no proof of any kind that, subsequent to the service of charges, there was any dereliction in this regard.

CHARGE NO. 10

"She has been reprimanded for scheduling 13 films during three consecutive weeks all of which were shown in all her classes."

There is no doubt that the 13 films were scheduled during a three-weeks' period. Exhibit P-23 makes this clear. Respondent's explanation (P-24) is that they were ordered to be shown during a three-months' period, but were sent during the three-weeks' period because this was the only time they were available. Students called to testify with regard to this charge averred that they had seen certain films on more than one, and sometimes on as many as three, occasions.

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The hearing officer regards the evidence as *prima facie* proof that the charge is true with respect to the one year in question. There was no testimony to the effect that any kind of over-scheduling occurred during the 90-day period provided for the correction of the inefficiency.

CHARGE NO. 11

"On one occasion she mailed in her grade book and grades late."

The occasion in question occurred in 1962, and the allegation is that respondent had taken her grade book with her at the close of school in June instead of turning it in with her keys and other reports. (P-25) Her check was withheld. At a subsequent time, the grade book was turned over to the school, and her check was released. There was an allegation by the vice-principal that this type of thing had occurred again in 1967, but there is no documentation or corroborating testimony in this regard.

The hearing examiner regards the evidence as *prima facie* proof of the charge with regard to the one incident in 1962. There was no testimony to the effect that any such delinquency occurred during the 90-day period provided in accordance with the statutes for the remedy of the inefficiency.

CHARGE NO. 12

"On at least three occasions, upon being reprimanded for violations such as leaving class unattended, leaving school early and eating in class, she insisted that she had not done these things, which denials were obvious untruths."

This charge is seemingly ambiguous in its wording and repetitious in that the sub-parts dealing with "leaving class unattended" and "eating in class" were heard on the merits as separate charges. The only elements in the charge which are new in any dimension are that the respondent is accused of "leaving school early" and that she "insisted that she had not done these things." The hearing examiner does not construe this last phrase to be a charge of inefficiency. For this reason, and to avoid repetition, testimony on Charge No. 12 was limited to an examination of the proofs that respondent was guilty of "leaving school early."

Testimony by the principal was limited to one occasion in 1964, when he alleged he had seen respondent outside the building before the officially-sanctioned leaving time of 2:40 p.m. He testified that he then checked the sign-out log, and found her name with the time of 2:40 p.m. as a notation.

The hearing officer concludes that this charge is repetitious and ambiguous, but that there is *prima facie* proof that on one occasion in 1964 the teacher was seen to leave the building early. There was no testimony to the effect that any such delinquency has occurred since that time or during the 90-day period provided for the correction of the alleged inefficiency.

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CHARGE NO. 13

"A routine review of past employment records in 1963 revealed that Miss Garcia had claimed a year of experience at a New York City School when her work had been limited to part-time. Therefore, she was not entitled to the additional experience step in salary for which she had been credited."

There was no testimony or documentation offered in support of this allegation, and the hearing examiner recommends that it be dismissed.

CHARGE NO. 14

"On one occasion the school was in receipt of a collection letter from a bank requesting assistance in securing payment of an overdue obligation owed by Miss Garcia."

Evidence pertinent to this charge was limited to the submission of one letter from a bank dated September 10, 1964. (P-26) The bank requested assistance from school authorities in securing the repayment of a personal loan by respondent.

The hearing examiner concludes that the evidence of this charge provides no foundation for an allegation of inefficiency against respondent, and he recommends therefore, that it be dismissed.

CHARGE NO. 15

"She has on many occasions, and with increasing frequency in recent weeks, been the subject of complaints of both students and parents, to wit:"

Letters pertinent to the subject of this charge were offered in evidence. However, they were refused as evidential because the witnesses who wrote the letters of complaint were available, and many testified and were subject to cross examination by counsel for respondent under Sub-Charge 15A through 15 N. The hearing examiner recommends that this charge be dismissed.

CHARGE NO. 15 (a)

"That there is a very low quality of instruction in her classes and that even excellent students are not learning."

Testimony on this charge was extensive. Students who testified had had respondent as a teacher for one or two-year periods which included the 1968-69 school year or prior school years. There were no students called to testify who had had respondent as a teacher during the 1969-70 school year up to the time of respondent's suspension in December 1969. Parents of students likewise testified to the truth of the allegation that there was a "low" quality of instruction. However, no parents testified with regard to their knowledge of respondent's "quality of instruction" during the 90-day period provided for overcoming the inefficiency. The principal, guidance director and vice-principal also testified to the merits of this charge.

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Students testified to the effect that they had regarded their homework assignments as too lengthy and tedious and lacking in purpose, and that often they were not collected or marked or graded in any way. Tests, too, were a source of complaint. Some students said that dates for tests were established, but that the tests were often not given. Others said that tests were marked incorrectly, or were not returned, or were returned in "batches." There was also testimony by students of inattention in class and of a general lack of motivation to study.

The testimony of parents generally corroborated that of the students. One parent said that an appointment for a conference had been broken by the teacher. Another alleged that the respondent was inconsistent in her statements concerning a child's progress. All of the parents testified that they were of the opinion that their children had not learned much Spanish in respondent's class.

The hearing examiner has already said that the present principal had observed respondent on two occasions prior to service of charges of inefficiency on her. Following the service of charges, he observed respondent a total of eight times. Reports of two of the observations were combined with those of two other observations, made prior to the service of charges, into one written report described as "unfavorable." He observed six other times on five days in September and October of 1969. His reports on those days are in evidence (P-65) and were generally critical. Included in the list of criticisms was a statement that the class was "notable for the lack of initiative from students" and an impression that "there is much activity but little real learning." Again, in his last report, on October 31, 1969, he says that "there is a quality of monotony in the procedures used." On the favorable side he gave credit for a new student-desk arrangement and noted that a test had been passed back in corrected form. He also said that students left promptly at the bell but implied that this time the departure was too abrupt. One of his reports was essentially barren of comments. Dated October 30, 1969, it merely says that "This class is in the pattern of many previous classes I have observed."

The principal's testimony indicated, contrary to some of the favorable comments, noted above, that he had noticed "no improvement after the service of charges," and that he had concluded "it was not possible for Miss Garcia to improve."

The vice-principal observed the teacher on just two occasions subsequent to the service of charges (P-62), and the two observation reports he wrote were dated May 28, 1969, and October 17, 1969. In these reports he was critical of a monotonous voice level used by the teacher and of "mere repetition of what the teacher reads or recites." (May 28, 1969) All of his October report was devoted to observations and suggestions pertinent to the test which was given that day. Cross examination centered around recommendations embodied in the ALM teacher's guide, which was apropos since these materials were used in the school and in these classes. Such manuals recommend both "full choral repetition" and "individual repetition." At the conclusion of the cross examination, the

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vice-principal stated that his "quarrel" was "with the degree of repetition," and not with repetition *per se.*

Counsel for respondent, in his brief in support of dismissing this charge, maintains that the key phrase of this charge, "***That there is a very low quality of instruction in her classes" is at best ambiguous and uninformative and does not meet the statutory requirement set forth in *N.J.S.A.* 18A:6-12 of furnishing the respondent with "***written notice of the alleged inefficiencies specifying the nature thereof with such particulars or to furnish the employee an opportunity to correct and overcome the same." The hearing examiner believes that this argument has merit and notes that a previous decision, *In the Matter of the Tenure Hearing of Alfred E. Jakues v. School District of the City of Linden, Union County,* 1968 *S.L.D.* 189, dealt with this requirement. In that case the hearing examiner said, at page 191:

> "The hearing examiner believes that a notice of inefficiency can be framed in such a fashion as to indicate clearly the employer's dissatisfaction with his performance and the *kind of correction demanded.*" (Emphasis supplied.)

The Commissioner thereafter instructed the Board of Education in that case to "proceed subsequently in conformance with the principles enunciated in this decision."

In the instant matter, the hearing examiner cannot conclude that Charge 15a was detailed enough to provide guidance to the teacher in the correction of the inefficiency, or that other guidance was properly substituted, since the number of observations was very limited. Nor does he think that observations by supervisors are the only or the most desirable method to assist teachers in the correction of inefficient teaching techniques. Certainly the observations of the vice-principal on May 28, 1969, and the principal on June 1 and 2, 1969, could not be expected to reflect any great or even noticeable improvement since the teacher was not served with charges until May 26, 1969. Neither could the vice-principal be expected to evaluate an "improvement" in the teacher's performance at that juncture, because there are no observation reports of his in the file dated prior to that time, and it must be assumed he had never seen her teach before. It is especially noteworthy that neither man observed respondent during the last six weeks prior to her suspension, and that no students, or parents, were called to testify as to whether or not the alleged inefficiency - "a low quality of instruction" - was present during the period or near the end of it.

The hearing examiner finds that this charge is lacking in specificity, and has failed to provide "*** such particulars as to furnish the employee an opportunity to correct and overcome the same." *N.J.S.A.* 18A:6-12 He further finds that no substitution for this lack of specificity was made available to the teacher in alternate oral or written form. He therefore concludes that the limited *prima facie* proofs purportedly furnished by six observation reports submitted in the fall of 1969 are not relevant and, in fact, are immaterial to the issue raised herein. He recommends, therefore, that this charge be dismissed.

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CHARGE NO. 15 (b)

"That she is not available for personal student help or breaks appointments with them."

A total of seven students and parents testified to the truth of this charge with respect to the period prior to the service of charges. It was testified that on occasions the teacher advised students to "come in for extra help," but it was purportedly not furnished or appointments to furnish it were broken.

The hearing officer concludes that *prima facie* proof exists for the truth of this charge prior to May 26, 1969, but that there is no proof of any kind that the alleged inefficiency was not in fact corrected during the 90-day period allowed for such correction.

CHARGE NO. 15 (c)

"That she sent 'tales' or derogatory comments home with a younger student about an older brother rather than communicating directly with the parents."

There was little testimony on this charge which allegedly occurred in 1966. (P-61) The vice-principal's testimony was limited in extent, and there was no cross examination.

There was no testimony that such an alleged infraction or inefficiency ever occurred before or since that time.

CHARGE NO. 15 (d)

"That on mere suspicion she accused two students of alleged antisocial behavior - i.e., homosexuality."

CHARGE NO. 15 (e)

"That she eats and writes letters in class and that she has students deliver them for her."

CHARGE NO. 15 (f)

"That she often gives lengthy and tedious assignments in anger and then never refers to them again."

CHARGE NO. 15 (g)

"That she seldom corrects or returns homework."

CHARGE NO. 15 (h)

"That she sends warning or reports to parents that are in substantial contradiction with the student's most recent grades and reports."

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CHARGE NO. 15 (i)

"That in conferences with parents, she contradicts herself by criticizing a student for failing to perform adequately in certain areas when she herself has always graded that student highly in the same categories."

CHARGE NO. 15 (j)

"That in conferences with parents she has alleged that a student drew various things on his test paper, but when the student denied this she failed or refused to produce the papers."

CHARGE NO. 15 (k)

"That she would schedule students for various make-up work and tests and then say that they were not ready and fail to give them."

CHARGE NO. 15 (l)

"That several of her students have expressed a desire to 'drop' her course and others have refused to take it because of the extensive complaints."

CHARGE NO. 15 (m)

"That she exhibits favoritism toward certain students, criticizes certain students for their dress and style of clothes, yells at students and does not grade and return tests."

CHARGE NO. 15 (n)

"Several complaints have been made in writing by students and have been directed to the attention of Mr. Arthur H. Fugelsoe, Principal of the Midland Park Junior-Senior High School."

All of these alleged inefficiencies occurred prior to the service of charges on respondent. Some of them, it will be noted, particularly sections (e), (g), (h), (k), (l) and parts of (m) and (n), have been detailed as parts of the proofs offered in regard to other charges discussed, *supra*. Testimony on all of them was limited and in one case non-existent. (n) Documents introduced into evidence in support of these charges are listed as follows: d - (P-52, P-53, P-54) i - (P-55, P-56)

The hearing examiner concludes that *prima facie* proof exists for the truth of some parts or all, of these charges, with the exception of (n), regarding the period prior to the service of charges on respondent. There was no evidence introduced that purported to prove the truth of these or similar incidents subsequent to that date.

CHARGE NO. 16

"She has ordered books for the school to be used in her classes without having received permission or authorization."

A bill of sale introduced into evidence as P-27f was sent to Midland Park

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High School in the summer of 1968. It was for two books which had been sent to "Miss Garcia," respondent. In a letter to the principal (P-27c), respondent indicated these were books with college level work, and that she would pay for them if the error was hers. At a later date she asked the school to return the books to the publisher (P-27d). Subsequent to this incident, the school has not been billed again for an order made by respondent.

The hearing officer concludes that there is *prima facie* proof that on one occasion in 1968 two books were sent to Midland Park High School, and that these books were probably ordered by respondent. It is not clear from the evidence that she ever ordered them sent to the school or billed to the school for payment. There is no proof of any kind that such an incident occurred during the 90-day period provided for the remedy of the inefficiency.

CHARGE NO. 17

> "She rented two films from a film supply company without authorization or permission and then failed to pay for or return the films to the company. This involved the school system in extensive correspondence, phone calls, conferences, memos, etc. between the school authorities, the film company, the local post office, and Miss Garcia. Additionally, the Board of Education was placed in the embarrassing position of having to pay the delinquent rental and request reimbursement from Miss Garcia, as well as to apologize to the film company for their loss of several hundred dollars in rental income occasioned by the actions of our teacher. Miss Garcia's conduct, claims and affirmations during this entire matter were subject to very substantial question as to her intentions and veracity."

There was an inordinate amount of testimony concerned with the truth of this charge, and the hearing examiner is convinced that the charge is faulty when it says that respondent "*** rented two films without authorization." He does not regard one of her letters written on November 10, 1967, to the company, Trans-World Films, Inc., (P-40a) as a definite rental authorization, but only an inquiry as to availability of the film. The body of the letter is quoted below:

> "I should like to inquire as to the rental fee of La Violetera in Spanish with Sarita Montiel.
>
> "Kindly place the name of our school on the rental list and advise me of the date of receipt of the film, the cost, and the date by which it must be returned.
>
> "Thank you for your kind attention to my film request. May I receive your correspondence as promptly as possible?"

A second letter was sent for another film on the same date. This letter had none of the elements of tentativeness; it instructed the company to "*** kindly enter the name of our school on the rental list ***." The two films arrived and were shown in respondent's classes in December 1967. There followed a bizarre

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melange of correspondence, mail receipts and memos pertaining to the films. The exhibits pertinent to this matter number 18 in all and are numbered P-28 a through P-44. One clear fact emerged. The films did not arrive back at the office of the company that owned them until September or October of the following year. In the intervening months the Board of Education had paid a rental fee of $83.30 for the films and had been reimbursed in this amount by respondent.

The hearing examiner concludes from the evidence that there is *prima facie* proof that respondent ordered one film for showing in her classes in December 1967, that two films were received, and that respondent was then negligent in returning the films promptly in the manner prescribed by the school. There was no testimony to the effect that such an incident occurred subsequent to the preferment of charges against respondent in May 1969.

CHARGE NO. 18

> "During the last year she made several serious complaints about her Department Head and was told by the Principal to put them in writing. This was never done. The clear implication to be drawn is that they were groundless."

The principal and vice-principal testified to the merits of this charge. The principal opined that respondent evaded questions about her own efficiency as a teacher by proffering charges against others as a screen or subterfuge. Respondent never did reduce her charges to writing according to the witnesses. (P-46)

The hearing examiner concludes that the proof is *prima facie* that respondent did in fact make serious complaints about her department head, but there was no evidence to establish that this could therefore by logically used as the basis for a specific charge of inefficiency against respondent. In the absence of any semblance of correlation, the hearing examiner recommend that the charge be dismissed.

CHARGE NO. 19

> "On another occasion she accused the principal of having made an ethnic slur against her. When challenged to verify the charge she claimed that 'she had heard' that the principal had made the remark. When asked to reveal who had told her this, she failed to supply any names and made a written retraction of the charge. Again, the clear implication is that the charge was false."

The respondent admits to the truth of this charge excepting only the phrase that alleges she was asked to name an informant. The incident occurred in 1968, and references to it are found in Exhibits P-48, P-49, and P-50. The principal did testify that he considered the retraction an apology.

The hearing examiner does not conclude from the evidence that there is any basis in fact for the classification of this charge as an "inefficiency", and he

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recommends that it be dismissed.

He finds no need to determine in each instance whether or not others of the separate charges detailed, *ante*, are in fact categorized correctly. It is sufficient that the gravamen of the petition is inefficiency and that the majority of the allegations are pertinent thereto.

In summation, after careful consideration of the testimony given during 12 days of hearing, and of the exhibits, briefs and arguments of counsel, the hearing examiner finds that:

(a) there is a *prima facie* case that respondent had performed in an inefficient manner prior to May 26, 1969;

(b) all such evidences of inefficient performance were presumably, or in fact, corrected, with one exception, during the 90-day period provided pursuant to *N.J.S.A.* 18A:6-12, and that no other evidence to the contrary was provided, with the exception of testimony and exhibits pertinent to Charge 15(a);

(c) Charge 15(a) was faulty in that it failed to conform to the mandatory requirement of the statute, *N.J.S.A.* 18A:6-12, to specify "* * * the nature thereof with such particulars as to furnish the employee an opportunity to correct and overcome the same."

For these reasons, and because the hearing examiner concludes that the one exception noted in (c) above could not be held to be just and sufficient cause for dismissal of respondent, he recommends that the motion for dismissal be granted at this juncture.

* * * *

The Commissioner has reviewed and considered the report, findings, conclusions and recommendations of the hearing examiner as set forth above. He agrees that with respect to Charge 15(a) the charge is lacking in the kind of direction imposed by the statute, *N.J.S.A.* 18A:6-12, in that it fails to specify the nature of the inefficiency in a manner to enable the employee "to correct and overcome the same." With respect to the other charges he notes that many are trivial in nature or occurred so infrequently as to be worthy of little note in the context of the teacher's span of service to the district. In this regard he refers in particular to Charges No. 3, 5, 6, 7, 9, 11, 12, 18 and 19.

In a previous decision, *Marion B. Rein v. Board of Education of the Township of Riverside*, 1938 *S.L.D.* 302, the Commissioner dealt with just such triviality when he said at page 305:

> " * * * Most of the charges and the evidence purporting to substantiate them are too trivial to receive individual consideration. If incidental acts occurring in school administration * * * are permitted to be exaggerated so as to be considered legitimate grounds for dismissal, then the tenure law gives no protection to teachers and fails to meet the purpose for which it was enacted by the Legislature. * * *"

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and in another decision *Georgia B. Wallace v. Board of Education of the Township of Greenwich, Cumberland County*, 1938 *S.L.D.* at page 493, the Commissioner said:

> " * * * She appears to have profited by the suggestions of the Helping Teacher in improving her housekeeping and the ventilation of the room. She * * * showed an interest in improving the school environment with a library, pictures, a victrola and records, flower beds, and a gravelled path. Her work probably does not compare with the best teachers. She may be below the average but she is not proven incompetent or inefficient nor is other conduct unbecoming a teacher shown by the evidence * * *."

Although that decision was later reversed, the reversal was based on other grounds; namely, that the power to pass on the charges in those days was that of a local board and that it should not be upset unless there was no justification for the finding which was made.

In the instant matter the teacher had been an employee of the Midland Park Board of Education for some 10 years. Reports of principals and department heads during this time had been laudatory in many, if not all, respects. The teacher had planned class trips, used extra audio-visual materials and helped stage celebrations pertinent to Spanish culture. There was no evidence that she deliberately or otherwise refused to follow detailed instructions or that she did not, in fact, correct these specific charges made against her during the 90-day period given for their correction. The Commissioner holds that the charges enunciated, *ante*, are trivial but remediable and were, in any event, substantially or entirely corrected during the period provided for this correction and thus do not require a defense. They are therefore dismissed. He further finds that Charges 8, 13, 14, 15 and 15(n) should be dismissed for the reasons enunciated in the report of the hearing examiner or because no testimony was received to buttress the allegations of petitioner.

There remain Charges 1, 2, 4, 10, 15 (b-m), 16 and 17. Some of these charges are more serious, but the Commissioner holds that they might generally be classed as remediable inefficiencies within the purview of the statute, *N.J.S.A.* 18A:6-12. The question is posed as to whether or not they were, in fact, corrected. In the absence of substantial proofs that they were not corrected, he must hold that they were for the reasons elucidated in *Michaels v. Brookchester, Inc.*, 26 *N.J.* 379, 140A 2*d* 199 (*Sup. Ct.* 1958). In that opinion at page 391 the Court dealt with the question "* * * whether the trial court erred in charging that defendant's failure to produce two of its employees permitted an inference that their testimony would have been unfavorable to it." The Court held that the trial court had charged correctly and that from a failure of the defense to produce witnesses who should have known some elements of the truth, it was proper to infer that their testimony would have been unfavorable.

In the instant matter there was testimony from many students and parents with regard to many of the charges, but in each and every case the testimony

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was pertinent only to respondent's alleged inefficiencies during or prior to the 1968-69 school year. There were no students or parents called by petitioner to give testimony about respondent's alleged inefficiencies during all of the period from September 1969 through the day of her suspension, December 19, 1969, a three and one-half months' period provided by the statutes for the teacher "to correct and overcome the same." (Inefficiency) The clear inference must be presumed to be that such testimony would not have been of help to petitioner. The testimony of the principal and the vice-principal that respondent had corrected the inefficiencies as noted, or that she had "improved" with regard to specific charges, receives a kind of corroboration by inference from this failure of petitioner to produce witnesses to testify that specific alleged inefficiencies were in fact substantially present during the whole of the period. The Commissioner determines, therefore, that each of these charges were in fact corrected and that they should be dismissed. This determination does not limit or prejudice the right of petitioner to relief if future evidence relevant to the charges is proof to the contrary.

For the reasons given, *supra*, the Commissioner finds that petitioner has failed to establish a case which requires a defense by respondent. The motion is therefore granted. The case is dismissed and respondent is restored to her former position as a teacher in the Midland Park schools with all the benefits to which she may be entitled retroactive to the date of her suspension.

COMMISSIONER OF EDUCATION

November 12, 1970

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Clyde E. Christner and Maryann N. Christner, individually and as the parents and natural guardians of R. Kenneth Christner, an infant, on behalf of the fifty-five children involuntarily reassigned from Mott School to Parker School in the City of Trenton,

Petitioners,

v.

Board of Education of the City of Trenton and Ercell I. Watson, Superintendent of Schools of the City of Trenton, Mercer County,

Respondents.

COMMISSIONER OF EDUCATION

Decision

For the Petitioners, Lawrence N. Stein, Esq.

For the Respondents, McLaughlin, Dawes & Abbotts (James J. McLaughlin, Esq., of Counsel)

This matter comes before the Commissioner as a class action in which the original petitioners, Rhine Beckman and Joyce R. Beckman, individually and as parents and natural guardians for Thomas Beckman, an infant, represent fifty-five white students who were involuntarily reassigned from the Mott School to the Parker School in the school district of the City of Trenton, as the result of an action of respondent Board of Education. Subsequent to the filing of the petition, Thomas Beckman has withdrawn from school, and the petition has been amended to name Clyde E. Christner and Maryann N. Christner individually, as parents and as natural guardians for R. Kenneth Christner, a student in the fourth grade at Mott School, who is part of the group reassigned to Parker School.

The petitioners requested *ad interim* restraints from the Commissioner pending a full hearing on the merits of the transfer plan on August 28, 1970. Concurrently petitioners sought similar relief from the New Jersey Superior Court, Chancery Division. On September 1, 1970, the Superior Court (Hon. A. Jerome Moore sitting) temporarily restrained respondent Board from taking any action to transfer or reassign any of the petitioners and ordered respondents to show cause on September 25, 1970, "why said defendants and all those acting under and pursuant to their authority should not be restrained and enjoined pursuant to the demands of the complaint, and why such other and further relief should not be granted as may be just and proper * * *."

On September 25, 1970, a hearing was held before the Superior Court at which time the injunctive order of September 1, 1970, was continued until October 9, 1970. The Court (Hon. John W. Fritz, JSC) further ordered the parties to appear before the Commissioner of Education to seek interim relief. A

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hearing on the motion for temporary restraints was conducted by the Assistant Commissioner of Education in charge of Controversies and Disputes at 225 West State Street, Trenton, on October 6, 1970. On October 8, 1970, injunctive relief was denied by the Commissioner of Education. On October 9, the New Jersey Superior Court, Chancery Division, dissolved the restraints on respondent Board effective October 19, 1970. On October 27, 1970, the Appellate Division of New Jersey Superior Court denied petitioners' appeal from the Chancery Division's decision and directed the parties to appear before the Commissioner of Education for a formal hearing on the merits of the plan.

Testimony and documentary evidence were produced at a hearing conducted by the Assistant Commissioner in charge of Controversies and Disputes on November 2, 4, and 5, 1970. The facts as stipulated by both parties are:

"1. On November 5, 1969, the State Board of Education adopted a Resolution concerning racial imbalance existing in the public schools in the State of New Jersey and determining that the Commissioner of Education in cooperation with local school districts undertake to determine in which school districts of the State of New Jersey racially imbalanced schools are maintained, and placing the Commissioner under the policy direction of the State Board and cooperating with local school districts to undertake such steps as he shall deem necessary to correct such conditions of racial imbalance as may be found * * *.[1]

"2. On January 13, 1970, the Trenton Board of Education adopted a policy statement on correcting racial imbalance in the public schools within the City of Trenton, and said policy statement was transmitted to Honorable Carl L. Marburger, Commissioner of Education, by letter dated January 14, 1970, signed by the defendant, Ercell I. Watson, Superintendent of Schools in the City of Trenton * * *.

"3. Under date of January 21, 1970, the Office of Equal Educational Opportunity of the State Department of Education, acting through Nida E. Thomas, Director, forwarded a memorandum to superintendents and county superintendents regarding transmittal of school desegregation plans and attempting, in part, to respond to inquiries as to what should be included in such plans * * *.

"4. Under date of February 2, 1970, the defendant, Board of Education of the City of Trenton, filed with the Office of Equal Educational Opportunity, a memorandum dated January 28, 1970, which included four separate plans designed to comply with the mandate of the State Board of Education concerning the correction of racial imbalance in the public schools of the City of Trenton, which said policy statement admitted conditions of de facto racial imbalance to be existent in the public schools of the City of Trenton * * *.

[1] * * * Indicate Existence of Supportive Data Appended to Stipulation.

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"5. Attached hereto and marked Exhibit "E" is a partial compilation of actions and discussions taken by the defendant, Board of Education, at various meetings from June 6, 1970 to date with regard to the problem of racial imbalance in the public schools. Counsel stipulate as to the existence of same and their authenticity * * *.

"6. Attached hereto and marked Exhibit "F" is a statement concerning racial imbalance made by the defendant, Board of Education, together with three specific plans prepared by the defendant, Board of Education and its administrative staff, which plans were presented at a special public meeting of the Board of Education for the purpose of considering said plans held on July 28, 1970. Counsel stipulate as to the existence of said letters and their authenticity * * *.

"7. On August 13, 1970, at a public meeting of the Board of Education, the following resolution was adopted by a vote of 5 to 3, one vacancy then existing on the Board of Education:

"In order, insofar as possible, to correct racial imbalance in the Trenton School System, Mr. Kiser moved that we approve Step One, as now proposed, and with Community involvement, begin intensive study of various other possible solutions to the problem of racial imbalance, including possible approval and implementation of Step Two, as now proposed, but with the stipulation that a more comprehensive program be adopted for implementation by September, 1971.

"This motion was seconded by Mr. Ganie.

"Dr. Watson explained that Step One would entail the reassignment of approximately one hundred black and Puerto Rican students from the Grant and Robbins Schools to the Washington and Franklin Schools. Both Washington and Franklin Schools have class sizes which will accommodate these youngsters without going over the goal of thirty pupils per class. This, in turn, will relieve overcrowding in the Grant and Robbins Schools. Step One would also involve the reassignment of approximately fifty-five white pupils from over-crowded classes in the Mott School to Parker School where they can be accommodated without going over the desired goal of thirty pupils per class. The first concern here is overcrowdedness; we are adding the racial imbalance aspect to satisfy the State mandate * * *.

"8. On August 28, 1970, counsel for the plaintiffs herein filed a Petition with the Office of the Commissioner of Education seeking to review the plan adopted by the Resolution of August 13, 1970. Counsel stipulate as to the existence and authenticity of this Petition which is pending before the Commissioner at the present time, and said Petition is attached to the Complaint in the within action.

"9. On September 1, 1970, the Complaint in this action was filed and an

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order was entered by Judge Moore on the same date restraining the defendant from implementation of the plan as adopted on August 13, 1970. Counsel stipulate that these facts are a matter of record and are correct.

"10. On service of the Order to Show Case (Sic) the defendant, Board of Education, discontinued its plan to implement the Resolution of August 13, 1970 upon the opening of schools in said district on September 9, 1970.

"11. Attached hereto and marked Exhibit "G" are copies of three letters dated September 18, September 21 and September 22, 1970, which constitute correspondence between the Board of Education of the City of Trenton and the Office of Equal Education (Sic) Opportunity. Counsel stipulate as to the existence of said letters and reserve the right to make further inquiry with regard to the content thereof.

"12. Counsel reserve the right herein to supplement this Stipulation should the Court desire further factual documentation and as counsel see fit to do so in the future."

Pupil enrollment statistics for the Trenton elementary schools as supplied by the Assistant Superintendent of Schools are as follows:

1969-70
PUPIL ETHNIC DISTRIBUTION
AS OF SEPTEMBER 30, 1969
(ELEMENTARY GRADES)

	Black	Span.	White	Other	Total Enroll.
Cadwalader	87.2%	8.7%	4.1%		555
Columbus	77.5	3.7	18.8		415
Cook	92.8	4.5	2.7		450
Franklin	17.4	1.5	81.1		475
Grant	82.4	13.8	3.8		996
Gregory	89.7	3.4	6.9		652
Harrison	1.3	7.2	91.5		295
Jefferson	93.6	3.2	3.2		818
Jr. No. 1 Elem.	91.6	1.9	6.5		108
Jr. No. 2 Elem.	46.0	5.1	48.8	.1	819
Jr. No. 3 Elem.	71.1	3.2	25.0	.7	381
Jr. No. 4 Elem.					
Jr. No. 5 Elem.	93.7	4.6	1.7		399
Monument	98.0	1.6	.4		404
Mott	17.9	20.2	61.9		402
Parker	78.3	17.4	4.2	.1	731
Robbins	59.2	12.0	28.7	.1	705
Stokes	83.6	2.6	13.8		716
Washington	3.0	----	97.0		395
Wilson	92.5	4.3	3.2		377
Total Elem.	70%	7%	23%		10,093

Examination of this data reveals that 23.4% of the district's elementary students

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are white. Of these 1,687 or 71% attend five of the district's nineteen elementary school buildings. Fifty-four percent of the white elementary students attend schools which average 84.7% white student enrollment. This data supports respondent Board's contention that *de facto* segregation exists in the Trenton Public Schools. The following statistics reveal that prior to the actual transfer there was an attrition of 52 white, a gain of 14 Spanish, and a gain of five black children at the Mott School.

ENROLLMENT SEPTEMBER 30, 1969
MOTT SCHOOL

Grade	Classes	Black	Spanish	White
1	2	12	16	35
2	2	7	13	40
3	2	5	7	40
4	1.5	13	5	30
5	1.5	6	7	45
6	2	12	8	29

ENROLLMENT SEPTEMBER 30, 1970
MOTT SCHOOL

Grade	Classes	Black	Spanish	White
1	2.5	12	27	33
2	1.5	12	18	27
3	2	13	16	26
4	1.5	6	9	26
5	1.5	8	5	31
6	2	9	14	28

ENROLLMENT SEPTEMBER 30, 1969
PARKER SCHOOL

Grade	Classes	Black	Spanish	White
1	6	102	20	4
2	4	68	18	5
3	4	70	15	2
4	4	80	12	2
5	4	69	18	5
6	2	49	14	4

ENROLLMENT SEPTEMBER 30, 1970
PARKER SCHOOL

Grade	Classes	Black	Spanish	White
1	6	96	21	3
2	5	89	16	3
3	3	55	11	3
4	4	74	12	1
5	3	63	14	2
6	3	71	14	7

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In the reporting sample of achievement test data submitted by respondent Board it is revealed that a significant difference exists in vocabulary achievement between students at the Mott and Parker Schools and that the Mott School children achieve at a significantly higher level in this area. In reading comprehension and mathematical achievement no such significant difference can be determined. This test analysis reveals that the students from both schools could be joined for purposes of instruction using standard classroom grouping procedures.[2]

Petitioners contend that they and their infant children have been aggrieved by the action of respondent Board of Education and that they will be deprived of their constitutional rights and will suffer irreparable harm unless the Board:

> " * * * and all those acting under or pursuant to their authority be restrained and enjoined from taking any further action, either at this time, or in the future, to transfer or reassign students within the City of Trenton Public School system beyond 'neighborhood' school boundaries unless such transfer or reassignment is part of a validly considered and adopted comprehensive plan submitted to and approved by the Commissioner of Education of the State of New Jersey in accordance with all applicable laws * * *."

Petitioners also contend that the Board acted primarily under the false assumption that it was being mandated by the State to adopt a plan immediately. They aver that respondent Board ignored that part of the State Department of Education's desegregation policy calling for community involvement; that the statistical data made available to the Board was not current; that the eventual plan adopted by the Board was not adequately discussed, but was adopted in a rather routine fashion upon the advice of the Superintendent of Schools; and that the Board of Education has acted improperly, arbitrarily, capriciously and unreasonably, and has completely abused its discretion and authority in that it:

"(a) Completely failed to involve the community in the development of the plan adopted or in its implementation,

"(b) Failed to adequately identify and consider alternative courses leading to the solution of the problem being considered,

"(c) Failed and refused to make any effort whatsoever to draw on all resources–educational, financial and community–that could have been brought to bear in the solution of such problem,

"(d) Failed to develop any semblance of a comprehensive plan or plans which could be intelligently analyzed, considered or evaluated,

"(e) Failed to follow or in any way adhere to any of the guidelines established by the New Jersey State Board of Education,

"(f) Failed to submit to the Commissioner of Education or to the Office of Equal Educational Opportunity the data and documentation required

[2]The parties in this matter agreed to be bound by the Commissioner's expertise in the area of tests and measurements and his analysis of the achievement test data (Tr. 79).

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pursuant to the memorandum of January 21, 1970 from Nida E. Thomas, Director,

"(g) Failed to make adequate or proper considerations of safety, convenience, time, economy or other acknowledged virtues of a 'neighborhood' school system,

"(i) Completely failed to develop or adopt a reasonable plan of student dispersal consistent with sound educational values and procedures."

Respondents assert that petitioners have in no way been aggrieved, nor have they been deprived of their constitutional rights. Respondents contend that at all times they were acting pursuant to the direction of the Commissioner of Education with regard to their efforts to develop a plan of student reassignment for the purpose of effecting racial balance in the public schools of the City of Trenton. Respondents deny that they failed to draw on community resources, to develop a comprehensive plan or to give adequate proper considerations to the virtues of a neighborhood school system. They further contend that its plan is reasonable and consistent with sound educational values and that it was adopted only after consideration of alternative courses of action.

The Commissioner finds that the City of Trenton was listed by the Office of Equal Educational Opportunity of the New Jersey State Department of Education as a district with severe racial imbalance and was so notified on November 10, 1969. Efforts of the Commissioner and the State Board of Education to eliminate racially imbalanced public schools in New Jersey are based upon *Art.* I, *par.* 5, *New Jersey Constitution* (1947) which provides in relevant part:

> "No person shall be * * * segregated in the * * * public schools, because of * * * race, color, ancestry or national origin."

and upon judicial determinations of the Supreme Court of the United States *(Brown v. Board of Education of Topeka*, 374 *U.S.* 483, 98 *L. Ed.* 873 (1954)), and the Supreme Court of New Jersey (*Booker v. Plainfield Board of Education,* 45 *N.J.* 161 (1965)). The *Booker* decision, in addition to placing New Jersey among the leaders in moving to eradicate *de facto* segregation, directed two criticisms at the posture taken by the Commissioner and the State Board. The Court characterized as too restrictive the State administrative view that (1) a school board's efforts were only to be reviewed for arbitrariness; and (2) that a racial imbalance existed only where a school was all or almost entirely black. The Commissioner subscribes to the philosophy of leaving the choice of solutions with the local board in the first instance, but recognizes his constitutional obligation that once the question of the sufficiency of that choice is brought before him, he must determine whether the choice comports fully with the requirements of State law and policy.

The Commissioner has consistently abstained from establishing a definition of racial imbalance for purposes of determining the legality of a

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board's action. His language in the case of *Paulsboro Community Action Committee v. Board of Education of the Borough of Paulsboro*, decided April 22, 1969, provides (at pp. 6-7) a statement of his position:

> " * * * The Commissioner knows of no instance in which a precise definition of racial imbalance and the point at which it occurs has been laid down. In *Booker*, supra, the court made it clear that racial imbalance could be reached short of a concentration of minority group children approaching 100%. It indicated that such point might be found above 50% but well below 100%. Support may be found from various authorities for criteria such as 50% or 60%, or the ratio of the racial composition of the community or of the school pupils, or the point at which a school becomes characterized in the minds of the people as a Negro School, and others. The Commissioner has observed, in the cases brought before him involving an issue of de facto school segregation, many attempts to arrive at a statistical definition of unlawful racial segregation and has noted the consistent refusal of minority group leaders to become involved in any such 'numbers game.' From his study of the problem of racial imbalance the Commissioner is convinced that it cannot be reduced solely to statistical analysis or defined precisely in terms of numbers * * *."

In previous cases, however, the issue decided affirmatively was whether the school district had either the authority or the duty to reduce an extreme concentration of black pupils within a school district which had a majority of white students. *Fisher v. Orange Board of Education*, 1963 *S.L.D.* 123; *Spruill v. Englewood Board of Education*, 1963 *S.L.D.* 141, affirmed State Board of Education 147; *Morean v. Montclair Board of Education*, 1963 *S.L.D.* 154, affirmed State Board of Education 160, affirmed 42 *N.J.* 237, 200 *A. 2d.* 97; *Alston v. Union Township Board of Education*, 1964 *S.L.D.* 54, affirmed State Board of Education 60; *Scolpino v. Teaneck Board of Education*, 1965 *S.L.D.* 152; *Byers v. Bridgeton Board of Education*, 1966 *S.L.D.* 15, affirmed State Board of Education 21, affirmed New Jersey Superior Court, Appellate Division, June 29, 1967; *cert. den.* 50 *N.J.* 294 (1967), 234 *A. 2d.* 402; *Elliott v. Neptune Township Board of Education*, 1966 *S.L.D.* 52, affirmed State Board of Education 54, affirmed 94 *N.J. Super.* 400 (*App. Div.* 1967); *Rice v. Montclair Board of Education*, 1968 *S.L.D.* 192, affirmed State Board of Education 199; *Paulsboro Community Action Committee v. Paulsboro Board of Education*, *supra; Dill v. Linden Board of Education*, decided by the Commissioner of Education August 26, 1970.

But the instant matter is clearly distinguishable from previous decisions of the Commissioner on the correction of racial imbalance. The question presented here is whether a district in which black students constitute a majority must move within that context toward establishing schools which reflect the racial balance of the school district.

The Commissioner notes that it is not merely to enhance the learning environment for black pupils which is the imperative for desegregation in the

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city. While this is a great desideratum, of greater importance is the possibility the school offers both races for the successful adjustment to interracial living. The ideal of the common school being the architect of democracy is not new. The hopes of Horace Mann expressed at the dawn of the public school movement are relevant today:

> " * * * Education, then, beyond all other devices of human origin, is the great equalizer of the conditions of men – the balance – wheel of the social machinery * * * It does better than to disarm the poor of their hostility towards the rich; it prevents being poor. Agrarianism is the revenge of poverty against wealth. The wanton destruction of the property of others, – the burning of hay-ricks and corn-ricks, the demolition of machinery, because it supersedes hand-labor, the sprinkling of vitriol on rich dresses, – is only agrarianism run mad. Education prevents both the revenge and the madness. On the other hand, a fellow-feeling for one's class or caste is the common instinct of hearts not wholly sunk in selfish regards for person, or for family. The spread of education, by enlarging the cultivated class or caste, will open a wider area over which the social feelings will expand; and, if this education should be universal and complete, it would do more than all things else to obliterate factitious distinctions in society. * * *" (*Twelfth Annual Report of the Board of Education together with the Twelfth Annual Report of the Secretary of the Board*, Boston: 1849)

The major purpose of racial integration has been to provide an educational climate for whites and blacks which enables them to share the positive experiences accruing from healthy inter-personal relationships in a situation roughly representative of society at large. A cursory examination of demographic data regarding the Trenton Public School population clearly reveals that it does not even closely reflect the overall racial composition of Mercer County or the State of New Jersey. Therefore, the Commissioner must consider whether a definition of racial imbalance based on the dominant culture becoming the minority is viable. To this end, the Office of Equal Educational Opportunity's working definition of racial imbalance which states that each district should strive "to establish school attendance areas that make possible wherever feasible a student body that represents a cross section of the population of the entire district," must be questioned within this context. It has been the hope and dream of American educators that central to the school's educative mission will be the amelioration of racial and ethnic hostility. That efforts toward this end appear counterproductive is a measure of the difficulty of the problem. The Commissioner is cognizant of these difficulties and through the Office of Equal Educational Opportunity has submitted detailed procedures and guidelines for the assistance of local boards and administrators. In addition, the Office of Equal Educational Opportunity has provided field workers who specialize in consulting with boards of education on the correction of racial imbalance. These efforts were all part of the Trenton experience.

With respect to the specifics surrounding the adoption of the plan *sub*

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judice, the Commissioner finds that the testimony at the hearing established that there is a marked difference of opinion between the Board members regarding the quality and extent of the deliberation leading up to the adoption of the Board's resolution. Two Board members recalled some in depth discussion regarding the problem of racial imbalance in the Trenton schools. (Tr. 243, 244, 412, 414) Another recalls no in-depth discussion. (Tr. 207) Petitioners' contention that the plan to bus children from Mott School was hastily devised and presented to the Board at the eleventh hour was supported by some Board members who claim that Mott School was never mentioned in any discussions prior to July 1970. (Tr. 237, 261, 438, 440) Other members contend that they looked at the problem of racial imbalance in the Trenton schools on a district-wide basis and that the possibility of Mott and other schools being involved in the transfer of students to achieve racial balance was always evident. (Tr. 283, 284, 286, 356) Board members were in general agreement, however, that the definition of racial imbalance, *supra*, submitted by the Office of Equal Educational Opportunity of the New Jersey Department of Education was their understanding of the meaning of the phrase *correcting racial imbalance*. (Tr. 289, 387, 417)

Board members also testified that they considered themselves to be under pressure from the State Department of Education to take positive affirmative action toward correcting racial imbalance in the Trenton schools by September 1970. (Tr. 176, 351, 387, 392) The Assistant to the Superintendent of Schools and the Mott School principal testified that they had no knowledge of the transfer of 55 white children from Mott School prior to August 1970. (Tr. 50, 361) It is the Commissioner's conclusion from the testimony of Board members that each had given considerable thought to his vote on the resolution of August 13, 1970. It is equally clear from the testimony that the Board attempted on July 28, 1970, to assess community opinion at an open meeting. (Ex. P-9) Parents of Mott School children, however, were apparently not present in any number at this meeting and learned of the proposal from the news media. (Tr. 474) These parents did, however, attend the meeting on August 13, 1970, at which time they had an opportunity to be heard prior to the Board's action. (Tr. 475) (Ex. P-10)

Taking into consideration all of the testimony and documentary evidence adduced at the hearing, the Commissioner concludes that:

1. Important segments of the Trenton community were not involved in the considerations incident to the development of respondents' plan.

2. The majority of the Board members at the time of the adoption of their resolution felt under considerable pressure to adopt a plan by September 1, 1970.

3. Parents, teachers and the children involved in the transfer were not provided with adequate information nor given sufficient preparation to accomplish the change.

4. The implementation of the plan produced vitriolic reaction in the community.

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The Commissioner recognizes the heavy burden borne by the Trenton Board of Education in seeking to ameliorate the effects of racial imbalance within a school system whose student body is drawn largely from minority groups. It has been previously noted that prior to the implementation of the plan, Mott School's white student population decreased by 52, so that withdrawal of 55 more white children would mean that it would have a white population of 39%. In this regard it has been suggested that implementation of the instant plan would result in further attrition of white students. While the Commissioner is well aware of the dangers of placing too high reliance on enrollment statistics to judge the merits of a plan, he believes it is important to look carefully at the language of the Court as expressed in *Booker, supra,* which decision has been the primary source of judicial direction to the Commissioner in his efforts to correct racial imbalance:

> "And trends towards withdrawal from the school community by members of the majority must be viewed and combatted, for if they are not, the results may be as frustrating as the inaction complained about by the minority * * *." (at p. 180)

Here the Court clearly enunciated that the possibility of white attrition is a major consideration in determining the workability of a plan to correct racial imbalance. The conduct of this hearing has convinced the Commissioner of the wisdom of the Court's expression in this area.

A final factor to be considered in this matter is the understanding of the Trenton Board of Education that its plan had been "accepted" by the Office of Equal Educational Opportunity. The Commissioner has reviewed this procedure and considers it to mean that the Office of Equal Educational Opportunity has preliminarily approved respondents' proposal as a course of action. Implicit in the acceptance of this course of action is compliance, wherever feasible, with the guidelines submitted to respondent Board by the Office of Equal Educational Opportunity. It is not enough that respondents' goals have received acceptance. The procedure implementing these goals must be in harmony with the policies of the State Board of Education and the laws of New Jersey, and it is this test that the Commissioner is being called upon to decide. The rationale for the aforementioned view of the Commissioner's role is best stated in the language of the New York Court of Appeals in the case of *Vetere v. Allen,* 258 *NYS 2d* 77, 79 (1965) which outlined the roles which the Commissioner must assume in the performance of his duties:

> " * * * 'In appraising the judicial nature of the act of the Commissioner of Education, it must be remembered that he combines both judicial and administrative functions. When he decides appeals where he has occasion to construe statutes, he undoubtedly acts in a judicial capacity. But in passing upon the propriety of educational policy by a particular school board or school district he acts in a broader capacity than the courts, by reviewing at times administrative acts of discretion of which a court would refuse to take cognizance.' * * *"

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See also *Booker v. Board of Education of Plainfield, supra.*

It is apparent that respondents were not in full compliance with the guidelines of the Office of Equal Educational Opportunity in adopting the resolution of August 13, 1970. There were serious procedural defects involving the failure of the Board or the administration to involve responsible segments of the community in planning. In addition, it has been established that the decision to involuntarily bus students was not the product of lengthy deliberation, but rather the act of a body responding to pressure in an uncertain climate of acceptance. The Superintendent's own acquiescence in the suggestion that the plan was conceived because of "the hot breath of the State Department of Education breathing down their neck" is ample support for the view that the plan is nothing more than a token, and was, in fact, meant as nothing more by the Board. The Commissioner considers this posture with regret, and relies on the language of the court in the decision of *Hobsen v. Hansen*, 269 *F Supp.* 401 (Washington, D.C. 1967), affirmed in *Smuch v. Hobson*, 408 *F. 2d* 682 (1969) to best express this concern:

> "Fact that in many schools in the District of Columbia the equivalent of token integration was carried out was of no legal moment, since the Constitution is not appeased by tokenism. * * * "

But the greater consideration in this matter was expressed in a forthright manner by respondent Board in its initial criticism of the State Board resolution regarding the correction of racial imbalance. The Board considered the resolution to be couched in unreality by requiring some districts to comply with the directive and allowing others, through an accident of geography and artificial political boundaries, to escape a similar responsibility. The Commissioner concurs and again relies on the language in *Hobson v. Hansen, supra,* for his expression of concern:

> " * * * Orthodox equal protection doctrine can be encapsulated in a single rule: government action which without justification imposes unequal burdens or awards unequal benefits is unconstitutional. * * * "

The Commissioner views the caution regarding projected white student attrition expressed in *Booker, supra,* to be significant here.

In the final analysis, the Commissioner must acknowledge the counter-productivity of involuntary busing to correct racial imbalance in school districts with a majority of minority group children. This is not to say that other methods of redressing racial imbalance should also be abandoned in those school districts and the Office of Equal Educational Opportunity has clearly enunciated alternatives in the guidelines submitted to the school districts.

Indeed, Boards of Education are required to provide opportunities for "successful adjustment to interracial living" for all children in the school system.

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The Commissioner further acknowledges his lack of powers to effectuate busing which transcends school districts and clings to the hope that the language of Judge J. Skelly Wright in *Hobson v. Hansen, supra,* (at p. 516) might provide some direction for the eventual solution of this problem:

> " * * * The plan, too, should anticipate the possibility that integration may be accomplished through cooperation with school districts in the metropolitan suburbs. There is no reason to conclude that all Washingtonians who make their homes in Virginia or Maryland accept the heresy that segregated public education is socially realistic and furthers the attainment of the goals of a democratic society. Certainly if the jurisdictions comprising the Washington metropolitan area can cooperate in the establishment of a metropolitan transit authority * * *, the possibility of such cooperation in the field of education should not be denied – at least not without first sounding the pertinent moral and social responsibilities of the parties concerned."

The Commissioner notes the excellent cooperation between the communities of the greater Trenton area when a problem of mutual concern is perceived. The regionalization of transportation services, close cooperation of the fire departments, the joining of police efforts to perform the vital service of providing order and preserving individual rights are commendable examples of such action. The amelioration of social disorder through education deserves similar regional consideration.

The Commissioner reiterates his firmly held belief that in the opportunities afforded children through meaningful school integration lies the hope for future harmony in our nation. The Commissioner finds that this type of meaningful school integration cannot be achieved by the involuntary busing of children in urban areas where the majority of the public school youngsters consist of the children of the nation's minority groups. As the Commissioner has noted, this matter is beyond his purview, but he is contrained to invite the attention of the Courts and the Legislature to its possibilities.

Accordingly pursuant to petitioners' prayer for relief, the respondents are hereby enjoined from implementing their plan to involuntarily bus students to achieve racial balance.

The petition is granted.

COMMISSIONER OF EDUCATION

November 14, 1970

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Board of Education of the City of Passaic,

Petitioner,

v.

Municipal Council of the City of Passaic, Passaic County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Louis Marton, Jr., Esq.

For the Respondent, August C. Michaelis, Esq.

Petitioner, hereinafter "Board," appeals from the action of respondent, hereinafter "Council," taken pursuant to *N.J.S.A.* 18A:22-37, certifying to the County Board of Taxation a lesser amount of appropriations for school purposes for the 1970-71 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were educed at a hearing conducted on September 18, 1970, at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

At the annual school election on February 10, 1970, the voters rejected the Board's proposal to raise $6,184,703.60 by local taxes for current expenses and $23,495.50 for capital expenditures. The budget was then sent to Council pursuant to *N.J.S.A.* 18A:22-37 for its determination of the amount of tax funds required to maintain a thorough and efficient school system.

After consultation with the Board and a review of the budget, Council made its determination and certified to the Passaic County Board of Taxation an amount of $5,968,803.60 for current expenses and $14,395.50 for capital outlay. The pertinent amounts may be shown as follows:

	Current Expense	Capital Outlay
Board's Proposal	$6,184,703.60	$23,495.50
Council's Certification	5,968,803.60	14,395.50
Reduction	$ 215,900.00	$ 9,100.00

The Board contends that the reductions of Council will leave an amount of money insufficient to provide a thorough and efficient system of education for the pupils of the school district. The Board appeals to the Commissioner for restoration of these funds.

As part of its determination Council suggested items of the budget in which it believed economies could be effected without harm to the educational

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program, as follows:

Acct. No.	Item	Board's Proposal	Council's Proposal	Amount Reduced
CURRENT EXPENSE				
J110b	Sals. - Election	$ 4,090	$ 2,090	$ 2,000
J130d	Other Election Exp.	2,500	2,000	500
J130f	Other Exp.-Supt 's Office	5,250	4,250	1,000
J130j	Other Exp.-Bldgs. and Grds.	1,000	800	200
J130m	Other Exp.-Print. and Publ.	6,500	5,000	1,500
J130n	Misc. Exp.-Admin.	2,500	1,500	1,000
J213-1-s	Sals.-Sub. Tchrs.	77,000	67,000	10,000
J213-2	Sals.-Bedside Tchrs.	15,190	11,190	4,000
J215-a	Sals.-Sub. Secy.	5,520	3,000	2,520
J220	Student Textbooks	50,000	40,000	10,000
J230	Library Books	12,000	10,500	1,500
J230e	Other Library Exp.	1,000	850	150
J240-1	Fine Arts Supplies	20,000	16,000	4,000
J240-2	Phys. Ed. Supplies	4,500	2,500	2,000
J240-3	Regular Teaching Supplies	40,000	30,000	10,000
J240-4	Music Educ. Supplies	3,000	1,200	1,800
J240-5	Home Ec. Supplies	6,000	5,000	1,000
J240-6	Ind. Arts Supplies	13,520	10,520	3,000
J240-7	Kindergarten Supplies	6,000	4,000	2,000
J250a	Misc. Supplies-Instr.	4,000	1,620	2,380
J250a-1	Testing Supplies	2,514	1,814	700
J250c	Misc. Exp.-Instr.	14,650	12,650	2,000
J320a	Attend. Serv. Supplies	450	250	200
J420a	Health Serv. Supplies	1,500	1,000	500
J520a-1	Transp.-Other Distr.	24,000	22,000	2,000
J620	Contr. Serv.-Plant	720	120	600
J640b	Electricity-Plant	56,500	55,500	1,000
J650a	Custodial Supplies	17,000	15,000	2,000
J650e	Supplies-Care of Grds.	250	150	100
J660c	Other Exp.-Grds.	1,000	200	800
J660d	Misc. Exp.-Plant Oper.	6,600	5,100	1,500
J710c	Sals.-Repair of Equip.	700	- 0 -	700
J720a	Contr. Serv.- Grounds	8,650	5,650	3,000
J720b	Contr. Serv.- Repair Bldgs.	83,460	20,160	63,300
J720c-3	Contr. Serv.-Repair of Equip.	4,000	3,000	1,000
J720c-4	Contr. Serv.-Repair of Music Equip.	2,000	1,700	300
J720c-6	Contr. Serv.-Repair of Ind. Arts Equip.	650	350	300
J720c-8	Contr. Serv.-Repair of Sci. Equip.	255	80	175
J720c-9	Contr. Serv.-Repair of Furn.	235	35	200
J720c-11	Contr. Serv.-Custod. Equip.	300	200	100

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J720c-15	Contr. Serv.-Supt's Office Equip.	375	200	175
J720c-17	Contr. Serv.-Maint. Equip.	200	100	100
J730a-1	Repl.-Fine Arts Equip.	5,625.40	2,625.40	3,000
J730a-3	Repl.-Educ. Equip.	5,000	1,000	4,000
J730a-4	Repl.-Music Equip.	3,000	1,500	1,500
J730a-5	Repl.-Home Ec. Equip.	1,500	1,000	500
J730a-7	Repl.-Kindergarten Equip.	1,000	500	500
J730a-9	Repl.-Furniture	4,822	1,422	3,400
J730a-13	Repl.-Bd. Secy.'s Office Equip.	1,000	300	700
J740a	Other Exp.-Grounds	1,900	900	1,000
J740b	Other Exp.-Repair of Bldgs.	13,800	5,800	8,000
J810b-1	Bd. Contrib.-Soc. Sec.	39,000	35,000	4,000
J820b	Employee Insurance	215,000	167,000	48,000
	Sub-Total-Current Expense	$797,226.40	$581,326.40	$215,900
	CAPITAL OUTLAY			
L1240b-14	Equip.-Board Secy's Office	$ 400	$ - 0 -	$ 400
L1240b-16	Equip.-Supt's Office	220	120	100
L1240c-1	Fine Arts Equip.	4,000	1,000	3,000
L1240c-4	Music Equip.	5,000	3,000	2,000
L1240c-5	Home Ec. Equip.	400	- 0 -	400
L1240c-8	Science Equip.	1,300	900	400
L1240c-9	Furniture	4,000	1,200	2,800
	Sub-Total-Capital Outlay	$ 15,320	$ 6,220	$ 9,100
	TOTALS	$812,546.40	$587,546.40	$225,000

The hearing examiner has carefully considered all of the items in contention, reviewed the total budgets for the years 1969-70 and 1970-71, and scrutinized with care the economies suggested by Council. He notes the following facts and circumstances as revealed in the testimony and documentary evidence.

The Board's budget for the 1970-71 school year was not formulated in isolation, but in the context of the experience of previous years and particularly in direct relevance to the budget for the school years 1969-70. Some background information derived from this budget is therefore essential to an understanding of the budget for 1970-71.

A study of the 1969-70 budget reveals that it sustained total cuts of $157,733.43 from the time it was first proposed to the voters in the February referendum. It was rejected by the voters in that first proposal and was reduced $52,167.43 by the Board prior to the second referendum defeat. It was then further reduced by Council by an aggregate cut of $154,466. An appeal to the

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Commissioner was successful in restoring a total of only $68,900, so that the amount of the major cut of Council allowed to be given effect was $85,566. Included in this latter total were large cuts in the maintenance account alone totaling $35,000. It was the testimony of Council at that time that certain maintenance items could be postponed for a year, and the hearing examiner sustained that judgment.

At this juncture, another year has passed. The same types of expenditures for repairs and replacements for buildings and equipment have been reduced again by Council. The argument is still the same one; namely, that a further postponement will not be harmful or have a deleterious effect on the school system.

The hearing examiner cannot agree that such is the case with many of the reductions imposed by Council this year. He believes that further delay in painting and caulking, in roof repairs, and in routine scheduled replacement of old equipment cannot be rationalized with a school system operating in an efficient manner. He also believes that such delay in instituting essential repairs and replacements can only result in unwarranted and needless additional expense to the taxpayers of the district.

The hearing examiner also notes with some alarm the small surplus carried by this large school system. The total available in current expense, according to the audit report of balances available on June 30, 1970, was $22,412.73. This is too small an amount to insure that all vital contingency expenses can be met. The argument that it ought to be greater gains cogency when it is compared with the list of negotiated agreements that the Board concluded with staff members subsequent to the submission of the budget to the voters on February 10, 1970. While these agreements were made pursuant to the Board's obligation under *Chapter* 303, *Laws* of 1966, they cannot be considered to be of direct relevance to the contested sum of $225,000 herein in dispute. However, they are indirectly relevant since they are now an incorporated part of the budget's skeletal structure, and it is the total expenditure which must provide a thorough and efficient system of education. Since this is so, it is vital that the accounts in contention in this petition be sufficient. If they are not, and major emergencies develop, the rest of the budget is incapable, in the opinion of the hearing examiner, of providing funds in their place.

Major account reductions and the recommendations pertinent to each of them are listed below. Minor reductions with recommendations of the hearing examiner will be contained in the table that follows:

J110b – J130d – Salaries and Other Expenses - Election

Council has reduced planned expenditures in these two accounts by $2,500 *in toto* and avers that this is reasonable since there will be no bond authorization election in the 1970-71 school year. The Board maintains, in written and oral testimony, that it has hired an architect and that it will hold a

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referendum to increase bonded indebtedness sometime during the spring of 1970. This election will mean an increased cost since it is likely that new polling places will have to be established and, in any event, at least one other polling place will have to be rented to replace the one formerly located in School No. 12, which is now demolished.

In the absence of definite plans for the bond authorization referendum, a cut in this account was sustained last year. Since a schedule for submission of a proposal to the voters has now been established, the hearing examiner recommends that the full amount of the cut be restored.

Summary:	Reduction of Council	$2,500
	Amount Restored	2,500
	Amount not Restored	- 0 -

J213-1-s – Salaries - Substitute Teachers

A review of past expenditures shows $70,419.01 was spent for substitutes in the Passaic Schools in 1968-69. The Board increased this item in its budget by approximately $3,000 for the school year 1969-70 and reduced it by $77,000 in its budget for 1970-71. Council maintains that $10,000 in savings is possible if the Board uses regular staff members at the negotiated rate of $3.00 per period. The Board avers that regular substitutes are absolutely necessary in an urban area. The hearing examiner regards the Board's estimate of $77,000 for substitutes as reasonable in view of past experience and in the context of increased per diem rates for substitutes. He regards the assignment of substitute duties on a routine basis to members of the regular staff, as an inefficient imposition, although such assignments are often imperative in emergency situations. Therefore, he recommends the full restoration of the cut of Council.

Summary:	Reduction by Council	$10,000
	Amount Restored	10,000
	Amount not Restored	- 0 -

J220 – Textbooks

The pupil population of this school system in September 1970 was 8,750. For these pupils the Board had budgeted $50,000 for textbooks as replacements and for new adoptions. This was an apportionment of approximately $5.71 per pupil. Council's reduction of $10,000 is specifically attributed to a large increase at the high school level.

The Board maintains that this increase is attributable to a realignment of the high school from a three-year to a four-year grade level orientation. A total of $43,113.56 was actually spent on textbooks in 1968-69. In view of increased costs, a larger enrollment, and the need for a general updating of textbook materials occasioned by a rapidly changing world, the hearing examiner finds the projected textbook expenditure of $5.71 per pupil reasonable. Therefore, he recommends that the cut of Council be restored.

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Summary:	Reduction of Council	$10,000
	Amount Restored	10,000
	Amount not Restored	- 0 -

J240 – Supplies

The Board proposed to spend $93,020 for routine items of supply from seven sub-accounts of the J240 category. Council reduced this by $23,800. In each case these category cuts would reduce expenditures below what was actually spent in the 1968-69 school year and would, in the opinion of the hearing examiner, provide a limitation so severe that the operation of an efficient and sound system of education would be in jeopardy. Certainly the planned expenditure of less than $10.70 per pupil for a year's supply of basic materials, as proposed by the Board, cannot be considered an extravagance. This represents a sum of about six cents a day per child to cover costs for paper, chalk, pencils, workbooks, wood for shop, food for home economics, crayons, etc. The hearing examiner finds the expense as budgeted by the Board to be reasonable and necessary and recommends that the cut be restored.

Summary:	Reduction by Council	$23,800
	Amount Restored	23,800
	Amount not Restored	- 0 -

J720 – Contracted Services

Council cut $68,650 from the Board's projected expenditures of $99,965 in this line item account. The cuts embrace major items such as renovation of old toilet rooms, painting, roofing repairs, and other minor items of building renovation and educational equipment maintenance. The hearing examiner has reviewed the voluminous oral and written testimony pertinent to these items and recommends that the following cuts made by Council within this account be sustained. The following items are held to be desirable but not essential to the maintenance of a thorough and efficient school system:

Item	Amount
Folding Gate - School No. 1	$ 900
Slant Barrier - School No. 3	1,200
Dust Collection System - High School	3,000
Window Guards - Stadium	1,500*
Public Address System - Stadium	900
Scoreboard Control - Stadium	500
SUB TOTAL	$8,000

He further recommends that the balance of the cuts made by Council in this account be restored as essential to the efficient operation of the school system. Prominent among these items restored for funding are the following:

*While the recommendations above sustain Council's cut of $1,500 for window guards, it restored $500 to complete one section.

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Painting - School No. 1 (first in 8 years)	$ 4,000
Replacement of Stage Curtain - School No. 4 (The previous curtain had disintegrated with age and has been replaced)	1,600
Roof Repairs - School No. 4	3,000
Lavatory Renovation - School No. 11	18,000
Roof Replacement - School No. 11	18,000
Waterproof Pump Room - School No. 11	1,000
Alteration Work - School No. 11	2,300
Replacement of Broken Cork Tile with Carpet - High School	2,700
Patch Concrete - Stadium	800
Miscellaneous	9,250
TOTAL	$60,650

A part of the rationale for the restoration of these projects is found in the remarks of the hearing examiner, *ante*, that refers to the cumulative effects of budget cuts in prior years. He regards these expenditures as necessary this year if the schools are to operate in an efficient manner in the future years.

Summary:	Reduction by Council	$68,650
	Amount Restored	60,650
	Amount not Restored	8,000

J730 – Replacement of Equipment

This account for the replacement of educational equipment throughout the school system was reduced $43,600 by Council's determination. The Board had budgeted in the sub-accounts as follows:

	Board's Proposal	Council's Reduction
(a) Fine Arts Equipment	$ 4,000	$ 3,000
(b) Commercial Equipment	5,000	4,000
(c) Music Equipment	3,000	1,500
(d) Home Economics Equipment	1,500	500
(e) Furniture	4,822	3,400
(f) Bd. Secy.'s Office Equip.	1,000	700
(g) Kindergarten Equipment	800	500
TOTAL	$20,122	$13,600

It is clear from the testimony that the equipment items scheduled for (b) above are routine scheduled replacements for typewriters and other commercial machines. The former are replaced on a four-year rotation. Since this is usual practice and since the alternative is frequent breakdowns and inefficient instruction, the hearing examiner recommends that the full amount of this cut

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be restored. The need for furniture itemized by the documentation of (e) is also established by the testimony. Increased enrollment in recent years has mandated "makeshift" furniture usage – usually in disadvantaged areas of the city. The restoration of the $3,400 in this account will help to supply better desk and chair units for children in six schools and thus equalize the educational opportunity. Therefore, the hearing examiner recommends that the full amount of $3,400 be restored in this sub-account.

The testimony pertinent to purchase of equipment for (a), (c), (d) and (g) above must also be perused with the knowledge that none of the large cuts, totaling $9,000, made by Council in 1969, were restored by the Commissioner in that year to this account. For this reason the hearing examiner believes that a continued severe denial of funds in these areas cannot be justified, and he recommends a restoration of $2,300 for equipment to be used in these sub-accounts with the sums to be apportioned at the discretion of the Board.

There remains the budget for equipment in the office of the Board Secretary. The cut of Council would make it impossible for the Board to buy any of the items listed by the Board as needed and necessary. The hearing examiner recommends restoration of $285 for the purchase of a calculator, adjudged by the Board to be the most necessary of these machines.

Summary:	Reduction by Council	$13,600
	Amount Restored	9,985
	Amount not Restored	3,615

J740b – Repair of Buildings

The Board spent $14,885.72 in 1968-69 for material to be used by its own maintenance crew in building repair. This year a total of $13,800 was budgeted. Council cut $8,000 from this total leaving a net of only $5,800. The hearing examiner believes this to be insufficient for proper maintenance of the many older buildings of this district and recommends restoration of $6,200 to provide an amount similar to the amount budgeted in the year 1969-70.

Summary:	Reduction by Council	$8,000
	Amount Restored	6,200
	Amount not Restored	1,800

J820b – Employee Insurance

The amount of $48,000 in contention for this account in written form was not a source of contention in oral testimony at the hearing on September 18, 1970. To the contrary, the Board agreed with Council that the money was budgeted in error on the mistaken assumption that a health benefits agreement for staff personnel would have to be funded for a full year. It is now ascertained that funding is limited to a six-months' period beginning January 1, 1970. However, the Board testified that some of the district's building insurance

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policies have been cancelled by insurance firms because of a poor risk rating and that the policies written in their stead will result in an increased cost of $30,000. Therefore, the hearing examiner recommends that the original cut of Council, while justified at the time, be limited to the $18,000 difference between the two items detailed, *ante*, because the contingency funding is a necessary one and may not in the opinion of the hearing examiner, be obtained from free appropriation balances or from surplus available in other accounts.

Summary:	Reduction of Council	$48,000
	Amount Restored	30,000
	Amount not Restored	18,000

Other reductions of Council and the recommendations of the hearing examiner pertinent thereto must also be considered in this report although the hearing examiner finds no necessity to detail the reasoning in each of these cases. The problem is one of total revenues necessary to provide a thorough and efficient system of education for children in a changing urban environment. The hearing examiner will, however, make a recommendation for each account.

Acct. No.	Item	Council's Reduction	Amount Restored	Amount Not Restored
	CURRENT EXPENSE (OTHER)			
J130f	Other Exp.-Supt.'s Office	$ 1,000	$ -0-	$ 1,000
J130j	Other Exp.-Bldgs. and Grds.	200	-0-	200
J130m	Other Exp.-Print. and Publ.	1,500	1,500	-0-
J130n	Misc. Exp.-Admin.	1,000	-0-	1,000
J213-2	Sals.-Bedside Tchrs.	4,000	4,000	-0-
J215a	Sals.-Sub. Secy.	2,520	2,520	-0-
J230a	Library Books	1,500	1,500	-0-
J230e	Other Library Exp.	150	150	-0-
J250a	Misc. Supplies-Instr.	2,380	2,380	-0-
J250a-1	Testing Supplies	700	700	-0-
J250c	Misc. Exp.-Instr.	2,000	-0-	2,000
J320a	Attend. Serv. Supplies	200	50	150
J420a	Health Serv. Supplies	500	-0-	500
J520a-1	Transp.-Other Distr.	2,000	2,000	-0-
J620	Contr. Serv.-Plant	600	600	-0-
J640b	Electricity-Plant	1,000	500	500
J650a	Custodial Supplies	2,000	2,000	-0-
J650e	Supplies-Care of Grds.	100	-0-	100
J660c	Other Exp.-Grds.	800	400	400
J660d	Misc. Exp.-Plant Oper.	1,500	1,500	-0-
J710c	Sals.-Repair of Equip.	700	700	-0-

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J740a	Other Exp.-Grounds	1,000	- 0 -	1,000
J810b-1	Bd. Contrib. and Soc. Sec.	4,000	4,000	- 0 -
	Sub-Total Misc. Current Expense	$31,350	$24,500	$ 6,850

CAPITAL OUTLAY

L1200 – Equipment and Furniture

The Board budgeted $46,266.20 for capital outlay for the school year 1969-70, and the cut of $10,000 made by Council was restored in full as the result of a decision of the Commissioner on an appeal brought by the Board. In its 1970-71 budget, the Board reduced the planned expenditures by more than 40% to a total of $26,781.95. Council subsequently cut this sum by $9,100. The hearing examiner has reviewed the specific cuts made by Council and the rationale propounded by the Board and recommends that restoration be made in the following accounts:

L1240c-1 – Fine Arts Equipment

The Board's budget to furnish and equip a new art room needed because of increased enrollment was cut by Council from a total of $4,000 to $1,000. Such a cut would, in the judgment of the hearing examiner, preclude the purchase of any essential equipment necessary for such a specialized facility. He therefore recommends that $1,500 of this cut be restored.

L1240c-8 – Science Equipment

The Board's budget for new science equipment totaled $1,300. The Council cut this amount by $400. It is the considered opinion of the hearing examiner that the Board's original budget figure was modest and reasonable and that any reduction from it must be regarded as a deprivation that would be inconsistent with the need to provide thorough and efficient instruction in science. He therefore recommends that the $400 be restored.

L1240c-9 – Furniture

Funds totaling $4,000 were designated by the Board for the purchase of needed classroom furniture, worktables and cabinets. Much of this proposed expenditure was allocated to schools in disadvantaged areas. The hearing examiner recommends that the full reduction of $2,800 made by Council be restored.

Summary: Capital Outlay

Reduction by Council	$9,100
Amount Restored	4,700
Amount not Restored	4,400

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In summation, the hearing examiner finds that the amounts proposed by the Board in the following accounts are necessary in whole, or in part, for the operation of a thorough and efficient school system in Passaic. He recommends restoration of part or all of Council's reductions, as shown in the following table:

CURRENT EXPENSE			
Account No.	**Council's Reduction**	**Amount Restored**	**Amount Not Restored**
J110 & J130d	$ 2,500	$ 2,500	$ -0-
J213-1-s	10,000	10,000	-0-
J220	10,000	10,000	-0-
J240	23,800	23,800	-0-
J720	68,650	60,650	8,000
J730	13,600	9,985	3,615
J740b	8,000	6,200	1,800
J820b	48,000	30,000	18,000
Misc.	31,350	24,500	6,850
SUB-TOTAL CURRENT EXPENSE	$215,900	$177,635	$38,265
CAPITAL OUTLAY			
L1200	$ 9,100	$ 4,700	$ 4,400
TOTAL	$225,000	$182,335	$42,665

The Commissioner has reviewed the findings of the hearing examiner reported, *supra*, and has carefully considered the recommendations made on these findings. In concurring therein, the Commissioner finds and determines that amounts of $177,635 for current expenses and $4,700 for capital outlay for a total of $182,335 must be added to the amounts previously certified by the Mayor and Council to be raised for expenses of the Passaic School District in order to provide sufficient funds to maintain a thorough and efficient school system. He therefore directs the Council of the City of Passaic to add to the previous certification of $5,968,803.60 for the current expenses of said school district the sum of $177,635 so that the total amount of the local tax levy for current expenses shall be $6,146,438.60. He further directs that the Council add to the previous certification of $14,395.50 for capital outlay the sum of $4,700 so that the total amount of the local tax levy for capital outlay shall be $19,095.50.

COMMISSIONER OF EDUCATION

November 16, 1970

Pending before Superior Court, Appellate Division.

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In the Matter of the Tenure Hearing of Mary Worrell, School District of the Township of Lumberton, Burlington County.

COMMISSIONER OF EDUCATION

Decision

For the Complainant Board of Education, Richard Dill, Esq.

For the Respondent, Henry Bender, Esq.

Charges of corporal punishment, assault and spilling the contents of pupils' desks on the floor were certified to the Commissioner of Education against Mary Worrell, a teacher with 32 years' service, who has been employed for 17 years by the Board of Education of the Township of Lumberton. The complainant Board of Education certified that the charges would be sufficient if true in fact to warrant dismissal or reduction in salary.

A hearing on the charges was conducted in the Burlington County Office Building on August 3, September 15 and 16, 1970, and in the Burlington County Vocational High School on August 12, 1970, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

The Superintendent of Schools prepared eight separate statements which were signed by eight different students and their parents which were the basis for charges of 17 counts of corporal punishment against respondent. In addition there were four charges of assault, six charges of spilling the contents of pupils' desks on the floor, and one unspecified charge. The students named therein, and several of their parents, testified to corroborate the written charges.

CHARGE NO. 1

This charge alleges that respondent teacher inflicted corporal punishment on "RF". "RF" testified that respondent teacher struck him on the head with a coffee cup, which was inside a paper bag, while he sat at his desk after lunch. He testified that he and several other boys were in the classroom during the lunch recess and that they should not have been there. The boys said they were noisy, and "RF" averred that respondent first hit "KF" and told him to "shut up." "RF" averred further that after "KF" was hit, he, "RF", was then struck with the coffee cup, and he cried.

Respondent denies striking either boy but says that she told the boys to be quiet. She avers that she used the coffee cup as a gavel to tap the back of "RF's" chair and get the attention of the boys in the room.

The hearing examiner cannot accept respondent's testimony as complete;

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moreover, he is compelled to believe "RF's" moving testimony that he was struck on the head and that he cried. The hearing examiner concludes, therefore, on the weight of the credible evidence educed from the testimony that this charge has been sufficiently corroborated and is true.

CHARGES NO. 2, NO. 5, NO. 9, NO. 14, NO. 21

Each of these charges of corporal punishment alleges that respondent teacher used a ruler on many separate occasions to strike the knuckles of the individual students therein named. Five students testified that the teacher went to their desks to strike their knuckles, and some testified that there were instances when students had to go to the teacher's desk to be struck with the ruler.

Respondent teacher does not deny any of these separate charges, but maintains that she did not strike the students hard enough to hurt them. Respondent avers that none of the students cried after being hit and that her only reason for striking their knuckles was to discipline them for dropping their rulers on the floor excessively. Respondent avers further that much of this ruler dropping was done to tease her.

It was clearly shown by the testimony of the students and by respondent's own admission of the fact that a ruler was used often to strike the knuckles of pupils as a means of discipline for their infractions of the teacher's rules. Counsel for respondent demanded that the students demonstrate how they were struck by the ruler, to show the degree of force used by the teacher when striking them. These demonstrations failed to impress the hearing examiner as inconsequential. To the contrary, he concludes that the striking was a deliberate and preconceived course of action clearly performed to punish and serve warning to others of what they might expect if found guilty of the same rule infractions.

The charges, *supra*, are amply supported by the testimony and evidence. The hearing examiner determines, therefore, that they are true.

CHARGES NO. 3, NO. 13, NO. 18, NO. 20

The charges listed above allege that respondent teacher assaulted the students named therein by throwing pens, pencils, rulers, dowels, erasers, teaspoons, pen holders, and paper punches in their vicinity, while they were in the classroom. One student testified that she was struck by a wooden dowel.

Respondent admits "tossing" pieces of the spongy part of the chalkboard eraser but denies throwing a whole eraser with its plastic back attached as charged. Respondent also admits throwing pencils, a plastic teaspoon and a ruler but denies throwing any of the other items listed in the charges. Respondent avers that she never hit anyone with any of the objects thrown and that they were only "tossed" in the vicinity of some of the students to get their attention while she was instructing the class.

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The hearing examiner finds that respondent teacher threw many objects about the room as she admits. The testimony of "JK" (Charge No. 20) that she was struck on the arm by a dowel was clear and convincing. It is determined, therefore, that "JK" was in fact struck by the wooden dowel thrown by respondent teacher.

CHARGES NO. 4, NO. 8, NO. 12, NO. 16, NO. 19, NO. 24

These charges allege that respondent teacher upset the desk of each of the individual pupils named therein, and "spilled the contents of the desk on the floor." The testimony revealed that on some occasions other students were asked to help clean out those desks of students who were untidy, and some students averred that the teacher would on some occasions dump their desks without looking inside to see whether or not they were neat.

Respondent does not deny that she emptied the contents of untidy desks, nor does she deny having other students help her to do this occasionally, but she denies dumping the contents of the desks on the floor. Respondent demonstrated her method of emptying a desk by tilting it and sliding the books onto a chair. One fell to the floor.

The hearing examiner determines, therefore, by the weight of repetitive testimony and respondent's demonstration, that respondent teacher emptied the contents of students' desks as she admits, and that some of the contents therein fell on the floor. The weight of the credible evidence does not allow a finding that respondent dumped desks without her prior determination that the desks were untidy.

CHARGES NO. 6, NO. 15, NO. 22, NO. 26, NO. 27

These charges of corporal punishment allege that the respondent teacher pulled the hair of the students therein named on several occasions. Charges No. 26 and No. 27 represent a single charge and allege that the teacher pulled "JY's" hair and rubbed his face on the desk. One student testified that he was pulled out of line by his hair and that his hair was pulled on other occasions while he sat at his desk. Another student said that respondent pulled him by his hair from the classroom to the nurse's office, where he was being directed by the teacher for going to the lavatory too often. A third student named in the charges averred that his hair was pulled several times to direct his attention to the lesson in progress.

Respondent denies pulling the hair of any student but admits touching their hair. She contends that she has placed one hand on students' heads and one on their shoulders, to turn inattentive students around and face them in the proper direction. Respondent denies further that she rubbed "JY's" face in the desk, but says she directed "JY" to place his head on his folded arms during a rest period. When he did not comply, respondent avers that she placed his head on his folded arms.

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The testimony of the students was clear, convincing and repetitive without being contradictory. The hearing examiner determines, therefore, that the charges listed, *supra*, are true on the weight of the believable testimony educed at the hearing.

CHARGES NO. 7, NO. 25, NO. 28

Respondent is charged with inflicting corporal punishment on her pupils by kicking them either on the shin, ankle or leg. Charge No. 7 alleges that "JM" was kicked on the shins on "four or more occasions." "JM" testified that the charge is true. Charge No. 25 alleges that "KF" was kicked on the leg, and Charge No. 28 alleges that "JY" was kicked on the ankle.

Respondent denies kicking any of her students, but recalls making contact with her foot or leg and the children's. She explains as follows: (TR. 494, 495)

"A. I had a habit of holding a textbook in my hand to demonstrate, or to explain further any directions in their textbook, and oft' times I would go to the board to illustrate on the board, to impress upon their minds, and sometimes I would take a step backward, in going to the board, and 'J' was a child who kept his foot in the aisle.

"Q. 'JY?'

"A. 'JY,' and 'KF,' also, and 'JM' and I would tell them, repeatedly, to keep their feet under the desk, and as it was a hazard, a safety hazard, and these boys repeatedly would put their feet in the aisle, and as I was stepping backwards, I have stumbled over these three boy's feet, repeatedly.

"Q. As you were stepping backwards, you said?

"A. Yes; going toward the board, or stepping backwards, or walking with a book in my hand, and talking, and explaining what was on the board.

"Q. And you say that these three boys kept their feet out in the aisle, repeatedly, what do you mean by repeatedly?

"A. Oh, it is recalled to my mind that I could have spoken to *either or all of these boys at least six times each day.*" (Emphasis supplied.)

The hearing examiner determines that the weight of credible testimony leads to the conclusion that the students were kicked by the respondent as charged. Her own testimony, *supra*, acknowledges many instances of "stumbling" over the feet of her pupils, and she admits that she had full knowledge that the boys continually placed their feet in the aisle. While *N.J.S.A.* 18A:6-1 authorizes the use of force in four specific circumstances, there is no provision for the use of any force to cause compliance with an order. The

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hearing examiner is not convinced that such stumbling as described, *supra*, was accidental, but rather had the effect of applying force, even if minimal, to cause the pupils to take their feet out of the aisle.

CHARGE NO. 10

"JD" charges that respondent teacher denied her permission to go to the school nurse because she had a headache.

Respondent teacher avers that the student was refused permission to go to the school nurse only when the nurse was not in the building. Her testimony indicates, also, that while the nurse may have been present in the building at another time of the day, she was not present at the time the alleged incident occurred.

The hearing examiner finds that there is insufficient evidence to establish the truth of this charge. He therefore recommends that the charge be dismissed.

CHARGES NO. 11, NO. 17, NO. 23

These charges allege that respondent inflicted corporal punishment on the three pupils named therein, by striking them with a yardstick. The students testified that they were struck while in the classroom on separate occasions because they were not paying attention or when they were disorderly. "GC" testified that he was struck on both legs on one occasion, after trying to get away from respondent teacher, and that he cried after being struck.

Respondent teacher denies striking any student with a yardstick despite a demonstration by one of them purporting to show how hard he was struck and where. All of the students involved described in detail the blows they received and on which part of their body they were struck.

On the weight of the believable testimony, the hearing examiner determines that the students named in the charges, *supra*, were struck by a yardstick.

* * * *

The Commissioner has examined the report of the hearing examiner and concurs with his findings, conclusions and recommendations.

With reference to the charges of corporal punishment, the Commissioner finds that respondent teacher inflicted corporal punishment on her students, as set forth in Charges Nos. 1, 2, 5, 6, 7, 9, 11, 14, 15, 17, 21, 22, 23, 25, 26, 27 and 28, as determined by the findings of the hearing examiner.

The Commissioner is constrained to observe that with respect to several of the charges, corporal punishment was apparently administered in an effort to bring about obedience to some directive or order of the teacher. Even though no

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severe physical pain may have resulted from such corporal punishment, the statute, *N.J.S.A.* 18A:6-1, as amended by *Chapter* 182, *Laws* of 1964, clearly does not authorize the use of force to bring about obedience to a teacher's orders.

Corporal punishment of students has been prohibited in New Jersey public schools by statute since 1867. *N.J.S.A.* 18A:6-1 provides in part as follows:

> "No person employed or engaged in a school or educational institution, whether public or private, shall inflict or cause to be inflicted corporal punishment upon a pupil attending such school or institution***."

With allegations of corporal punishment, the Commissioner has alway been mindful that the testimony of children must be examined with great care. The Commissioner said *In the Matter of the Tenure Hearing of David Fulcomer*, 1962 *S.L.D.* 160, remanded State Board of Education 1963 *S.L.D.* 251, decided by the Commissioner 1964 *S.L.D.* 142, affirmed State Board of Education 1966 *S.L.D.* 225, reversed and remanded 93 *N.J. Super.* 404 (*App. Div.* 1967), decided by the Commissioner 1967 *S.L.D.* 215:

> " ' *** It is the opinion of the Commissioner that testimony of children, especially of those ten years of age, against a teacher, whose duty it is to discipline them, must be examined with extreme care. It is dangerous to use such testimony against a teacher; it is likewise dangerous not to use it. The necessities of the situation sometimes make it necessary to use the testimony of school children. If such testimony were not admissible, the children would be at a teacher's mercy because there is no way to prove certain charges except by the testimony of children.' *Palmer v. Board of Education of Audubon*, 1939-49 *S.L.D.* 183, 188.*** "

The charges of assault (No. 3, No. 13, No. 18, No. 20) are not in the purview of the Commissioner's powers to make a finding of guilt or innocence; however, the Commissioner cannot condone the actions of throwing objects around a classroom as admitted by respondent teacher. The Commissioner wrote in *Palmer*, *supra*, that: (at page 187)

> "Educators stress the fact that the concomitants of learning are important as well as the learning itself. A pupil not only learns subject-matter, but he learns to like or dislike it. He forms attitudes. His emotional life is affected. Regardless of how efficient a teacher is in teaching subject-matter and skills, she is not justified in doing so at the cost of unnecessary emotional upsets. Good mental hygiene is important in child growth and promotes intellectual achievement.
>
> "A good teacher can exercise better control and show better results in the pupils' acquisition of subject-matter than can the teacher who resorts to ridicule and sarcasm. Lack of respect for the personality of the child produces inefficiency."

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Respondent's own admission of tossing items in the classroom is antithetical to all tenets of what good teaching should be and is setting an example for young children that should not be learned in a public school.

Respondent's action in emptying the contents of the students' desks likewise cannot be viewed as a positive approach to the teaching of good housekeeping, but rather a negative approach which has the effect of creating negative attitudes in children about their teacher and their school. This resultant attitude of the children is manifested in their charges against respondent teacher which stemmed from their conference with the Superintendent.

In the instant matter, respondent has clearly demonstrated a pattern of conduct that created an atmosphere of apprehension, if not fear, in her classroom. *In the Matter of the Tenure Hearing of Thomas Appleby,* decided by the Commissioner of Education November 25, 1969, the Commissioner said:

> "*** While the Commissioner understands the exasperations and frustrations that often accompany the teacher's functions, he cannot condone resort to force and fear as appropriate procedures in dealing with pupils, even those whose recalcitrance appears to be open defiance. The Commissioner finds in the century-old statute prohibiting corporal punishment (*N.J.S.A.* 18A:6-1) an underlying philosophy that an individual has a right not only to freedom from bodily harm but also freedom from offensive bodily touching even though there be no actual physical harm. *In the Matter of the Tenure Hearing of Frederick L. Ostergren,* 1966 *S.L.D.* 185, 186***."

and:

> " '*** that such a philosophy with its prohibition of the use of corporal punishment or physical enforcement does not leave a teacher helpless to control his pupils. Competent teachers never find it necessary to resort to physical force or violence to maintain discipline or compel obedience. If all other means fail there is always a resort to removal from the classroom or school through suspension or expulsion. The Commissioner cannot find any justification for, nor can he condone the use of physical force by a teacher to maintain discipline or to punish infractions.***' "

and also:

> "Thus, when teachers resort 'to unnecessary and inappropriate physical contact with those in their charge (they) must expect to face dismissal or other severe penalty. *In the Matter of the Tenure Hearing of Frederick L. Ostergren, supra.*' "

The Commissioner is constrained to consider respondent's advanced years in making his decision. Although the Commissioner determines that respondent inflicted corporal punishment on her pupils as described, *supra*, and further

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determines that her actions cannot be supported in Charges 3, 4, 8, 12, 13, 16, 18, 19, 20, 24, he concludes, after careful study of this matter that summary dismissal of respondent would be too harsh a penalty to be imposed.

The mental anguish respondent has undergone over the possible loss of livelihood, the damage sustained of her professional reputation and the possible deleterious effect dismissal could have on her pension rights, are all significant aspects of the appropriate penalty for her error.

The Commissioner orders therefore that:

1. Mary Worrell be reinstated as a teacher in the school district of the Township of Lumberton as of December 1, 1970.
2. Her teaching assignment be made by the Lumberton Board of Education within the scope of her State certification.
3. Her salary be reduced by the loss of all of the compensation that she would have earned since June 30, 1970, and that she be reduced to her proper step on the State Minimum guide (*cf. N.J.S.A.* 18A:29-7) for a teacher with her training and experience beginning December 1, 1970.

   This reduction of her salary for the school year 1970-71 is the maximum additional penalty that the Commissioner deems warranted under all the circumstances of this case.

COMMISSIONER OF EDUCATION

November 16, 1970

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Special Education Parents Club of Vineland,

Petitioner,

v.

Board of Education of the City of Vineland, Cumberland County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Schlesinger, Manuel & Schlosser, (Jan M. Schlesinger, Esq., of Counsel)

For the Respondent, Frank J. Testa, Esq.

Petitioner is a parents club which has brought this action on behalf of its members who claim that the special educational classes of respondent's schools do not meet the spirit or letter of the rules and regulations for special education classes promulgated by the New Jersey State Department of Education. Petitioner's prayer is that the Commissioner require such compliance. Respondent denies the allegations and avers that it is providing a program sufficient to meet the needs of its students who are in need of special help.

Testimony and documentary evidence were presented at a hearing conducted at the City Hall, Bridgeton, on September 28, 1970, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

This petition of appeal was received at the State Department of Education on June 23, 1969. On or about August 27, 1969, a conference was held in Vineland with interested persons attending, and it was hoped that an amicable settlement of the issues in dispute could be achieved. Proceedings were meanwhile held in abeyance. On March 13, 1970, the petition was reactivated, and respondent was requested to file an answer to the original petition. This answer was filed on May 13, 1970. A request by the hearing examiner for an up-dating of the petition at that time was not complied with in writing, but amendments to it were made in oral form and incorporated into the report of the conference of counsel held on July 30, 1970.

The issues in this matter have been reduced to one primary issue since the petition was originally served. As a result, the original allegations of textbook inadequacy and discriminatory treatment with reference to provision of programs of physical education, art and music instruction need no detailed analysis in this report. Some mention of progress in these regards is necessary, however, if the present status is to be viewed in proper perspective.

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The one primary allegation remaining poses the issue. Petitioners maintain that children enrolled in special education classes are segregated from children in attendance in so-called regular classes by virtue of the fact that they ride to school on separate busses, attend classes in buildings devoted to special education alone, and eat in cafeterias with separate isolated groups. A secondary allegation is that the buildings used and the auxiliary facilities incorporated within them are inferior to those provided for other students.

Respondent acknowledges that the majority of the children in special education programs attend classes located in buildings separate from those housing regular classes, and that the students are segregated by necessity in the busses that transport them and in the cafeteria in which they eat. Respondent maintains that a severe housing problem militates against a different structuring of classes at this time, and that special class students bear no burdens in this regard that are not borne by many of the students in regular classes. It states that thirteen classes are housed in out-of-school facilities. Three of them are for special education. It further avers that the problems alleged to exist with regard to transportation and cafeteria usage develop from logistical necessity, and that they are in part occasioned by the very same limitations imposed by lack of sufficient classroom space referred to, *ante*.

Testimony at the hearing of September 28, 1970, was limited to three witnesses, with two appearing on behalf of petitioner. The Superintendent of Schools was the sole witness for respondent.

Witnesses for petitioner opined that some improvements had been made in recent years in respondent's program for children in special education, but reiterated the request embodied in the pleadings for an integration of the classes with those of regular students. These witnesses also averred that some children speaking foreign language were classified incorrectly as special class children. There was no expert testimony to this effect offered by petitioner.

The Superintendent of Schools detailed the improvements in the special education program during the period subsequent to January 1969 as follows:

1. Classes have been increased in number from 18 to 23, housing 319 students.
2. The budgeted expenditures for these children have risen by 120% for supplies, texts and libraries. The dollar expenditure has increased from $5,000 in these categories to $12,000.
3. This expenditure to purchase the above-mentioned items for 3% of the school population represents 7.4% of the total expenditures for the district as a whole.
4. Programs of vocal music, art and physical education have been instituted in the same scheduling rotation applicable to classes in all schools of the district.
5. Tentative plans have been developed to transfer three classes to a

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new elementary school scheduled to open in September 1971.

6. During all of this time respondent has employed a psychological services team. All children in the special education program are examined every three years as required by the rules of the State Board of Education.

The Superintendent also testified that he, too, believed that special education classes should be integrated in more than the present 10% of the building assignments, and that he hoped to be able to recommend such additional integration if circumstances prove it to be feasible in the future.

* * * *

The Commissioner has carefully reviewed the report of the hearing examiner. He notes the agreement of petitioner and the Superintendent representing the Board, with regard to the desirability of a more complete integration of special classes with regular classes in the attendance districting of the schools. He notes, too, the general agreement that improvements in curriculum and in the equipment and supply allotments for the special education classes in Vineland have been made in recent months. This consensus, together with the tentative plan to redistrict some areas in 1971, leads him to conclude that respondent Board is moving through the channels of decision open to it to provide more effective education for children in special education classes in the district.

The Commissioner holds that the principal goal in this matter is a reasonable plan achieving the greatest dispersal of special education classes consistent with sound educational values and procedures. In the progress toward this goal there are numerous factors to be conscientiously weighed by school authorities. Included in these factors are those involving safety, age level grouping, convenience, time and economy. In addition, logistical problems involving the transportation of children in the special education program must be incorporated as part of the thinking of school authorities pertinent to special class placement since these children come from all areas of the large city and arrive and depart from school on a schedule different from that of children in regular classes.

It seems apparent that in the instant situation the greatest obstacle to further progress toward the goal is an inadequate number of classrooms. However, respondent has already moved to alleviate the stresses and strictures caused by this classroom shortage, and its new building program should provide some measure of relief. Having already concluded that petitioner has moved in the past to improve the education of children in special classes, the Commissioner holds that this planning for the future is consistent with the goal outlined, *ante,* and further evidence that respondent is moving to improve the educational opportunity for all children in its school system including those on whose behalf this petition was brought. Therefore, the Commissioner will not

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substitute his discretion as to a proper course of action in this matter for that of respondent.

Accordingly, the petition is dismissed.

COMMISSIONER OF EDUCATION

November 20, 1970

Beatrice M. Jenkins, Individually, and as Parent and Natural Guardian of Brenda Marie Jenkins and Bruce Rodney Jenkins, infants; Clifford G. Burton; Charles C. Jamison, Jr., Individually, and as Parent and Natural Guardian of Charles C. Jamison, III and Alexander B. Jamison; Theodore B. King, Individually, and as Parent and Natural Guardian of Anthony Crocker King, infants; Valerie M. Kowalski, Individually, and as Parent and Natural Guardian of Steven A. Kowalski and Leland A. Kowalski, infants; S. Lloyd Newberry, Individually, and as Parent and Natural Guardian of Robert W. Newberry and Lynne V. Newberry, infants; Inge Nierenberg, Individually, and as Parent and Natural Guardian of Mark D. Nierenberg, an infant; and Ernestine Ritchie, Individually, and as Parent and Natural Guardian of Wanda C. Ritchie, an infant,

Petitioners,

v.

The Township of Morris School District and Board of Education, the Town of Morristown School District and Board of Education, and the Borough of Morris Plains Board of Education,

Respondents.

COMMISSIONER OF EDUCATION

Decision

For the Petitioners, MacKenzie and Harding (Frank F. Harding, Esq., of Counsel)

For the Respondent Morris Plains, Bangiola & Van Houten (Paul Bangiola, Esq., of Counsel)

For the Respondent Morristown, Meyner and Wiley (Stephen B. Wiley, Esq., of Counsel)

For the Respondent Morris Township, Victor H. Miles, Esq.

Petitioners are three residents of the Town of Morristown and five residents of the Township of Morris, seven of whom have children attending the

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public elementary schools in either Morristown or Morris Township. They name as respondents the Boards of Education of Morristown, hereinafter "Town", Morris Township, hereinafter "Township", and Morris Plains. (Harding Township was originally named as a respondent but was subsequently dropped as a party to these proceedings.)

Petitioners ask the Commissioner of Education to prevent the withdrawal of Morris Township high school pupils from Morristown High School upon the expiration, in 1974, of the present sending-receiving contract entered into between the Boards of Education of the two municipalities in 1962. They allege that, should the Township Board of Education be permitted to pursue its plans to erect its own high school facilities for its own students, the result would ultimately be the fostering of two separate high school districts with vastly different racial compositions and vastly different capacities to provide quality educational programs. They contend that without the Township's high school students, the Town would inevitably be unable to provide its students (and those of Harding Township and Morris Plains, which districts are presently sending their high school students to Morristown High School) with anything comparable to the educational opportunities that could be provided by the continued joining, in some form, of the high school populations. The act of separation would, in their view, deprive the Town students of an equal educational opportunity and, therefore, would be in violation of the *United States* and *New Jersey Constitutions.*

Accordingly, the petitioners ask the Commissioner to prevent the withdrawal of the Township's high school students by ordering that appropriate steps be taken to effect a merger of the districts on a grade 9 through grade 12 basis. At the very least, they ask the Commissioner to prevent a termination of the present sending-receiving relationship.

In addition, petitioners focus on the entire school system of the two municipalities and call upon the Commissioner to investigate and report on racial and educational aspects of a merged district as opposed to two separate districts. They assert that constitutional and educational principles require the Commissioner to take steps to effect the merger of these two districts on a K through 12 basis. In the alternative, petitioners ask that racial balance across district lines be achieved by busing.

Respondent Town Board of Education agrees with petitioners and seeks similar relief by way of cross-petition. The Town asks the Commissioner to determine that merger is in the best interests of the students and residents of the Town and the Township, to find that failure to merge would be a violation of constitutional principles and to direct that a merger plan be submitted. The Town also calls upon the Commissioner to determine that municipal boundary lines be disregarded toward the end that racial balance be effected throughout the overall community consisting of the Town and the Township. Their cross-petition also asks that a non-binding referendum conducted in 1968 by respondent Township Board of Education seeking to obtain public reaction to

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alternatives of a K through 12 merger or an independent high school be declared void.

Respondent Morris Plains Board of Education admits all of the essential allegations of petitioners and also joins in the relief sought by them, except that it limits its demands to regionalization of grades 9-12.

Respondent Township Board of Education denies that their proposed course of action would result in a violation of the constitutional rights of any student. The Township Board insists that it has the right and duty to provide educational facilities for its own students and asserts that the building of its own high school is required by the pressing need to provide facilities. It argues as well that the provision of such facilities would not prevent consideration of the possibility of merger at some future point.

Prior to the start of hearings in this matter cross-motions for relief were filed by the Boards of Education of the Town and the Township. On March 21, 1969, the latter's motion for judgment on the pleadings was denied by the Commissioner. The Township was restrained from holding any referendum seeking authorization for capital expenditures for purposes of the erection of a new high school, and it was likewise restrained from proceeding with any plans to withdraw its students from Morristown High School or to establish its own high school pending a full hearing of the matter and a final determination by the Commissioner. The Commissioner directed that the Morris County Superintendent of Schools make himself available to conduct a study, with representatives of the Town and Township school districts (and with such assistance as he may request from the State Department of Education), of the advisability of merging the two districts.

Hearings were conducted in this matter on October 6, October 7 (tour of the schools in the Town and the Township), October 14, 15, 16, 27, 29, November 5, 10, 11, 14, 17, 21 and December 18 and 19, 1969. The parties were given an opportunity to file post-hearing briefs, answering briefs and reply briefs. Final papers were received on June 17, 1970. After full consideration of the witnesses' testimony, of the many exhibits accepted into evidence and of the several briefs, the hearing officer finds the facts to be as follows:

FACTUAL FINDINGS

A. The School Systems and the Sending-Receiving Relationships

The Town is a K through 12 school district that serves as a receiving district for the 9-12 pupils from Harding Township and Morris Plains and for the 10-12 pupils of Morris Township. The Township educates its own children from K through 9.

A sending-receiving relationship has been in effect, at least so far as the Town and Township are concerned, for the past 100 years with a brief, but not total, interruption for the 1958-59 school year during which several of the Township grades were sent to Madison High School. At present, there is a

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10-year sending-receiving contract between the Town and the Township which was entered into in 1962 pursuant to *R.S.* 18:14-7.3 (now *N.J.S.A.* 18A:38-20). The contract is due to expire in such a way that starting in 1972, tenth grade students will no longer be required to be sent to the Town. The eleventh and twelfth grade students already in the High School, however, will continue to attend and graduate so that some Township students will be sent to the Morristown High School until the end of the 1973-74 school year.

Grades 9-12 students from Harding and from Morris Plains attend Morristown High School by virtue of a designation without a contract as such.

The Township Board of Education, as noted, intends to withdraw its students from the Town in accordance with the expiration date of the contract and thenceforward to educate them itself by providing its own high school facilities.

Morristown High School has a reputation for being a fine educational institution. It compares favorably with other school districts in the State with respect to the various criteria generally employed.

The Township acknowledges the excellence of Morristown High School but points out that its desire to provide its own facilities stems from the necessity of providing for the housing and education of its ever-expanding resident-student population. It has a total public school student population as of September 30, 1969, of 4,172, and there is every reasonable expectation that the number will rapidly expand along with the growth of the Township itself.

Geographically, Morristown consists of 2.9 square miles and is completely surrounded by Morris Township which consists of 16 square miles. The relationship of the two municipalities resembles, albeit imperfectly, the shape of a doughnut, with the Township as the doughnut and the Town as the hole within the doughnut.

The Town elementary schools are located in close proximity to the border line between itself and the Township. They consist of three K-6 schools and one junior high school. (This arrangement is part of the result of a plan adopted in 1962 by the Morristown Board of Education to achieve a racial balance among the schools; the predominantly black Lafayette School was made the Town-wide junior school housing all seventh and eighth grades.)

The Township has five K-6 schools all of which lie close to the Town line and form, together, a circle around the Town. The Frelinghuysen School is in the northwest section of the Township, is somewhat removed from the Town and serves as a 7-9 junior high school for the entire Township.

Morristown High School is presently accommodating 1,950 students. It operates with an eight-period day and staggers arrival and departure times of students. By using a nine-period day, the school can accommodate 2,450

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students. The high school population is not expected to reach this figure until 1974.

The Township estimates that its student population will grow from its present 4,172 to between 6,906 and 11,291 by 1976. The Town, on the other hand, expects a leveling-off of its total student population. There is an admittedly pressing need for more high school facilities by the end of the contract period as a result of the expected growth of the Township school population.

Various means of meeting this need were testified to at the hearings. The Township wants to meet the need on its own by the construction of a high school. Town witnesses discussed the possible, though difficult, expansion of the present high school site at Early Street as a home for a merged high school. No real thought went into the possible accommodation of the Township's proposed high school to a merged district; testimony revealed only that its basic design is intended to provide a comprehensive high school.

It is not necessary for present purposes to specifically detail the various proposals and costs. One item, however, can be noted: The Town Board of Education is on record as desiring a regionalization with the Township even though the need for added facilities will come from the Township. This would mean that, given the present relationship of real property valuations between the Town and Township, the Town would bear about 40% of the cost of providing facilities for the Township students. (This is one item that did not seem to have been made clear to the Township residents prior to the non-binding referendum of January 11, 1968.)

B. Racial Composition of Morristown and Morris Township Schools

The percentage of black pupil enrollment in these schools as of May 1969 is as follows:

Morristown	
Morristown High School	14%
Lafayette Junior High School	42%
Alexander Hamilton School	35%
Thomas Jefferson School	48%
George Washington School	45%
Morris Township	
Frelinghuysen Junior High School	6%
Sussex Avenue School	5%
Hillcrest School	less than 1%
Woodland School	0%
Normandy Park School	9%
Alfred Vail School	10%

The disparity in the racial composition of the two school systems is

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emphasized by a comparison of the schools that are located near each other. The Town's Thomas Jefferson School, with its 48% black enrollment is very close to the Township's Woodland School with zero percent black enrollment. Geographic proximity also invites attention to George Washington School (Town, 45%) and Normandy Park School (Township, 9%) and to Lafayette Junior High School (Town, 42%) and Alfred Vail School (Township, 10%). Alexander Hamilton School (Town, 35%) is equidistant between Sussex Avenue School (Township, 5%) and Hillcrest School (Township, less than 1%).

There were a number of projections of ratios of black to white student populations presented at the hearings. The Town experts project that the elementary school percentage will go from its present 43% black to 55% in 1974 and 70% by 1980. The High School is presently 14% black. The Town maintained that if the Township were to withdraw its grades 10-12 students at the end of the contract period, the percentage of blacks in the High School would immediately be double its present figure, even if Harding and Morris Plains continue to send its students to the High School. By 1980, on the same basis, the black percentage would likely reach 35%. If Harding and Morris Plains were to withdraw, the Town's experts predict a 56% black enrollment at the High School by 1980. The Township, on the other hand, cannot be expected to increase its black population significantly because there is no real room for expansion of the one black area in the Township (the "Collinsville" area) and because the prices of homes in the rest of the Township are by and large economically prohibitive to potential black buyers. The percentage of black residents, they represent, will in fact decrease as the white population and housing expand.

Since no real projections in contradiction to those presented by the Town have been presented and since those offered by the Town seem essentially reasonable, they will be accepted for purposes of this hearing.

C. Socio-Economic Make-up: Morristown and Morris Township

The Township consists of approximately 18,000 residents and can be characterized as primarily residential. According to the testimony of real estate experts there is an abundance of room for development of homes in the Township, and the prices of new homes is and will be at least $40,000 and up. The reasonable projections made were that the area would continue to attract middle to upper-middle class white families. There are presently three apartment complexes in the Township which are relatively expensive. There is little likelihood that there will be any more apartment house development within the Township.

The Town, on the other hand, with its roughly 23,000 inhabitants, is the urban center with less room for single family developments. Homes are presently available from $17,000 to about $35,000. There are a number of apartment developments and low-cost housing developments. There was testimony to the effect that most black families coming into the Morristown general area are

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restricted by economic factors to locating in the Town. There are, however, large numbers of high-cost apartments available in the Town, and they are occupied by higher-income white families with few or no children. Because of the expected continued occupancy of these high-cost apartments by predominantly white people, it is unlikely that the overall population of the Town will grow to be more than 50% black. The school population, however, can be expected to become increasingly black.

There was sharp contrast in testimony between the Town's and the Township's real estate experts with regard to estimating the size of the negative reaction to Morristown by potential white buyers. The Town's expert maintained that 80% of potential white buyers reject the Town as a place of residence upon their learning of the substantial percentage of blacks in the Morristown school system. He testified that this trend has significantly increased over the past five years. The Township's expert, on the other hand, testified that any school-connected, race-based rejection is insignificant, affecting perhaps some 3% of potential white buyers. While there is no reason to arrive at any finding with respect to exact percentages in this highly conjectural area, it should be recognized that such a rejection factor does come into play and does result in some areas of the Town becoming increasingly black as has been testified to by several witnesses. Unfortunately, there is every reason to expect this reaction to continue, and the hearing officer concludes that it comes into play much more frequently than the Township's witness estimated. The testimony of the Town's witness that a decision in this case that the Township may withdraw its students will serve to exacerbate the trend must also to some extent be acknowledged.

The difference in socio-economic make-up of the two municipalities can be expected to result in differences in the performance and motivation of the students of each. Studies such as the United States Office of Education Survey, "Equality of Educational Opportunity," and the 1967 report of the United States Commission on Civil Rights, "Racial Isolation in the Public Schools," in evidence as R-58 Town, indicate a strong correlation between socio-economic background and student performance. Evidence was presented that shows a difference between the Town's and Township's student population in terms of academic performance, advancement to college, and even intelligence quotient as measured - perhaps unfairly because of their orientation - by standardized tests. The Town students, coming from a lower socio-economic level than the Township students, as a whole are admittedly behind the Township students in these areas.

Two implications flow from these facts: (1) that a rather sweeping re-orientation of Morristown High School's program will have to be made should withdrawal occur; and (2) that some weight should be given to the indications in the Civil Rights Commission report that students from low socio-economic backgrounds tend to perform better if educated along with students of higher socio-economic backgrounds.

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D. Interrelatedness of the Two Communities

Despite the socio-economic differences, petitioners and the Town Board of Education argue that the Morristown-Morris Township area is really "one community." Their city planning expert described this concept and concluded that by all of the generally-used criteria, the two municipalities, in sociological terms, are "one community." The hearing officer finds that the expert's testimony that the Morristown-Morris Township area is "one community" is essentially so.

Indeed, the Town and Township were once one entity. In 1865 the entity was divided. No obvious formula for the separation line presents itself, and none was revealed at the hearing. The boundary line does not adhere to natural or expected physical separation but instead cuts across streets and terrain in a seemingly arbitrary way. Morristown is the commercial center for the entire Town - Township area and beyond. It is the focal point for retail sales and for many area activities. The road system and resultant traffic patterns underscore the interrelatedness of the two municipalities: All main arteries radiate out from and feed into the center square of Morristown. As a practical matter one cannot conveniently get from one side of the Township to the other without going through the Town.

The Township does not dispute the interrelatedness between itself and the Town, but argues that statutorily the two are nevertheless entirely separate entities for school purposes.

E. Impact of Proposed Withdrawal

If the Township were permitted to build its own high school and to withdraw its students from Morristown High School upon the expiration of the present sending-receiving contract, the Town would be left with between 1,300 and 1,500 students (as of 1974) assuming Harding and Morris Plains continue to send their students. Should these districts be permitted to change their designation of receiving high schools or, more likely, join in some other regional system, the Town would have only 800 to 900 students in its High School. To be left with only Harding and Morris Plains - and especially to be left alone - would impose the following disadvantages:

1. By dint of reduced size alone Morristown High School could not continue to provide the same scope and variety of courses.
2. Withdrawal of Township students would mean withdrawal of a significant number of educationally highly-motivated, capable students, and this is likely to have an adverse effect upon the performance and motivation of the remaining Town students.
3. The remaining students would be, as a group, from lower socio-economic backgrounds and be less oriented toward academic achievement, with the result that the program structure will have to be drastically re-oriented.

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4. The percentage of black students in the High School will be approximately as stated above: with Harding and Morris Plains, 27% in 1974 and 35% in 1980; without Harding and Morris Plains, 44% in 1974 and 56% in 1980.
5. Morristown High School will not be able to maintain its place in the scale of excellence in terms of breadth and quality of program.
6. It is probable that, as a consequence, it will have more difficulty in keeping and attracting the same high quality faculty.
7. With the change in program and reputation and the loss in tuition revenue, it is possible that the Town will not be as able or as willing to support financially its school system as it currently is.
8. The Township students will be denied the privilege of an integrated education.
9. The sudden alteration in the racial composition of the High School might aggravate the tendency of potential white buyers to avoid purchasing houses in Morristown.

However, even accepting petitioners' enrollment projections, no conclusive testimony was introduced to establish that, as a result of the withdrawal of the Township students, the remaining black Morristown High School students would necessarily experience a sense of stigma or be subject to a stamp of inferiority.

F. Impact of Failure to Merge K-12

The above factual conclusions deal with the impact on the High School and high school students. They do not speak to the impact of a failure to merge the school systems of the two municipalities on a K-12 basis.

The Town's K-12 black enrollment as of May 1969 was 39%; projections indicate a 66% black enrollment by 1980. These figures are in sharp contrast to the Township's white enrollment of 95%, and the close proximity of the Town and Township elementary schools makes the disparity easily visible to, and easily felt by, the students of the two districts.

Convincing evidence was adduced at the hearing that the community with which Morristown residents, including students, identify extends beyond the bounds of the Town and encompasses the Township.

Although the ultimate impact of failure to merge on a K-12 basis is for the Commissioner to decide, it seems to the hearing officer that, because of the particular circumstances of this case, should the districts fail to merge, the black student population of Morristown – particularly at the elementary school level – will suffer the same harmful effects that the Commissioner of Education has worked so hard to eliminate within single school districts throughout the State.

G. The Non-binding Referendum

Petitioners and the Town Board of Education contended that the

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Township Board did not give adequate consideration to the question of merger, and that the Board abdicated its responsibility by allowing the results of a non-binding referendum to dictate their actions. The hearing officer makes the following findings with respect to these contentions:

1. On January 11, 1968, the Board of Education of Morris Township submitted to the voters of the Township a non-binding referendum in which it asked the Township voters to vote for one of the following two alternatives:

   "1) I favor a separate school district for Morris Township including grades Kindergarten through 12.

   2) I favor merger of the complete school district of Morris Township together with the Morristown school district."

2. Just prior to the submission of this referendum, six out of the then eight members of the Board of Education of the Township were on record as favoring some sort of merger.

3. The Board members agreed beforehand to be bound by the results of the non-binding referendum and communicated this pledge to the voters in a bulletin made available to the voters prior to the referendum (see R-14 Town).

4. The results of the referendum were as follows: 2,164 voted in favor of the first alternative, for a separate high school; 1,899 voted for a merged system.

5. Ever since the referendum the Township Board of Education has conducted itself as if the decision were irrevocably made to have a separate school district and has attempted to take the necessary steps to bring that about. The only exception was then Board member Michael Barry who voiced his opposition to this line of action, and continued to follow his own conviction that a combined district of some sort was best for both municipalities.

6. The Township Board did not participate in a study of regionalization with the other school districts upon the invitation of the County Superintendent of Schools in accordance with the Commissioner's urgent recommendation contained in his decision in this matter on March 21, 1969.

7. It appears from the testimony of the President of the Morristown Board of Education and from a member of the Morristown Board that, since the referendum, no serious consideration has been given to the question of regionalization. At the hearing, however, the President of the Morris Township Board could articulate no disadvantages to a merger on the high school level.

LEGAL ARGUMENTS OF THE PARTIES

Petitioners and cross-petitioners make the following legal arguments:

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1. Withdrawal of Township students from Morristown High School would result ultimately in a racial imbalance between Town and Township high schools and in the deprivation of equal educational opportunities in violation of the *Federal* and *New Jersey Constitutions.* The Commissioner should, therefore, take steps now to prevent the withdrawal by ordering a continuation of the sending-receiving relationship or the initiation in some form of a merger between the two districts on the high school level.
2. The Commissioner can and should look to the racial composition of the Town and Township and determine that there is, or soon will be, an unconstitutional racial imbalance that the Commissioner must correct by appropriate orders concerning merger of the two districts on a K through 12 basis, or, at least, provide for some remedial action such as cross-busing.
3. The Commissioner, in his duty to achieve racial balance and to provide for the educational welfare of all students in the Town and Township, must and should look to the overall "community" and determine the "community" in this case to encompass both the Town and Township. The Commissioner cannot permit school district boundary lines to interfere with the accomplishment of racial balance throughout the overall "community."
4. The Township Board of Education is required by statute to apply to the Commissioner for approval for the withdrawal of its pupils from Morristown High School, and upon that application the Township must show good and sufficient reason for the withdrawal, and the Commissioner must make equitable determinations with regard thereto. Although previous decisions of the Commissioner seem to be in conflict with this position, they are distinguishable from the present situation because here the new facilities have not yet been provided for. The 1968 revision of the education laws changes the criteria language of earlier statutes and demonstrates the applicability of the withdrawal statute.
5. Applying the appropriate criteria under the withdrawal statutes, the Commissioner must deny permission for the withdrawal of the Township students from Morristown High School.
6. The Commissioner should declare the Township's referendum of January 11, 1968, unlawful and determine that the Township's pledged and steadfast adherence to the results of that referendum amount to an improper abdication of the Township's responsibilities as a board of education under State law.

The Morris Township Board of Education argues:

1. The Township has the right and the duty to provide educational facilities for its pupils.
2. No unconstitutional racial imbalance now exists or will result from the

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withdrawal of Township students for purposes of attending Township high schools.

3. No authority exists for the Commissioner to attempt to achieve racial balance across school district lines.

4. There is no statutory requirement for the Township Board of Education to seek the approval of the Commissioner of Education except for obtaining perfunctoral and ministerial acts of approval regarding school size, adequacy of physical facilities, etc., and the Commissioner, therefore, has no authority to prevent the Township Board of Education from erecting its own high school facilities for the education of its own pupils.

5. The Township Board's resort to referendum in order to learn the wishes of the Township with respect to the important question of merger v. a separate K to 12 school district for the Township was entirely proper, and the Board itself has adequately studied and presented to the residents of the Township all sides of these questions and has fulfilled its statutory responsibilities.

The Commissioner has fully considered the findings of fact and arguments of counsel contained in the hearing officer's report and makes the following determinations:

A. Sending-Receiving Statutes

Since there is no need to reach constitutional issues if a matter can be resolved on other grounds, it seems appropriate to focus first on the statutory requirement regarding withdrawal of students from a sending-receiving relationship and to determine the Commissioner's role with respect thereto. Title 18A of the New Jersey Statutes provides as follows:

N.J.S.A. 18A:38-11:

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

(*N.J.S.A.* 18A:38-12 merely deals with allocation and apportionment of pupils among two or more high schools.)

N.J.S.A. 18A:38-13:

"No such designation of a high school or high schools and no such allocation or apportionment of pupils thereto, heretofore or hereafter made pursuant to law shall be changed or withdrawn, nor shall a district having such a designated high school refuse to continue to receive high

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> school pupils from such sending district except for good and sufficient reason upon application made to and approved by the commissioner, who shall make equitable determinations upon any such applications."

N.J.S.A. 18A:38-13 in its present form seems to say that application to and approval by the Commissioner, upon a showing of good and sufficient reason, is required equally for (a) change of designation, (b) withdrawal of designation and (c) refusal to continue to receive. Respondent Town Board argues that this language, which was the result of a 1968 amendment, requires the Township to apply to the Commissioner of Education for approval for withdrawal of its students from Morristown High School, and that the Township Board must show good and sufficient reason for the withdrawal, and that the Commissioner must make equitable determinations with respect thereto. The Town points to the difference between this statute and the earlier version to demonstrate that approval must be forthcoming from the Commissioner before withdrawal would be allowed. A provision in the predecessor statute read as follows:

> "*** No such designation of a high school or schools heretofore or hereafter made by any district either under this section or under any prior law shall be changed unless good and sufficient reason exists for such change and unless an application therefor is made to and approved by the commissioner. ***" *R.S.* 18:14-7

This was amended in 1944 to take care of the problem of allocation and apportionment of pupils among two or more high schools. In 1956 the withdrawal language was added and the statute read as follows:

> "*** No designation of a high school or schools heretofore or hereafter made by any district either under this section or under any prior law shall be changed or withdrawn, nor shall a district having such a designated high school refuse to continue to receive high school pupils from such sending district unless good and sufficient reason exists for such change and unless an application therefor is made to and approved by the commissioner. ***" *R.S.* 18:14-7

This language was capable of the interpretation that, although withdrawal and refusal were mentioned, only "such change" of designation required the Commissioner's approval upon a showing of good cause. Respondent Town, therefore, seeks to establish a legislative intention in 1968 to correct the 1956 version and to make withdrawal, as well as "such change," subject to the Commissioner's approval upon good and sufficient reason, and seeks at the same time to discount cases decided under the pre-1968 statute which indicated that the Commissioner's approval is not required for having the students of a former sending district withdrawn for purposes of attending its own district's facilities.

But this is not the crucial language so far as the Commissioner has been consistently concerned. The Commissioner has looked to the beginning

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paragraph of the older *R.S.* 18:14-7, which speaks in terms of *a district which lacks its own facilities.* This language was not substantially changed by the 1968 amendment. Absent some specific and unequivocal language effecting a change of meaning, the Legislature will not be deemed to have altered the administrative interpretation that the Commissioner has consistently given to the statute prior to the 1968 amendment.

The view of the Commissioner of Education with respect to the law before the revision was quite clear. He believed and has ruled that once a school district provides its own high school facilities, *R.S.* 18:14-7 is no longer applicable to it and that there is, therefore, no requirement of submission to him of the question of withdrawal of students from the receiving district. This interpretation of the law was expressed most directly in his 1962 opinion, *In the Matter of the Termination or Modification of the Sending-Receiving Relationship between the Board of Education of Chatham Township and Chatham Borough*, 1961-62 *S.L.D.* 144, a case that bears close resemblance to the instant matter in its sending-receiving fact pattern. The two boards of education there had entered into an agreement pursuant to *R.S.* 18:14-7.3. The Board of Education of the Township of Chatham petitioned the Commissioner for a termination or modification. By the expiration of the agreed upon ten-year period, the Township expected to have its own high school facilities available.

After determining that he had power only to terminate and not to modify, the Commissioner turned his attention to the argument of petitioner that prior to the ten-year agreement, a sending-receiving relationship had existed under the terms and conditions of *R.S.* 18:14-7, which the agreement reinforced but could not change. Petitioners' point was that, despite the agreement and despite the lack of power of the Commissioner under *R.S.* 18:14-7.4 to modify its terms, the Commissioner, nevertheless, had power to approve withdrawal of pupils under the terms of *R.S.* 18:14-7.

The Commissioner's direct response was that *R.S.* 18:14-7 was *inapplicable:* once a sending district, absent an agreement to the contrary, provided its own high school facilities, application to and approval of the Commissioner for the withdrawal of pupils from the former receiving school was not necessary. The Commissioner said:

> "*** The provisions of *R.S.* 18:14-7, as specifically stated in its first sentence, apply only to a district 'which lacks or shall lack high school facilities ***.' *Once a district provides its own high school facilities, the statute cited [R.S. 18:14-7] is inapplicable as to it.* Under the statute, the Commissioner may consider a request by a sending district for a 'change' of high school designation or by a receiving district that the pupils it is required to receive be 'withdrawn.' But this has no application to the instant case where, after the expiration of the agreement, petitioner will have in operation its own high school facilities. It was for this exact purpose that *R.S.* 18:14-7.3 was enacted, permitting boards of education to fix a sending-receiving relationship for up to ten years in order to

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safeguard the receiving district from loss of tuition revenue should the sending district decide to provide its own high school facilities either by itself or by joining in a regional high school district. *Absent such an agreement, the sending district could withdraw once its facilities are ready, without any necessity for an application and approval by the Commissioner.* Since *R.S.* 18:14-7 does not control the instant case, the decisions of the Commissioner in respect to this statute, as cited by petitioner, do not apply.***" (Emphasis added.)

The Commissioner's position on this matter dates back at least to 1933, when a letter of the then Commissioner was cited in an opinion, *In the Matter of Withdrawal of Students of the Borough of Hawthorne from Central High, Paterson, New Jersey.* In the face of *P.L.* 1929, *c.* 281, *p.* 664, which contained change-of-designation language parallel to that of *R.S.* 18:14-7, *supra*, he wrote to the Board of Education of the then-receiving Paterson High School:

"The Borough of Hawthorne contemplates the erection of a high school. *Although the question of the withdrawal of the pupils of a district which provides its own high school facilities from schools in which the children of that district are enrolled does not require the approval of the Commissioner,* I am nevertheless writing you in regard to the probable development of this high school because when such a high school is opened, the Hawthorne pupils will be withdrawn from your school system.

"Hawthorne has a sufficient number of pupils and contemplates organizing a school which will meet the requirements of the Department for approval." (Emphasis added.)

This position was reaffirmed as recently as July 28, 1966. *Board of Education of the Town of Newton, Sussex County v. Boards of Education of the Highpoint Regional High School District, et al.*, 1966 *S.L.D.* 144 The boards of educations of several sending districts had joined in the formation of a regional high school district and expected to educate their students in the soon-to-be ready regional facilities. The receiving school, in anticipation of withdrawal of its tuition pupils, petitioned the Commissioner, pursuant to *R.S.* 18:14-7, *supra*, to prevent their precipitous departure. The Commissioner decided that he had, in effect, already given his approval to withdraw when he approved the formation of the regional district. He went further at p. 146:

"*** However, even if it be argued that petitioner had no opportunity to be heard in such a determination, the fact remains that a valid sending-receiving relationship can exist only where a district lacks or shall 'lack high school facilities within the district for the children thereof to attend.' "

The Commissioner then cited and quoted the *Chatham* case, *supra*, and concluded, in effect, that once a school district provided its own facilities, either by itself or by joining in a regional high school district, the statute no longer applied, and no approval needed to be sought or given for withdrawal of its

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students from the receiving school.

Respondent Town Board of Education urges that the *Chatham* and *Newton* cases are distinguishable in that they did not deal with the preliminary question of whether or not a school district can be permitted to get to the point of having its own facilities ready or nearly ready. Respondent Town concedes that, once facilities are indeed available in a sending district, it does not need to seek the Commissioner's approval at that point to withdraw. While it is not so that facilities were ready in *Chatham* (as they were determined essentially to be in *Newton*) when the Commissioner decided that his approval need not be sought ("petitioner *will have* in operation its own high school facilities"), it may be true that the preliminary authorizations to construct the sending districts' own facilities had already been provided for.

The Commissioner concludes that the stage of objecting to the failure to apply to the Commissioner is not crucial. That conclusion is arrived at for the following reasons:

1. The Commissioner has consistently and *in unqualified terms* held and expressed his view of the inapplicability of *R.S.* 18:14-7 in the event a sending district should elect to provide its own facilities. He did not make the proferred distinction in *Chatham* or *Newton*, nor in the above-quoted letter in the *Hawthorne* case, where the existence of such a distinction would have been crucial. In the very matter here under consideration both the Commissioner of Education and an Assistant Commissioner of Education have, in response to inquiries by the Township Board of Education, expressed again the interpretation that a sending district is free to pursue its own plans to provide its own facilities without the need of the Commissioner's approval or an application to the Commissioner.

2. The history of the sending-receiving statutes seems to reveal the total vulnerability of a receiving district upon the decision of a sending district to erect its own facilities and educate its pupils itself. As the Commissioner noted in the *Chatham* case, it was precisely because of this vulnerability that the Legislature enacted *R.S.* 18:14-7.3, which provided some measure of protection to the receiving district by way of a ten-year contractual arrangement, where the receiving district had to go to some expense in order to provide the facilities needed for the accommodation of the sending district. The fair implication is that, absent such an agreement, the receiving district is subject to the loss without recourse of students from a sending district that determines at any point to provide its own educational facilities.

3. The Legislature, in its revision of all of Title 18 in 1968 did not specifically alter these consistent interpretations of the Commissioner regarding sending-receiving relationships. The Legislature must be deemed to have been aware of the administrative interpretations placed on these statutes over the years, and it cannot be assumed that the Legislature meant to change or modify such interpretations absent clear and unequivocal language to that effect.

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B. The Statutes and Merger

The Commissioner having no area of authority under sending-receiving statutes to prevent withdrawal of the Township's students, the question arises as to whether he has any other statutory authority to order a continuation of the sending-receiving relationship or to order the forms of merger sought by petitioners and cross-petitioners.

The Commissioner has broad areas of authority and responsibility under the statutes. He is the chief executive and administrative officer of the Department of Education, having general charge and supervision of the work of the Department, and he is the official agent of the State Board of Education for all purposes. *N.J.S.A.* 18A:4-22 In addition, he is charged with the supervision of all elementary and secondary schools in the State which receive State assistance. *N.J.S.A.* 18A:4-23 He must enforce all State Board rules. *N.J.S.A.* 18A:4-23 He is empowered to oversee courses of study conducted by public schools and to prescribe minimum courses of study. *N.J.S.A.* 18A:4-25 The Commissioner is given jurisdiction, under *N.J.S.A.* 18A:6-9, to hear and determine all controversies and disputes arising under the school laws and State Board rules.

The breadth of the Commissioner's powers and responsibilities has been acknowledged by the courts; in fact, in some instances the courts have construed his powers to be broader than he himself had interpreted them to be. See *Board of Education of East Brunswick v. Township Council of East Brunswick*, 48 *N.J.* 94 (1966) (budget appeals); *Booker v. Board of Education*, 45 *N.J.* 161 (1965) (intra-district racial imbalance); *In re Masiello*, 25 *N.J.* 590 (1958) (review of sub-agency rules).

But there is also a broad area of authority given by the Legislature to local boards of education. Local boards are empowered, consistent with State Board rules, to make, amend and repeal rules for its own government and the transaction of its business and for the government and management of the public schools of the district. *N.J.S.A.* 18A:11-1 Local boards are also empowered to perform all acts and do all things, again consistent with State Board rules, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district. *N.J.S.A.* 18A:11-1 Local boards of education also have a good deal of prerogative in the area of regionalization as will be noted below.

The question then is, do the Commissioner's broad statutory powers enable him on his own to effect a non-consensual merger of some sort? The avenue toward merger is specifically spelled out in *N.J.S.A.* 18A:13-34, which reads in part as follows:

> "If the boards of education of two or more local districts *** and the commissioner or his representative, after consultation, study and investigation, shall determine, that it is advisable for such districts to join

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and create ***

(a) an all purpose regional school district *** or
(b) a limited purpose regional school district ***

said board or boards shall by resolution frame and adopt a proposal to that effect stating also the manner in which the amounts to be raised for annual or special appropriations for such proposed regional school district *** shall be apportioned *** and each such board shall call for, and conduct, upon the same day, a special school election in each municipality in its district and shall submit thereat the question whether or not said proposal shall be approved ***."

Regionalization will be realized only in the event that a majority of the votes cast in each district favor the proposal. *N.J.S.A.* 18A:13-35

Upon an evaluation of the statutes involved it is the determination of the Commissioner that the statutes themselves do not provide the power to the Commissioner to effect on his own a merger of the school systems at any level. The Commissioner derives his powers from the Legislature. The Legislature has seen fit to give him broad powers; but, at the same time, the Legislature has provided *the way* that districts can merge. The way is rather painstaking and elaborate. It involves mutual determinations by local boards to study the question and a concurrence in the study and in its result by the Commissioner. It involves a submission of the issue to the voters of each district and makes approval by all districts a prerequisite to merger.

The Legislature provides no alternative method for the formation of a merged district and takes cognizance of the rights of the people within the affected districts to have their say in how their money will be spent and how their children will be educated. It cannot be concluded that the Legislature intended, by providing the Commissioner with broad supervisory powers, to grant indirectly to him the authority to supersede all of these specific requirements and precautions. The statutes themselves, therefore, do not provide authority for the Commissioner to effect merger without reference to the regionalization sections' requirements.

C. Constitutional Perspective

But is there some constitutional imperative that supersedes the authority of the Legislature and would enable the Commissioner to take the steps demanded by the petitions to him? Petitioners urge that there is.

1. The United States Constitution.

The *United States Constitution's Fourteenth Amendment* provides that United States citizens are to receive equal protection of the laws. The United States Supreme Court in *Brown v. Board of Education*, 374 *U.S.* 483 (1954) has declared that segregated education imposed by government action deprives black children of the equal educational opportunities required by the Fourteenth

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Amendment. Cases decided since then have established that any form of state action deliberately designed to effect a substantial separation of black and white students likewise violates the Federal Constitution. See *Alexander v. Board of Education*, 396 *U.S.* 19 (1969); *Green v. County School Board of Kent County*, 391 *U.S.* 430 (1968).

There has been no authoritative judicial pronouncement to date, however, that makes it equally clear that racial imbalances that are the result purely of residential patterns is equally a violation of the *Federal Constitution.* In one of the earliest cases to deal squarely with the question, *Bell v. School, City of Gary, Indiana*, 213 *F. Supp.* 819 (*N.D. Ind.* (1963)), a Federal Court declared that there was no constitutional imperative to eliminate *de facto* segregation even within a school district. The United States Supreme Court refused to review this decision. 377 *U.S.* 924 (1964) Since *Bell* a number of other courts have reached the same conclusion. See *Offermann v. Nitkowski*, 378 *F. 2d.* 22 (*2d. Cir.* 1967); *Deal v. Cincinnati Board of Education*, 369 *F. 2d.* 55 (*6th Cir.* 1966), *cert. den.* 389 *U.S.* 847 (1967). Contrary indications may be found, however, in other Federal and state decisions. See *Barksdale v. Springfield School Committee*, 237 *F. Supp.* 543 (*D. Mass.* 1965); *Blocker v. Board of Education*, 226 *F. Supp.* 208 (*E.D.N.Y.* 1964); *Branch v. Board of Education*, 204 *F. Supp.* 150 (*E.D.N.Y.* 1962); *Jackson v. Pasadena City School District*, 59 *Cal. 2d.* 876, 382 *P. 2d.* 878 (1963).

The fact that there has yet been no decisive determination that the *United States Constitution* requires elimination of *de facto* school segregation, however, does not mean that the Federal Constitution *forbids* efforts to eliminate such segregation. A small number of states have taken the initiative and have acted to eliminate *de facto* segregation without reference to a compulsion from the *Federal Constitution.* New Jersey, through the decisions of the Commissioner of Education, was in the forefront in taking affirmative steps to eradicate the problems created by *de facto* racial segregation.

The first authoritative statement of State policy came in 1963 when the Commissioner decided the case of *Fisher v. Board of Education of the City of Orange*, 1963 *S.L.D.* 123. In that decision the Commissioner cited the *New Jersey Constitution, Article* 1, *section* 5, which states:

> "No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin."

and *R.S.* 18:11-1, which provides in relevant part:

> "Each school district shall provide suitable school facilities and accommodations for all children who reside in the district and desire to attend the public schools therein. Such facilities and accommodations shall include proper school buildings, together with furniture and equipment, convenience of access thereto, and courses of study suited to the ages and

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attainments of all pupils between the ages of five and twenty years.***"

The Commissioner concluded that school districts have an affirmative obligation to reduce or eliminate *de facto* segregation and stated his policy in the following language:

> "*** It is clear that the ultimate solution lies in the free choice of residence and the elimination of segregated housing which lie beyond the control of the board of education or the Commissioner. Nevertheless, the Commissioner is of the opinion that in the minds of Negro pupils and parents a stigma is attached to attending a school whose enrollment is completely or almost exclusively Negro, and that this sense of stigma and resulting feeling of inferiority have an undesirable effect upon attitudes related to successful learning. Reasoning from this premise and recognizing the right of every child to equal educational opportunity, the Commissioner is convinced that *** in planning for new school buildings, a board of education must take into account the continued existence or potential creation of a school populated entirely, or nearly so, by Negro pupils. ***" *Fisher v. Orange, supra,* (at p. 127)

In the *Fisher* opinion the Commissioner was dealing with the employment of the traditional neighborhood-school concept and had this to say about it (at p. 127):

> "***The practice of assigning pupils to schools near their homes, particularly with regard to children of elementary school age, is well established and is attended by educational values that are widely accepted, not only by educators, but by the public generally. Consideration of such factors as distance to be traveled, safety, economy of time, establishment of rapport between school and home, and knowledge by the school staff of the child's environment have operated to establish convenience of access as the controlling criterion of pupil assignment, and the importance of these values cannot be denied. It is the Commissioner's conviction, nonetheless, that one or more solutions to the present problem can be developed which will mitigate the existing undesirable concentration of Negro enrollment in the Oakwood School and which can at the same time preserve and protect in great part the values of the time-tested pattern of pupil assignment.***"

The State Board of Education has fully supported the Commissioner's position on the duty to eliminate intra-district racial imbalance. *Alston v. Board of Education of the Township of Union,* decided July 28, 1964; *Booker v. Board of Education of the City of Plainfield,* decided February 5, 1964; *Volpe v. Board of Education of the City of Englewood,* decided September 25, 1963.

Both the Commissioner and the State Board of Education have been fortified in their positions by the New Jersey courts. In *Morean v. Board of Education of Montclair,* 42 *N.J.* 237, 242-243 (1964), the State Supreme Court said as follows:

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"*** The Montclair Board's obligation was to maintain a sound educational system by the furnishment of suitable school facilities and equal educational opportunities. It could not, consistently with either sound legal principles or with sound educational practices, maintain an official policy of segregation with its inherent inequalities of educational opportunities and its withholding of the democratic and educational advantages of heterogeneous student populations *** nor need it close its eyes to racial imbalance in its schools which, though fortuitous in origin, presents much the same disadvantages as are presented by segregated schools.***"

The most recent and the most complete judicial statement on the matter of *de facto* segregation in New Jersey is found in the New Jersey Supreme Court decision in *Booker v. Board of Education of the City of Plainfield*, 45 *N.J.* 161 (1965). There the Court stated that New Jersey's policy against racial discrimination and segregation in the public schools has been long-standing and vigorous, and that the Commissioner has been vested with broad power to deal with the subject. The Court concluded that the Commissioner had had a greater scope in his functions in reviewing and supervising local actions than the Commissioner, in fact, had to that date taken upon himself. It had been the Commissioner's and State Board's view that, when reviewing actions of local boards, it was their function simply to determine whether their actions were "arbitrary or capricious or whether it was the result of bias or prejudice." The Court determined that the Commissioner unduly confined himself in the *Booker* decision to the corrections of racial imbalances that resulted in schools within a system that were "all or nearly all Negro":

"*** Before us, the petitioners have not advanced any fixed percentage but have presented the thought that, at some ascertainable point, the Negro population of a school becomes so excessively high, in contrast to the percentage of Negroes in the schools of the same level in the community, that it becomes known as a Negro school with the attendant 'sense of stigma and resulting feeling of inferiority' referred to in *Fisher v. Board of Education of the City of Orange* *** That point generally may well be above fifty percent but well below the Commissioner's and State Board's one hundred percent or nearly one hundred percent.***" *Booker, supra,* (at pp. 179-180)

The obligation to take affirmative steps to eliminate racial imbalance, regardless of its causes, is clearly a strong State policy and requirement in New Jersey even though it might not be directly dictated as yet, by the *Federal Constitution.* The Commissioner and the State Board of Education have taken the initiative to see that all districts within the State reduce or eliminate racial imbalance within their districts.

All of the above cases and actions have, however, been directed to the mitigation of racial imbalances *within school districts.* And all of the articulations of New Jersey's policy against racial imbalance have been in terms of, and decided in context of, achieving a racial balance within a given school

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district. There has been no administrative or judicial determination in the State of New Jersey that declares the existence of an affirmative obligation to reduce or eliminate racial imbalances that may exist between or among the various independent school districts. The Commissioner is aware of no court determination anywhere in the country indicating such an affirmative duty. The question of whether or not the Commissioner of Education of the State of New Jersey has the duty or even the power to order a merger of school districts for the purpose of achieving a racial balance in the absence of any specific legislative authority to do so must be viewed in this perspective.

If the Commissioner were to determine that the United States Constitution *requires* him to disregard the requirements of the New Jersey statutes and order, on his own, the traversing of school district lines, he would be making new and far-reaching constitutional law and not merely applying established constitutional principles. To make new constitutional law is a function of the courts and not of the Commissioner of Education. As stated above, the position of Commissioner is a creation of the Legislature and the individual holding that position derives his authority from the Legislature. For him to determine that the legislative scheme is unconstitutional as applied to the Morristown-Morris Township situation, and attempt himself to effect a correction, he would have to rise above the source of his power. On the contrary, he is required to act on the assumption that State statutes are constitutional unless otherwise indicated by the courts. The Commissioner, therefore, cannot, as a legislatively created administrative official, rule that there exists a Federal constitutional imperative that would enable him to disregard the legislative scheme and to issue orders in contravention thereof.

That the *Federal Constitution* does not *forbid* state action to eliminate racial imbalance does not empower the Commissioner to act here – What is required is an affirmative direction from the *Federal Constitution* that would *compel* the Commissioner to override the New Jersey Legislature. At present, no such affirmative direction exists.

2. The New Jersey Constitution

The *New Jersey Constitution* provides in pertinent part as follows:

Article 1, *Paragraph* 5:

"No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin."

and

Article VIII, *Section* IV, *Paragraph* 1:

"The Legislature shall provide for the maintenance and support of a

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thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years."

The discrimination section in the *New Jersey Constitution* speaks in terms of discrimination on the basis of race, creed or national origin. It does not speak in terms of segregation resulting strictly from housing patterns and neighborhood school concepts. Although the courts may do so ultimately, the Commissioner is not in position to conclude that the sort of racial imbalance we are dealing with here is race-based in the sense meant by this constitutional language.

The section of the *New Jersey Constitution* directing the Legislature to provide a thorough and efficient system of free public education places a heavy burden on the Legislature, and it may well be that, given the racial disparity between the school populations in Morristown and in Morris Township and given the disparity in socio-economic makeup of the two communities and the resultant difference in capacity to provide quality education programs, the Legislature has not fulfilled its constitutional obligation to provide for a thorough and efficient system of public schools. But the constitutional mandate is to the Legislature and not to the Commissioner of Education, himself a product of the Legislature's attempt to carry out its constitutional function. The Commissioner is simply devoid of power to cast aside the work of the Legislature and to legislate in its place. Standing behind the lack of specific power is the doctrine of separation of governmental powers. The question of whether or not the Legislature has satisfactorily carried out its constitutional directive in any given situation is not legitimately for the Commissioner to determine.

When the Supreme Court of New Jersey spoke of a strong State policy regarding the obligation to take actions to eliminate racial imbalance, it did indeed make reference to the *New Jersey Constitution*. However, it by no means made it clear that it relied on the *Constitution* as the bulwark of the proclaimed State policy. The Court looked to a number of State statutes that speak out against discrimination, and it looked to the decisions of the Commissioner of Education. Taking into account *all* of these indications, the Court found a strong State policy to eliminate *de facto* segregation. The problem here is that in order to override the legislative design with regard to procedures to establish a regional school system the imperative would have to come from the *Constitution* itself. The New Jersey Supreme Court has not yet made this determination. While the Commissioner would welcome such a determination by the Court, he must reluctantly acknowledge that he himself, as an administrative officer, is precluded from the manufacture of such a new constitutional dimension.

In sum, absent direction from above, there is nothing that the Commissioner of Education of the State of New Jersey can do as an administrative officer to disregard the explicit directives of the Legislature with regard to the formation of regional school districts and to grant the merger relief sought by petitioners and cross-petitioners herein.

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D. The Non-Binding Referendum

Petitioners and cross-petitioners have questioned the validity of the non-binding referendum conducted in Morris Township in January 1968, claiming that it was illegal and an improper abdication of the Township Board's responsibility to perform its function. The Commissioner agrees on both counts. There is no authority for a school board to present such a question to the electorate in the form of a non-binding referendum. See *Hackensack Board of Education v. Hackensack*, 63 *N.J. Super.* 560 (*App. Div.* 1960); *Botkin v. Westwood*, 52 *N.J. Super.* 416 (*App. Div.* 1968). The only statute of which the Commissioner is aware that permits the conduct of non-binding referenda is *R.S.* 19:37-1:

> "When the governing body of any municipality or of any county desires to ascertain the sentiment of the legal voters of the municipality or county upon any question or policy pertaining to the government or internal affairs thereof, and there is no other statute by which the sentiment can be ascertained by the submission of such question to a vote of the electors in the municipality or county at any election to be held therein, the governing body may adopt at any regular meeting an ordinance or a resolution requesting the clerk of the county to print upon the official ballots to be used at the next ensuing general election a certain proposition to be formulated and expressed in the ordinance or resolution in concise form. Such request shall be filed with the clerk of the county not later than 60 days previous to the election."

The result of such a referendum is not binding on the governing body. *R.S.* 19:37-4

It should be noted that this statute authorizes referenda by "the governing body of any municipality" to ascertain the sentiment of the voters on "any question or policy pertaining to the government or internal affairs thereof." The *Botkin* case, *supra*, took great pains to demonstrate that school districts and municipalities were separate and independent entities in what was then known as a "Chapter 7" school district. In holding that the governing body could not properly intrude into school affairs by conducting a referendum presenting the question of whether or not deconsolidation should be considered, the court stated that "government or internal affairs" did not encompass the particular school question there involved as a legitimate votable concern of the governing body. In passing, the court noted that although it was not called upon to decide the question, it did not appear that a school board could call for such a referendum under *R.S.* 19:37-1.

The *Hackensack* case, *supra*, focused on the statutory words "and there is no other statute by which the sentiment can be ascertained by the submission of such question to a vote of the electors in the municipality *** at any election to be held therein***." It specifically held that, since the Mayor and Council in a "Chapter 6" district could present the question of bonding for expansion to a

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vote after its adoption of an ordinance authorizing bond issuance, there was another statute available, and recourse to *R.S.* 19:37-1 was improper.

The reasoning of both *Botkin* and *Hackensack* applies to Morris Township. The Board of Education could have submitted the regionalization question to a binding vote pursuant to *N.J.S.A.* 18A:13-34. It could likewise have resolved to erect its own high school and submitted the bonding question to binding vote. *N.J.S.A.* 18A:22-41 The point is that *R.S.* 19:37-1 would be unavailable to the Board of Education even if the election statute's language were to be read broadly enough to encompass boards of education. (The referendum, incidentally, was not conducted at a "general election" as *R.S.* 19:37-1 calls for but at a special election.)

It may well be that, in any event, *R.S.* 19:37-1 is not applicable to school boards. The statute speaks in terms of governing body of a municipality, and the Legislature has provided no parallel referendum sections for boards of education. If the Legislature wanted to give them power to conduct non-binding referenda, it could well have stated that intention plainly. The omission appears deliberate, and there are good reasons on the side of denial of the power to school boards. It might, for example, have been the legislative judgment that to permit boards to submit any questions to the voters might lead to hesitancy on the part of boards to take positions on touchy subjects and lead ultimately to a passing off of their fundamental statutory obligations.

The problem in this case is not merely the improper conduct of a non-binding referendum. Rather, it is the established pledge of all but one of the members of the Township Board of Education to abide by the results of the referendum. This pledge was contained very clearly in brochures that were distributed to the electorate prior to the election. Agreeing to be bound by a so-called non-binding referendum is tantamount to making the results binding and improperly delegates the responsibility for ultimate decision.

Ever since the vote favoring by a close margin an independent high school, the Township Board of Education has steadfastly adhered to that course. It has refused to consider any alternative. It is noted that the Township Board of Education did not abide by the urgent request of the Commissioner of Education in this very matter to consider merger alternatives. In so doing, it did not violate an order, but it did further demonstrate that since January 1968, it has failed and refused to consider a plan other than that favored in a non-binding referendum.

The posture taken by the Township Board in conducting a non-binding referendum amounts to a decision not to merge, thereby rendering as pointless any determination by the Commissioner ordering the Board to restudy the matter. The Commissioner cautions boards of education to avoid the use of non-binding referenda as described herein, and notes his strong dismay with the abrogation of responsibility which this practice manifests.

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CONCLUSION

The Commissioner is particularly concerned about two points.

1. The adverse educational impact of the proposed withdrawal of the Morris Township students from Morristown High School, which results from the reduction in the number of students who would be attending the Morristown High School and socio-economic disparities between the student bodies of the two municipalities, and
2. The long-range harmful effects to the two school systems – and particularly to the black students of Morristown – of the maintenance of two separate school systems, K-8 or K-12, in light of the growing racial imbalance between the entire student populations of the Town and the Township.

The Commissioner has carefully sifted through all pertinent statutory and constitutional provisions in search of authority for him, as the administrative officer responsible for education according to the legislative scheme, to effectuate on his own a full measure of correction of both situations. He has considered the arguments of counsel, and he has engaged in independent research.

As much as he desires to act so as to forestall the development of what may be another urban-suburban split between black and white students, he ultimately recognizes that he can operate only within the sphere of his authority under law. The Commissioner, is therefore, reluctantly constrained to conclude that he has no authority to grant the relief sought by petitioners. He has no statutory authority to prevent a withdrawal of the Morris Township students from Morristown High School at the end of the present sending-receiving contract, nor has he any statutory authority to order merger. Further, a careful examination of the *United States* and *New Jersey Constitutions* as they have to date been interpreted by the courts does not disclose any supervening power or responsibility that would enable the Commissioner to override the legislative scheme and order some form of merger on the basis of a higher order of authority.

Ultimate determination of the constitutional issues must be left to the courts. The Commissioner, as he did in the recent case of *Christner, et al. v. Board of Education of the City of Trenton*, decided November 14, 1970, and in order to prevent the very difficulties involved in that case, again urgently invites the careful attention of the New Jersey Legislature to the profound problems posed by the *de facto* separation of races and socio-economic backgrounds in the schools of our State.

In accordance with his determinations, the Commissioner hereby orders and directs:

1. That the restraints heretofore imposed in this matter be and hereby are

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lifted, and

2. That the petition and cross-petition be and hereby are dismissed.

COMMISSIONER OF EDUCATION

November 30, 1970
Pending before Supreme Court.

James Tolliver and Elizabeth Tolliver, Ronald Roman and Joan Roman, Lawrence Moore and Frances Moore, Carl Boeing, Sr., and Thelma Boeing, June Spellman, Doris Warrington, Edward Skwarka and Frances Skwarka, Andrew Yetsko and Norma Yetsko, George Daggett and Marion Daggett, John Herity and Mary Herity, Joseph Yoschak and Bernadine Yoschak, Reis Clark and Sandra Clark, Hugh Sweeney and Elizabeth Sweeney, Thomas Zwayer and Keiko Zwayer, George Mazur and Ann Mazur, Manuel Canton and Paulina Canton, Ernest Arndt and Veronica Arndt, Robert Powers and Margaret Powers, and Robert Velluzzi and Carole Velluzzi, Individually and as Representatives of a class,

Petitioners,

v.

Board of Education of the Borough of Metuchen, Middlesex County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioners, Michael Justin, Esq.

For the Respondent, Apruzzese and McDermott (Richard F. Powell, Jr., Esq., of Counsel)

Petitioners are residents of the Borough of Metuchen, Middlesex County, and are parents of children in grades Kindergarten through Five who, prior to September 9, 1970, had been attending the Edgar School. Petitioners bring this action as individuals and as representatives of a class. They allege that the transfer of their children from Edgar School to Moss School by the Metuchen Board of Education, hereinafter "Board," was enacted in an improper manner, that the transfer was enacted for racial reasons in violation of their privilege of equal protection of the law under the Fourteenth Amendment, and that the Board has failed to provide transportation over a hazardous route to be traveled on foot by the children. Petitioners aver that irreparable damage and injury to their children will result from this transfer. They pray for relief in the form of transportation, reversal of the Board's action and adoption of a substitute plan,

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or remand to the Board for appropriate lawful action. In its answer respondent Board admits that no vote was taken concerning the aforementioned transfer but denies that the transfer was undertaken for racial reasons. The Board also states that with the exception of handicapped children, transportation is not provided for any of the school children within its school district.

Testimony and documentary evidence were presented at a hearing conducted by the Assistant Commissioner of Education in charge of Controversies and Disputes on October 1, 1970, in the East Brunswick Vocational School, East Brunswick.

There was substantial agreement on many of the facts, and additional facts were educed at the hearing. On May 12, 1970, petitioners attended a public meeting of the Board at which time they presented a petition objecting to the transfer of children, enrolled in grades Kindergarten through Five, from the Edgar School to the Moss School. These children reside on East Walnut Street, Charles Street, George Street, Lincoln Avenue, and on the east side of Main between Amboy and East Walnut.

On June 2, 1970, a majority of Board members, the Superintendent and Board Secretary met privately with five of the petitioners and informed them that there would be a transfer from the Edgar School to the Moss School of seventy-eight (78) children, enrolled in grades Kindergarten through Five, residing on the aforementioned streets. Petitioners state that they were informed at this meeting by the Superintendent that this transfer would be for the purpose of balancing class sizes and, secondly, to balance classes racially.

At a public meeting of the Board held June 9, 1970, the petitioners presented to the Board a survey taken by members of their group, which indicated that seventy-three (73) percent of the involved parents would not object to having children in the lower grades attend the Edgar School, and children in the higher grades, either Third, Fourth, and Fifth, or Fourth and Fifth, attend Moss School. The Board decided to defer a final decision on the transfer until the July 14, 1970, meeting in order to study the results of the survey.

At the July 14, 1970, public meeting, the Board issued a statement on the transfer plan. Since this statement has a direct bearing upon several issues in the instant matter, the first page of the statement is included here as follows:

"THE PUBLIC SCHOOLS
METUCHEN, NEW JERSEY

Statement on Redistricting

"At the open meeting last month the Board took under advisement additional information that had been presented by a group of parents living in the Edgar School area and stated that we would announce our final decision regarding the redistribution of pupils between Edgar and

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Moss Schools at this meeting. All of the information that has been presented has been carefully reviewed, surveys have been reconducted, and class sizes have been studied.

"In order to provide a better balance of class size between the two schools, the Board has decided to transfer pupils in all grade levels, including kindergarten, residing on Lincoln, Charles, East Walnut, George, Lawrence, east side of Main between Amboy and East Walnut to the Moss School.

"With reference to the matter of safety, the Board has arranged to meet with the Mayor and Council prior to the opening of school to discuss pupil traffic patterns and safety regulations for the entire district but especially in the area concerned with this transfer. Additional crossing guards will be provided if it is deemed necessary. A special effort will be made to enforce the snow removal ordinance throughout the Borough to ensure safe conduct of pupils during winter months.

"We recognize that a large number of students are staying for lunch at each of our elementary schools and that this is increasing annually. When the all-purpose rooms were built at each of the elementary schools, it was stated that these rooms would be made available during the lunch hour for convenience for those children who live farthest from the schools and children of working parents. It was not the intent then, nor do we foresee at this time the necessity to provide a full-scale lunch program at the elementary school level. Children who live close to school are encouraged to go home for lunch. The administration has the responsibility to make recommendations for changes in our existing lunch program if and when they deem it necessary.

"We appreciate the concern and interest that has been shown and the effort put forth in assisting the Board to make this decision and hope that all citizens will continue to share their opinions with the Board on matters pertaining to the educational system within the Borough."

I.

Petitioners testified at length regarding the hazardous traffic conditions which imperil the safety of their children who are required to walk to the Moss School. Witnesses testified that their concern for the safety of their children, in traversing the route on Main Street to Amboy Avenue and west to Simpson Street, caused them to walk with or drive the children to the point of crossing at Simpson Street where a crossing guard is stationed. This routine, according to the witnesses, caused them severe inconvenience. Additional testimony by petitioners stated that they had purchased their homes in this area primarily due to its proximity to the Edgar School.

Respondent Board produced testimony by the Superintendent of Schools, both orally and by affidavit, to the effect that every reasonable precaution had

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been taken to insure the safety of the children affected by this redistricting plan. Testimony educed indicated that these efforts included conferences with the Mayor, the President of the Borough Council, the Superintendent of the Department of Public Safety and the police official charged with the responsibilities of school crossing guards. The Board further testified that no pupil transportation is provided for the children enrolled in its school district other than for handicapped children. However, testimony from petitioners indicated a substantial lack of confidence that proper safety procedures were being followed, particularly by school crossing guards at Simpson Street.

Previous New Jersey school law decisions have held that local boards of education are not required to provide transportation for children who reside at distances which are not remote from school. In *Schrenk et al. v. Ridgewood Board of Education*, 1960-61 *S.L.D.* 185, 186, the Commissioner stated that:

> "***There have been numerous appeals arising out of the interpretation of remoteness by local boards of education. In a series of decisions extending over a long period of time, a board of education has never been reversed for refusing transportation to an unhandicapped pupil residing within two miles of a school house in the case of elementary pupils and within two and one-half miles where high school pupils are concerned. These distances have become so well established that county superintendents have for many years based their approval of transportation for State aid on these limits. The State Board of Education has adopted these distances as a guide for the approval of State aid for transportation.***"

In *Read et al. v. Roxbury Board of Education*, 1938 *S.L.D.* 763, 765 (1927), the Commissioner held that:

> "***Boards of education are not authorized by law to provide for the safety of children in reaching school. While a board should be concerned as to the safety of children and should report to the State Police or local officers the reckless use of highways, it is not directly responsible for the danger to pedestrians because of automobile traffic any more than it is responsible for sandy or muddy highways. Highways and street dangers demand parental concern and care of children to avoid accidents and also a civic enforcement of traffic laws rather than larger expenditures of public funds to provide transportation.***"

This position has been consistently reaffirmed in numerous decisions. See, for example, *Iden v. Board of Education of West Orange*, 1959-60 *S.L.D.* 96; *Frank v. Board of Education of Englewood Cliffs*, 1963 *S.L.D.* 229; *Livingston v. Bernards Township Board of Education*, 1965 *S.L.D.* 29; *Peters v. Washington Township Board of Education*, 1968 *S.L.D.* 42; *Friedman v. Board of Education of South Orange and Maplewood*, 1968 *S.L.D.* 53, affirmed State Board of Education, February 5, 1969.

While the Commissioner is in sympathy with every parent who is

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concerned for the safety of his child, he cannot hold that a board of education must assume responsibility for the municipal function of providing safe conditions of travel. A board of education is limited to educational functions. As part of the educational program, the board can provide instruction in safety in order to inculcate proper habits and attitudes of safety in the school children. The board can and should call to the attention of the responsible governmental body the traffic hazards and other dangers to which pupils may be exposed. However, it is not within the authority of the board to provide traffic lights, sidewalks, crossing guards, police patrols, overpasses and the like to meet the requirements of safe travel for school children. *Schrenk et al. v. Board of Education of South Orange and Maplewood, supra*

The testimony and evidence offered in this matter disclosed no elements so different from other situations in the State as to make inapplicable previous decisions with regard to remoteness or to warrant any departure from previous determinations in construing "convenience of access." In view of the fact that respondent Board does not provide any transportation for other than handicapped children, and is not required to provide transportation by reason of remoteness, the Commissioner determines that it violated no statute in refusing transportation, and is not compelled to provide transportation for petitioners' children.

II.

The second issue to be considered here is the contention that transfer of petitioners' children from the Edgar School to the Moss School was enacted for racial reasons in violation of their privilege of equal protection of the law under the Fourteenth Amendment.

Testimony educed at the hearing established the fact that the Board has a policy which sets forth the geographical boundaries of the neighborhood elementary school districts. Testimony also established that the Board has no official policy regarding racial balance among the three elementary schools. All pupils within the school district attend a single middle school and a single high school.

Respondent Board testified that the Superintendent of Schools was directed in January 1970, to undertake a study of class size in the elementary schools, and to submit a recommendation to the Board for relieving overcrowded classes and balancing class size. The Board has a policy for maintaining a desirable class size, defined as thirty (30) pupils or less in elementary school classes, and a maximum of twenty-five (25) pupils in kindergarten classes.

Testimony by the Superintendent of Schools established that he had made the study together with the principals of the three elementary schools and other members of his staff over a period of months, and that he had presented his recommendations to the Board at the May meeting. Also, he testified that the

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primary purpose of his recommendations was to reduce class size in the Edgar School. Any resultant change in the racial composition of classes would have been purely ancillary.

Respondent Board offered direct testimony that the primary motivation for changing the district lines of the two neighborhood schools was to achieve a better balance of class size, particularly to reduce class size at the Edgar School, and not to redistribute pupils in order to alter the racial composition of the two elementary schools.

Petitioners testified that they had originally been informed that changing the racial composition of the Moss School was one of the two objectives of the proposed redistricting, the other being the relieving of overcrowded classes at the Edgar School. Also, petitioners presented uncontradicted testimony that a member of the Board visited the black families in the area and urged them to support the Board's plan, since the transfer would be beneficial for the black children who would be moved from the Edgar School to the Moss School. Petitioners point to the fact that the Board's action included all pupils in grades Kindergarten through Five ostensibly not to require children from one family to attend both schools. Petitioners offered evidence that they had surveyed the affected families and had reported to the Board that seventy-three (73) percent of the parents would not object to having children in the lower grades attend the Edgar School, and children in the higher grades, either Third, Fourth and Fifth, or Fourth and Fifth, attend the Moss School.

The Board offered testimony that, if its primary motivation were to enact a plan to change the racial composition of the three elementary schools, such a plan would require inclusion of the Campbell School, which has the largest percentage of black pupils of the three elementary schools. The Board also testified that its decision to transfer pupils in grades Kindergarten through Five, was the best possible solution it could find considering all the components of the problem of balancing class size.

The following enrollment statistics were offered to indicate the grade and class size prior to and following the implementation of the redistricting plan:

EDGAR SCHOOL

Grade	June 19, 1970 No. of Pupils	Class Sizes	September 30, 1970 No. of Pupils	Class Sizes
K	84	21, 21, 21, 21	85	22, 22, 21, 20
1	92	23, 23, 23, 23	87	12, 24, 25, 26
2	99	33, 33, 33	85	28, 28, 29
3	82	27, 27, 28	69	23, 24, 22
4	99	33, 33, 33	84	28, 28, 28
5	92	31, 31, 30	76	25, 26, 25
			6	
	548		492	

Median Class Size 30.5 (1-5) | Median Class Size 25.5 (1-5)

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MOSS SCHOOL

Grade	June 19, 1970 No. of Pupils	Class Sizes	September 30, 1970 No. of Pupils	Class Sizes
K	54	13, 13, 14, 14	78	19, 20, 19, 20
1	63	21, 21, 21	79	27, 26, 26
2	73	24, 24, 25	91	30, 31, 30
3	88	22, 22, 22, 22	99	24, 25, 25, 25
4	75	25, 25, 25	92	31, 31, 30
5	88	22, 22, 22, 22	109	27, 27, 28, 27
	441		548	

Median Class Size 22 (1-5) Median Class Size 27 (1-5)

The evidence before the Commissioner indicates that, prior to the altering of the district boundaries, enrollment of black pupils in the Moss School and the Edgar School was approximately two (2) and forty-nine (49) respectively. Petitioners testified that twenty-one (21) black pupils were involved in the transfer. In the Commissioner's judgment, the weight of the evidence indicates that the Board's dominant purpose for altering the district lines of the elementary schools was to balance the sizes of elementary school classes.

It is well established that boards of education may exercise their discretion in the conduct and management of the public schools:

> "***The School Law vests the management of the public schools in each district in the local boards of education, and unless they violate the law, or act in bad faith, the exercise of their discretion in the performance of the duties imposed upon them is not subject to interference or reversal.***" *Kenney v. Board of Education of Montclair*, 1938 *S.L.D.* 647, affirmed State Board of Education, 649, 653

and further:

> "***it is not a proper exercise of a judicial function for the Commissioner to interfere with local boards in the management of their schools unless they violate the law, act in bad faith (meaning acting dishonestly), or abuse their discretion in a shocking manner. Furthermore, it is not the function of the Commissioner in a judicial decision to substitute his judgment for that of the board members on matters which are by statute delegated to the local boards. Finally, boards of education are responsible not to the Commissioner but to their constituents for the wisdom of their actions. *Boult and Harris v. Board of Education of Passaic*, 1939-49 *S.L.D.* 7, 13, affirmed State Board of Education 15, affirmed 135 *N.J.L.* 329 (*Sup. Ct.* 1947), 136 *N.J.L.* 521 (E&A 1948)."

In the instant matter the Commissioner finds no merit in petitioners' plea that the rights of their children were violated. The fact that the Board's decision

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to alter the school district boundaries ran counter to the wishes and opinions of some parents does not establish its actions as arbitrary. As has been stated, absent a clear showing that a board of education has acted unreasonably and beyond the scope of its discretionary authority, in bad faith, in violation of the law, or in any other illegal manner, the Commissioner will not intervene. Respondent Board's decision to alter school attendance boundaries is clearly an exercise of the discretionary authority vested in boards of education by the Legislature. (See *Boult and Harris v. Board of Education of Passaic, supra.*) Concerning the specific issue of the instant matter, the Commissioner relies on the language of the court as expressed in *Thomas v. Morris Township Board of Education*, 89 *N.J. Super.* 327, 332 (*App. Div.* 1965):

> "***We are here concerned with a determination made by an administrative agency duly created and empowered by legislative fiat. When such a body acts within its authority, its decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable.***"

There is no clear showing of such harm in this instance, and the evidence does not support any conclusion that the Board's action was arbitrary or that its reasons for this action were vague or fanciful. The prime motivation was to attempt to balance and reduce the numerical size of the elementary school classes. Such an objective, standing alone, is not only reasonable but commendable. However, the Commissioner is constrained to take notice of the fact that the action of the Board in altering the elementary school boundaries did not totally accomplish its stated purpose. (See enrollment data, *ante.*) Such action is always subject to adjustment by the Board.

The Commissioner determines that the constitutional questions raised by petitioners are not in evidence in the instant matter, and that the Board's motives in changing the school attendance zones were, as stated, to balance and reduce class size.

The Commissioner determines that this issue of the instant matter does not require his intervention since he can find no evidence that the Board's action was arbitrary, capricious or unreasonable, or that the affected children were exposed to irreparable educational detriment.

III.

The final question to be answered in this matter is whether the Board acted properly in the method it used to adopt changes of pupil boundary lines for the schools in question.

Testimony by respondent Board clearly established that no vote of the Board was ever taken for the adoption of this policy change, either at a public meeting or during a private caucus session. Instead, the proposed policy change was discussed during two caucus sessions, at which time the President of the

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Board asked whether there was any disagreement on this subject. There being no disagreement voiced by any member of the Board, the proposed policy change was assumed to be adopted. This procedure was followed prior to both public meetings held in June and July, 1970. Indeed, respondent Board's answer to the petition of appeal stated that "no vote whatsoever was taken by the respondent concerning the aforesaid transfer." Further, the Board argues that it is only required to conduct a public roll call vote of its members in matters where there exists a specific requirement by statute.

Petitioners argue to the contrary and rely on *N.J.S.A.* 10:4-1 *et seq.* which read in relevant part:

N.J.S.A. 10:4-1

"The Legislature finds and declares it to be the public policy of this State to insure the right of the citizens of this State to attend meetings of public bodies, with certain exceptions, for the protection of the public interest."

N.J.S.A. 10:4-2

" 'Public body' and 'body' mean a commission, authority, board, council, committee and every other group of 2 or more persons organized under the law of this State to perform a public governmental function by official action. 'Official action' means a determination made by vote."

N.J.S.A. 10:4-3

"The public shall be admitted to any meeting of a public body at which official action is taken."

Petitioners also rely on the language of the court in *Scott v. Bloomfield*, 94 *N.J. Super.* 592, 599, wherein the court stated:

> " 'The purpose of this bill is to further freedom of information to the public of the transaction of governmental business by insuring to the citizens of this State the right to attend public meetings.' "

The Commissioner is aware that boards of education may, and frequently do, meet in conference or caucus sessions. It is well established, however, that no final action can be taken at such a meeting. The Commissioner again relies on judicial language which speaks clearly to the point as follows:

> "***The Legislature has unmistakably and wisely provided that meetings of boards of education shall be public (*R.S.* 18:5-47); if a public meeting is to have any meaning or value, final decision must be reserved until fair opportunity to be heard thereat has been afforded.***" *Cullum v. Board of Education of North Bergen*, 15 *N.J.* 285, 294 (1954)

and in speaking of caucus sessions:

> "***This in no wise precludes advance meeting during which there is free

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and full discussion, *wholly tentative in nature;* it does, however, justly preclude private final action such as that taken by the majority in the instant matter.***" (Emphasis ours.) *Ibid.* 294

The testimony and evidence in this matter indicate that the Board was in agreement as to its course of action and that the informal assent of its members as previously described was considered to be its standard procedure for changing attendance zones within the district. The Commissioner can find no evidence of arbitrary or capricious action; however, he cannot ignore the procedural defect in the instant matter. The matter is, therefore, remanded to the Metuchen Board of Education with the following directions for final disposition:

Petitioners' children and all other children similarly situated shall remain at the schools of their present enrollment, as of the date of this decision, until the Board, at its next regularly-scheduled meeting or at a special meeting called for this purpose, either ratifies, modifies or reverses its previous action in the instant matter by a public vote.

COMMISSIONER OF EDUCATION

December 3, 1970

Hy Laufer and Marga Laufer,
parents of Robert Mark Laufer and Gregory Alan Laufer,

Petitioners,

v.

Board of Education of the Township of
Scotch Plains-Fanwood Regional Schools, Union County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioners, Read and Leib (Walter Leib, Esq., of Counsel)

For the Respondent, Beard and McGall (William M. Beard, Esq., o Counsel)

Petitioners herein, Hy Laufer and Margaret Laufer, are the parent respectively of Mark and Gregory Laufer, students in an elementary school i Scotch Plains-Fanwood Regional Schools, Union County. They appeal from decision of the Scotch Plains-Fanwood Regional Board of Educatio respondent, denying their children a further right to such school attendan because of an allegation that petitioners' domicile is in Plainfield. Responde

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asserts that its action was lawful and maintains that the children have no right to an education in its schools since they are not domiciled within its district. The matter is submitted on the pleadings and on oral argument heard November 20, 1970, at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

Petitioners purchased their present home in August 1968. The home is located at the end of a cul-de-sac and is built on land within the district boundary lines of Plainfield, although a contiguous part of the same property is within the physical boundary lines of Scotch Plains. The driveway in front of petitioners' home leads directly to the roads of the Township of Scotch Plains. The home and land is assessed at $13,400 by Plainfield which renders no municipal services to it. The part of the total land area within Scotch Plains is assessed at $1,300, and all municipal services are provided by that Township; namely, police, fire, sewage, garbage, street maintenance and mailing address. Petitioners' children were enrolled in respondent's school system in September 1968, and have maintained their attendance through the succeeding two-year period through June 1970. On or about June 26, 1970, petitioners were notified that their children must be transferred so as to attend schools in Plainfield in September 1970. A request by petitioners for a hearing before respondent concerning the order of transfer was denied. Respondent's counsel then advised it in a letter that school attendance for petitioners' children should be in Plainfield schools, but that respondent could, if it wished, admit the children as tuition pupils. No alternate decision to permit such attendance was made by respondent. Subsequently, counsel for petitioners appealed to the Commissioner for a stay of the transfer order, *pendente lite.* This was granted, and the matter was remanded to the Union County Superintendent of Schools for review of the facts and an early decision. The County Superintendent's decision on September 16, 1970, was that the "children should be transferred to the Plainfield Schools." It is from that decision the petitioners now appeal. The stay of the order of transfer remains in effect *pendente lite.*

Petitioners base their argument that the two children should remain in the present school assignments on the fact that the children's friendships are with other children of Scotch Plains Township and that a transfer now will be contrary to their welfare. They maintain that the children have a right to attendance in Scotch Plains Schools that derives from the orientation of their home to that Township, in which the total property fronts, since it is this Township which supplies petitioners with all other municipal services and entrance and egress from their home. They aver that the word domiciled should be broadly construed to embrace the concept of where people "live," and not the restricted delineation of precise Township boundary lines. Their prayer is that their children be considered as domiciled in Scotch Plains or that, in alternative ways, the Commissioner take steps to insure attendance in respondent's schools even if such attendance is on a reasonable tuition basis.

Respondent denies that petitioners' children are domiciled in Scotch Plains, and are thus entitled to free education under the terms of *N.J.S.A.*

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18A:38-1. It cites *Towner v. Mansfield Township Board of Education*, 1938 *S.L.D.* 633, reversed State Board of Education 634, affirmed 101 *N.J.L.* 474 (Sup. Ct. 1925) in support of its contention. It avers that it is a common practice for municipalities to provide municipal services in borderline areas, but that this practice does not change the character of the property's location or confer rights to school attendance for children living thereon. Respondent states that crowded conditions have precluded acceptance of children on a tuition basis.

The Commissioner has considered the report of the hearing examiner. He notes that the pleadings and the facts as presented pose the legal question under litigation; namely, have petitioners acquired a residence in Scotch Plains as would entitle them to the benefit of *N.J.S.A.* 18A:38-1, which provides in part that:

> "Public schools shall be free to * * *
>
> " (a) Any person who is *domiciled within the school district* * * *" (Emphasis added.)

He notes that petitioners' argument would, in effect, require a new definition of "district" as an area bound by ties of municipal services and accessibility, rather than by legally-defined school district boundaries precise in nature and, except for regional and consolidated school districts, identical or coterminous with municipality boundaries. The Commissioner holds that such a definition of "district" has no substance in the law and that legal privileges of domicile are derived from the geographic location of the one permanent home within the precise boundary lines of a school district. He relies on the construction and application of the law which has prevailed in New Jersey in similar cases. See *Rutgers, the State University et al. v. Board of Education of the Township of Piscataway, Middlesex County*, 1963 *S.L.D.* 163; *Board of Education of the Borough of Franklin v. Board of Education of the Township of Hardyston, et al.*, 1954-55 *S.L.D.* 80. The Commissioner cited *Kurilla v. Roth*, 132 *N.J.L.* 213,215 (*Sup. Ct.* 1944) in *Rutgers, supra*, at page 166:

> " * * * 'Domicile' is the relation which the law creates between a[n] individual and a particular locality or country. In a strict legal sense, th[e] domicile of a person is the place where he has his true, fixed, permanen[t] home and principal establishment, and to which, whenever he is absent, h[e] has the intention of returning, and from which he has no present intentio[n] of moving. 17 *Am.Jur.* 588, 590; 28 *C.J.S.* 3. It is the place with which h[e] has a settled connection for certain legal purposes, either because his hom[e] is there or because that place is assigned to him by law. *Croop v. Walto[n]* 199 *Ind.* 262, 157 *N.E. Rep.* 275; 53 *A.L.R.* 1386; *Fisher and Van Gild[er] v. First Trust Joint Stock Land Bank*, 210 *Iowa* 531; 231 *N.W. Rep.* 67[...] 69 *A.L.R.* 1340; *Shenton v. Abbott*, 178 *Md.* 526; 15 *Atl. Rep.* (*2d*) 90[...] This is the rule adopted by the American Law Institute. *A.L.I. Conflict [of] Laws*, § 9. And every person, in all circumstances and conditions,

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deemed to have a domicile somewhere; and, in general, a domicile once established continues until superseded by a new domicile, and the old domicile is not lost until a new one is acquired. *In re Dorrance Estate*, 115 *N.J. Eq.* 268; affirmed, *Dorrance v. Thayer-Martin*, 13 *N.J. Mis. R.* 168, affirmed, 116 *N.J.L.* 362; 17 *Am. Jur.* 590, 601. * * *"

In the instant matter, it is clear that petitioners' true permanent home is entirely situate on land in Plainfield. The Commissioner holds that the fact that another piece of land in another municipality is contiguous with the land on which petitioners' house rests, the whole comprising petitioners' property, is of no importance in a determination of where petitioners' children are domiciled. Their domicile is clearly in Plainfield. In this place the family abides, and the fact is *prima facie* evidence that this is the place of their legal residence. *Lea v. Lea*, 28 *N.J. Super.* 290 (1953); *Snyder v. Callahan*, 3 *N.J. Misc. Rep.* 269; *Brueckmann v. Frignica*, 152A 780, 9 *N.J. Misc.* 128 (1931); *Marsteller v. White*, 1938 *S.L.D.* 30

Having determined that petitioners are domiciled in Plainfield and not in the respondent's district, the Commissioner holds that petitioners' children have a right to free public education in Plainfield, pursuant to *N.J.S.A.* 18A:38-1, quoted in part, *ante*, but not in the district of respondent where they have been in attendance for the past two-year period. There is no alternative relief that the Commissioner is empowered to afford as the petitioners suggest. The Commissioner does recommend that respondent reconsider its previous refusal to allow attendance of petitioners' children on a tuition basis, pursuant to *N.J.S.A.* 18A:38-3, for the balance of the 1970-71 school year, since to deny this is to cause a disruption in the children's lives because of errors in initial school enrollment for which the children were not responsible. This recommendation is limited to the 1970-71 school year. If respondent chooses to implement the recommendation, the Commissioner believes that the tuition charges should be made retroactive to September 1970, since notice of transfer was afforded petitioner in July 1970 and was sufficient to allow time for the move.

Accordingly the petition is dismissed, but the Commissioner remands the recommendation, ante, for possible further action by respondent at its discretion.

COMMISSIONER OF EDUCATION

December 4, 1970

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In the Matter of the Application of the Board of Education of the Borough of South River for the Termination of the Sending-Receiving Relationship with the School District of Spotswood, Middlesex County

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Karl R. Meyertons, Esq.

For the Respondent, Abraham J. Zager, Esq.

For many years the Board of Education of the Borough of South River, petitioner, has received the pupils of the Board of Education of Spotswood Borough, respondent, as tuition pupils in its high school. Now, because of overcrowded conditions and the continued population growth in both districts, petitioner seeks to terminate the relationship. Respondent denies that good and sufficient reason has been given by petitioner for the action requested and avers that the present relationship should be continued since it has been mutually beneficial in the past.

The facts of the matter were presented at a hearing conducted on October 13 and 14, 1970, in the conference room of the Middlesex County Planning Board, New Brunswick, before a hearing examiner appointed by the Commissioner. The report of the hearing examiner follows:

Petitioner's school system includes a junior high school for grades 7-9 and a separate senior high school for grades 10-12. The junior high school was built in 1880 and received extensive additions and alterations in 1921 and 1929. The senior high school was built in 1961. Enrollment data, pertinent to the petition, for the 1970-71 school year is itemized as follows in Exhibits P-2 and P-3 which were received in evidence:

	Functional Capacity	Maximum Capacity	Total Enrollment	From Spotswood
Junior High	595	675	792	(126) (gr. 9)
Senior High	760	950	1,091	(365)
Totals	1,355	1,625	1,883	(491)

Enrollment projections for the senior high school made by petitioner's Superintendent of Schools through the 1978-79 school year embrace the pupils from both districts and range from a low of 1,160 in 1972-73 to a high of 1,270 in 1978-79. The junior high school is expected to increase from 815 to 900 during the same period. These projections make no provision for population growth except that no drop-out factor has been added to the years subsequent

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to 1975. It is petitioner's belief that the general increase in population in these years will act as an offset in this regard. It is noted by the hearing examiner that the actual pupil population in South River schools in grades 7-12 totaled 1,883 in September 1970, whereas the projected enrollment for this year at those grade levels was 2,025. (P-5) Much of this difference can be accounted for by the fact that enrollment of respondent's pupils in the county vocational schools has increased from 38 in 1969-70 to 113 in September 1970.

Respondent projects enrollment from its district for grades 9-12 as follows in Exhibit R-3. The figures are inclusive of those sent to all schools and not just to those of petitioner:

1971-72 – 591
1972-73 – 658
1973-74 – 716
1974-75 – 760

Cognizant of the need to project school population in the context of general population trends, petitioner introduced in evidence (P-4) a report of population trends developed by the Middlesex County Planning Board. This report shows that the population of the County increased 33.2% during the eight-year period 1960-1968. In approximately the same period South River grew by 17.7% and Spotswood by 27.5%. Population growth in the period 1969 to 1975 is predicted to be similar to past experience for South River, but a smaller percentage of 8% is estimated for Spotswood. Long range projections, however, indicate that Spotswood will grow from 8,052 in 1975 to 11,079 in 1985 and to 16,360 in the year 2000. It is now estimated that South River is 63% developed and that Spotswood has 48% of its land already in use.

The testimony of the Superintendent of Schools of petitioner's district is to the effect that all of the schools of the system are operating in crowded conditions and that in each instance the current enrollment is in excess of functional or maximum capacity. Academic offices are used for classes. Church quarters are in service. At the high school level the adjustments, for heavy enrollment, have meant the scheduling of a nine-period day with five lunch periods, and the school's teaching stations are said to be in use 100% of the time. The cafeteria and auditorium serve as study halls when not used for their primary purposes. One gym class has 80 pupils with two teachers assigned to it. The Superintendent avers that such overcrowding precludes new offerings of any kind, and in this regard he specifically mentions courses in data processing, work study, typing in the junior high, and "mini" courses now offered in many other schools. He states that the only alternative to the present overcrowding and the restricted program without new construction is that which could be provided by double sessions.

However, petitioner does wish to proceed with plans to upgrade and restructure its present school system and to build a new senior high school for its own pupils. Preliminary estimates by petitioner's architect are that such a school

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can be built for $4,000,000, but that the cost will rise to $7,500,000, if the school must be built for the high school pupils of the two districts. Petitioner avers that this larger expenditure would represent an undue burden on local taxpayers, and that this burden would not be mitigated by the relatively small amount of 5%, the rental charge assessed sending districts by the terms of Title 6:20-15, *New Jersey Administrative Code.*

Respondent maintains that petitioner can reasonably be expected to accomodate its students because an increasing number of them will go to other vocational programs in the County. Additionally, respondent points to the possibility of a new parochial high school for an amelioration of the crowded conditions at South River High School. It has also expressed willingness in the past to consider regionalization with petitioner, and in an effort to consider other alternatives it has engaged a consultant from Rutgers to study the feasibility of regionalization with another neighboring district. A report from this consultant was due in late October of 1970 but was not received. Respondent does not believe it has the economic resources to establish a comprehensive high school of its own, since it was not permitted in 1968 to exceed its debt limit percentage to the extent necessary to build a junior high school. Respondent has not investigated the possibility of new sending-receiving relationships with other neighboring districts.

Evidence (P-1) was introduced to show that petitioner had notified respondent in 1959 that it would continue to "accept all public high school pupils for the next five years or until the number exceeds 350." Thereafter, the two boards of education met together periodically to discuss the sending-receiving relationship, or discussed it separately in meetings. (R-2) In 1966 the respective boards met in a conference which was reported in a conference memo entered as R-1 in evidence. This memo says in part:

> "* * * South River indicated that they are pleased with our relations with Spotswood; that combining pupils of both communities into one establishment is, at least, more economical for both communities and provides a well-rounded curriculum.
>
> "South River thanked Spotswood for the information they provided which will help with plans they are trying to formulate for additional schoolhouse capacity at South River."

Subsequent to that conference, however, petitioner determined that its best interests were separate from those of the combination of districts, and it passed a resolution on January 14, 1969, (P-6) "to notify the Board of Education of the Borough of Spotswood of its intention to terminate their sending-receiving relationship." Following a conference with the County Superintendent of Schools, petitioner filed the petition herein with the request that the withdrawal of students begin not later than September 1972.

* * * *

The Commissioner has considered the report of the hearing examiner as set

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forth above. The statutes relative to the termination of sending-receiving relationships are *N.J.S.A.* 18A:38-13, 22 and 23. The relevant parts read as follows:

> 18A:38-13
>
> "No such designation of a high school or high schools and no such allocation or apportionment of pupils thereto, heretofore or hereafter made pursuant to law shall be changed or withdrawn nor shall a district having such a designated high school refuse to continue to receive high school pupils from such sending district except for good and sufficient reason upon application made to and approved by the commissioner, who shall make equitable determinations upon any such application."
>
> 18A:38-21
>
> "Any board of education which shall have entered into such an agreement may apply to the commissioner for consent to terminate the same, and to cease providing education to the pupils of the other contracting district on the ground that it is no longer able to provide facilities for the pupils of the other district * * * ."
>
> 18A:38-22
>
> " * * * if the commissioner finds that there are good grounds for the application, as provided in this article, he shall give his consent, and the applying board of education shall thereupon be entitled to terminate the agreement * * * ."

It is clear that the law thus provides for stability in sending-receiving relationships between districts while at the same time it provides flexibility if there is "good ground" for a severance of the existing pattern. In the instant matter the two districts have had a long and amicable relationship, but the continuance of it at this time precludes a modernization of petitioner's high school curriculum in the future and would seem to make mandatory alternatives which petitioner deems would cause hardship and deprivation for its own students and taxpayers. These alternatives seem to be the arrangement known as double sessions or an expanded building program over and above the requirements petitioner would be obliged to finance for its own students. The Commissioner can find no reason to conclude that a receiving district must necessarily be forced to either of these alternatives. *In the Matter of the Termination of the Sending-Receiving Relationship Between the Boards of Education of the Township of Lakewood and the Township of Manchester, Ocean County*, 1966 *S.L.D.* 12, 14

It is clear from the report of the hearing examiner that the long-term interests of both parties to this dispute would be best served by an early decision to sever the past relationship. Respondent has already initiated steps involving

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regionalization which may well prove fruitful. If regionalization fails, the Commissioner cannot preclude another alternative; namely, a decision by respondents to establish a separate high school at a future date. Nor does the Commissioner preclude the establishment of a new sending-receiving relationship with another district if, after exploratory study, this seems feasible. In any event, it is clear that indefinite continuation of the present relationship will seriously hinder, if not negate, the possibility of maintaining a thorough and efficient school system in the South River school district in the very near future.

The Commissioner finds and determines that the high school facilities presently available to petitioner are inadequate to provide a suitable program for its own students and those from the Spotswood district in future years, that the proper "ground" required by the statute quoted, *ante*, exists for a severance of the relationship. Therefore, in order to grant both parties a reasonable period of time to plan in accordance with this decision, he directs that the sending-receiving relationship between the South River and Spotswood school districts be terminated in whole or in part as of September 1, 1974. He remands to the parties the matter of deciding on the details of separation applicable in that year, and, specifically, the decision as to whether the separation shall be complete or in phased stages. He further directs the Board of Education of Spotswood Borough to consult with the Middlesex County Superintendent of Schools and members of the staff of the State Department of Education for the purpose of providing an educational program for its high school students beginning in September 1974.

COMMISSIONER OF EDUCATION

December 14, 1970

Pending before State Board of Education

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Ronald Giberson,

Petitioner,

v.

Board of Education of the Borough of South Plainfield, Middlesex County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Cassel R. Ruhlman, Jr., Esq.

For the Respondent, Klein and Lusardi (Leroy P. Lusardi, Esq., of Counsel)

Petitioner, a principal in the schools of respondent, claims that he was unlawfully denied compensation for the final fifteen days of his employment by respondent in August 1969. Respondent denies that petitioner is entitled to such compensation and by way of counterclaim seeks reimbursement of the compensation paid to petitioner for a purported vacation period in the summer of 1969.

A hearing in this matter was conducted on March 11, 1970, at the Middlesex County Administration Building, New Brunswick, by a hearing examiner appointed by the Commissioner of Education. Documentary materials marked Exhibits P-1 to P-6 and R-1 and R-2 were received in evidence at the time of the hearing. Subsequently, by consent of counsel, further documentary materials in photocopy form were submitted by counsel for respondent and have been marked as Exhibits R-3 through R-8. The report of the hearing examiner is as follows:

Petitioner was originally employed by respondent for the period from July 1, 1967, to June 30, 1968, and began his services for the school district on August 15, 1967. He was reemployed under contract with respondent for the period from July 1, 1968, to June 30, 1969. During the summer of 1968 he was scheduled for vacation for six weeks beginning July 8. Because of his summer studies at Temple University he was absent from his duties during the week of July 1, 1968, but asserts that he more than made up the loss of time by working on several Saturdays and Sundays, and at other times on weekday afternoons and evenings. (R-4, R-5, R-6)

The parties entered into a further employment contract for the period from July 1, 1969, to June 30, 1970, said contract providing for payment of a salary of $16,380 in 24 equal semi-monthly installments, and for termination of the contract by either party giving 60 days' notice in writing of its intention so to terminate. (P-1) On July 4, 1969, petitioner submitted a letter of resignation

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effective 60 days from that date, and asking in the alternative for a year's leave of absence in order that he might complete a year in residence at Temple in fulfillment of graduate degree requirements. (P-2) Petitioner's resignation was accepted by respondent on July 17, 1969. The Board directed the Superintendent to try to compromise with petitioner to bring about termination in 45 days instead of 60. The Superintendent attempted to stop delivery of petitioner's pay checks for July, but found that petitioner had already collected these checks. On or about July 28, 1969, the Superintendent and petitioner conferred about petitioner's termination date. The Superintendent asserts that agreement was reached that petitioner would work the first two weeks of August and be paid therefor, and that he would not work or be paid thereafter. Had there been any other understanding the Superintendent testified, he would not have authorized that petitioner be paid the first half of August. Petitioner denied that there was such an agreement (P-3, P-4, P-5, P-6), and testified that he worked many afternoons and evenings during July and the first half of August and on advice of counsel, daily thereafter to the end of the work month, performing duties incident to the opening of school in September. No evidence was presented to contradict such testimony although the Superintendent and his assistant testified that a principal's summer duties can be performed in two weeks. The hearing examiner finds that petitioner performed the services indicated by his testimony and in Exhibit P-6.

Petitioner was not paid the second semi-monthly installment of his salary in August 1969, and his claim is for that payment. Respondent asserts that since petitioner took the customary six weeks' vacation in the summers of 1967 and 1969, he was not entitled to vacation pay in the summer of 1969 in light of the submission and acceptance of his resignation effective at the end of August, but allegedly agreed to be effective August 15, and seeks by way of counterclaim an order that petitioner reimburse respondent for vacation pay received in July and August 1969.

The hearing examiner finds that although it was Board practice to allow principals six weeks of paid vacation annually, no conditions as to such vacation were set forth in the contracts entered in evidence (P-1, R-2), nor was any testimony or other evidence offered to show the existence of a uniform Board rule or policy governing such vacations.

* * * *

The Commissioner has reviewed and considered the hearing examiner's report of his findings of fact in this matter.

The question of vacation pay was considered by the Commissioner in the case of *Herold v. Board of Education of Mount Arlington,* 1967 *S.L.D.* 255. In that case petitioner claimed compensation for purported accrued vacation leave from the beginning of the contract year to the date of his resignation before the conclusion of the contract year. In that case, as in the instant matter, petitioner had taken vacations with pay at the beginning of each of the contract years of

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his employment, but as vacation for the previous year's employment, a condition set forth clearly in the employment contract. However, absent a contract provision for payment for accrued vacation leave in the event of early termination or provision for salary in lieu of vacation leave, the Commissioner held that *Herold* had no claim for such payment. In the instant matter, however, no contract provision or Board rule governing vacation leave has been shown. Moreover, the Commissioner concurs in the finding that petitioner performed services both during and after his scheduled vacation period, so that petitioner's claim for pay for the last half of August 1969 is not a claim for either accrued vacation leave or salary in lieu of such leave, as in *Herold.*

As to respondent's claim that agreement was reached between the Board and petitioner for termination of the 1969-70 employment contract earlier than the 60 days' notice period provided therein, the Commissioner finds that although such earlier termination may be consented to by the board of education (*N.J.S.A.* 18A:26-10; see also *N.J.S.A.* 18A:27-9 with reference to resignation of a tenured teaching staff member), such earlier termination may not be unilaterally generated by the board. *Cf. Gager v. Board of Education of the Lower Camden County Regional High School District No. 1,* 1964 *S.L.D.* 81. The Commissioner concurs in the hearing examiner's finding that there was no mutuality of agreement that petitioner's contract would expire on August 15, 1969.

The Commissioner has no doubt that the problem raised herein, or other problems relating to the vacations of employees who are employed for the entire school year, may not be unique to respondent Board. The Commissioner is convinced that such problems may be forestalled by appropriate Board rules governing vacation leave, entirely consistent with employees' rights and the Board's statutory authority to make rules and regulations governing the terms of employment. *N.J.S.A.* 18A:27-4

The Commissioner finds and determines that petitioner was in the employ of respondent Board of Education for a period of 60 days from the date of his resignation on July 4, 1969, and is entitled to the second semi-monthly salary payment for the month of August 1969, as claimed.

COMMISSIONER OF EDUCATION

December 14, 1970

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Herbert J. Buehler,

Petitioner,

v.

Board of Education of the Township of Ocean, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Charles Frankel, Esq. (Peter B. Shaw, Esq., of Counsel)

For the Respondent, Abramoff, Apy & O'Hern (Daniel J. O'Hern, Esq., of Counsel)

Petitioner is a teacher claiming tenure of employment as a chairman and/or supervisor of the department of social studies in the schools of respondent Board of Education and contesting the termination of his services in that capacity at the close of the 1967-68 school year. Respondent denies that petitioner has acquired any tenure rights other than those as a teacher.

Testimony was taken and exhibits received at a hearing conducted by a hearing examiner appointed by the Commissioner, at the office of the Monmouth County Superintendent of Schools, Freehold, on September 26, 1968, and continued on October 16, 1968, December 3, 1968, and March 5, 1969. Counsel also filed briefs. The report of the hearing examiner is as follows:

Petitioner was first employed by respondent as a teacher beginning September 1952, and the employment has been continuous to the present day. In the years prior to 1965, his assignment was in the elementary schools. During the 1964-65 school year he was asked by the Superintendent of Schools to serve as chairman of the social studies department at respondent's high school beginning in September 1965. In the spring of 1965 he completed a course in methods of teaching social studies at the high school level. This course, when combined with his previous academic preparations, made him eligible to receive a certificate to serve as a teacher and supervisor of social studies at the high school level. Thereupon, in June 1965, he filed an application to be certified as a secondary teacher and supervisor. Errors in the application were noted but were corrected and forwarded to the office of teacher certification in Trenton in September 1965. A certificate (P-3) was issued on April 25, 1966, with the endorsements "Secondary school teacher of social studies" and "Supervisor of social studies."

In the spring of 1965 petitioner received a contract (P-4) to serve as chairman of the social studies department for the 1965-66 school year at a salary of $500. Similar contracts were issued for the 1966-67 school year in the

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amount of $540 (P-5), and for the 1967-68 school year (P-6) at the same salary. These amounts were in addition to the contractual salary he received as a teacher during this three-years' period. All contracts itemized, *ante*, and petitioner's basic teaching contract, were for a duration of ten months from the first day of September through the last day of June. None of the contracts issued to petitioner had reference to the supervisor's certificate as a requirement. A contract dated April 5, 1968, and signed by petitioner, was not executed by the President of the Ocean Township Board or the School Business Administrator. Instead, petitioner received the following letter from the Superintendent of Schools, dated April 1, 1968 (P-22):

> "This letter is to inform you of our decision to let your contract as Chairman of the Social Studies Department in the Ocean Township High School expire as of the last day in June, 1968 and to further inform you that we do not plan to renew this contract.
>
> "You will be assigned to the eighth grade in the Ocean Township School, Dow Avenue, for the 1968-69 school year as a teacher of social studies."

It is petitioner's contention that he has "tenure as a teacher and in his position as chairman and/or supervisor of the social studies department of the Ocean Township High School, pursuant to *N.J.S.A.* 18A:28-5 and 28-6 and Rules Concerning Teachers Certificates, State of New Jersey, Department of Education, 20th Edition, 1966," and that his removal from the position of department chairman was unlawful. His prayer is for reinstatement in the position.

Respondent, on the other hand, denies that petitioner "acted at any time as a supervisor" in its high school or that petitioner holds tenure rights in any position other than that of a teacher. It is respondent's contention that it never employed petitioner in a "status where he could obtain tenure under his supervisor's certificate."

Petitioner's testimony was that for most of the three years' period from September 1965 through June 1968, he had a teaching load of three classes per day, but that in the 1967-68 year his load was reduced to two classes for part of the year. He says that teachers other than department heads taught five classes per day. The rest of petitioner's work day, he avers, was devoted primarily to the responsibilities or duties incumbent upon him as chairman of the social studies department comprising 12 to 14 teachers. He describes these duties as those drawn up by the high school principal in a memo for department chairmen, dated August 13, 1965, and admitted into evidence as Exhibit P-2. This memo is detailed as follows:

> "Each Department Chairman will participate in a cooperative selection of all teaching candidates for his department. Recommendation will be made by the Principal, Supervisor of Instruction, Department Chairman, with final approval and recommendation being made by the Superintendent of Schools.

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"The Department Chairman will provide for an individual orientation program for all new and transfer teachers assigned to his department.

"There will be released time for Department Chairmen for the following major purposes:

a. Supervision of teachers within the department, including observation and conference;
b. to provide time for preparation and teaching of 'master' lessons and to check on planning procedures within the department;
c. evaluation, curriculum revision, and construction;
d. selecting, requisitioning, processing, and maintaining an inventory of all instructional supplies and equipment for the department;
e. Department Chairmen will also set up and submit to the Administration an annual budget for all items necessary for the department;
f. provide the leadership for weekly department curriculum meetings;
g. meeting with members of the Administration concerning the work and function of the department;
h. being on call to interpret the program offered by the department to the Superintendent, Board of Education, parent groups, or general public;
i. being on call for curriculum articulation meetings with the elementary school staffs and with representatives from higher education;
j providing leadership in areas of research and development for the department on current and new trends in education;
k. working cooperatively with the Guidance Department concerning testing and evaluation in the area of pupil achievement;
l. preparation of news releases and other public-relations media concerning department activities;
m. assist substitutes in the department to do an effective teaching job:

"Department Chairmen will also perform such additional duties as may be directed by the Principal of the High School and the Superintendent of Schools."

Testimony from petitioner was to the effect that he had performed within the spectrum of duties outlined in the memo, and his testimony received substantial corroboration from other members of his department and was not basically refuted by witnesses for respondent. The quality of petitioner's work as department chairman was not an issue in this litigation since the concern is not whether the Board did or did not have good reason for dismissing petitioner. The concern is whether it could take that action at all.

There was no evidence that respondent ever adopted the "duties" as outlined by the principal and excerpted, *ante*, as their own required duties for the position of chairman of the department, or that respondent adopted any other job description to serve as a guide in this regard. Neither was there conclusive evidence introduced to show that respondent ever required a supervisory certificate of persons who were to perform such duties although when petitioner was asked to serve as chairman of the department, the matter of

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proper certification to serve as a secondary teacher and department chairman was discussed.

Testimony was educed from the Secretary of the State Board of Examiners, Dr. Allan F. Rosebrock, and the Monmouth County Superintendent of Schools, Earl B. Garrison, that a supervisory certificate was not required in New Jersey for a teacher serving as department head or department chairman. The pertinent parts of the testimony of the Secretary of the State Board of Examiners are excerpted as follows: (Tr. 276)

> "Q. Dr. Rosebrock, if the title of the applicant's position differs from his actual responsibilities and performance in that position, what is the factor used to determine whether he is to be certified – the title or the responsibility and performance?"
>
> "A. * * * This becomes a problem in practice only when a person is assigned a title that is not recognized in the rules. * * * it's the position that he holds and the functions that he has been assigned that are the determining factors rather than the title."
>
> "Q. From your understanding, Dr. Rosebrock, is the title of department chairman as such required to be certified in the State of New Jersey?"
>
> "A. No. The rules don't recongize the title department chairman."

The Monmouth County Superintendent of Schools had not required the possession of a supervisor's certificate as a prerequisite to employment as a department chairman because he did not believe the position was that of a supervisor. He made the distinction as follows: (Tr. 460)

> "Q. Can you distinguish for me, Mr. Garrison, the difference between a subject supervisor, and a department head, or department chairman?
>
> "A. To the best of my knowledge a supervisor is a (person holding a) position established by a Board of Education, and (it) requires a holding of a supervisory certificate. A department chairman is designated by the Board of Education but (the position) may be held by anyone holding a permanent certificate." (Words in parenthesis supplied.)

He also said that the following requirements of the State Board of Examiners, promulgated in 1963, were in force for districts appointing subject supervisors in 1965:

"Subject Supervisor Authorization
(from Rules of 1963)

> "This certificate is required for the position of supervisor of instruction in any school district in the subject, or subjects, covered by the certificate. It may be issued to an assistant subject supervisor (when so designated by a board of education) spending one half the time in supervision." (Tr. 466)

There were three items of testimony pertaining to the way that respondent

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viewed the position of department chairman:

1. The former Superintendent of the school district testified that he wrote the rules or regulations adopted by the Board in 1963 and introduced into evidence as R-1. These rules contain an organizational chart on page 18. The pertinent parts of this chart show the one position labelled "supervisor of instruction" on a line directly responsible to the Superintendent of Schools. There is a job description for this position, and later testimony was that the incumbent in this position did some supervisory work in the high school for the school year 1965-66. The department chairmen grades 7-12 are included in a box labelled "instructional staff" and are on the same level with 12 subject area departments of the school.

2. The assistant principal of the high school testified that in his annual report of certificated personnel he had assigned petitioner the code designation applicable as a teacher of civics and U.S. history. No such code was assigned for the position of department head or chairman of department. One supervisory designation was made for the "supervisor of instruction" who was mentioned, *ante*, as being treated in a separate manner in the rules and regulations of the Board contained in Exhibit R-1.

3. Finally it was the testimony of the Secretary of the Board that "salaries of supervisors of instruction" had to be included in line 212 of the Board's chart of accounts pursuant to regulations of the Business Division of the New Jersey State Department of Education. In conformity with those regulations he said he had listed petitioner's salary as department chairman together with that of other department chairmen and the supervisor of instruction on line item 212 of the 1967-68 chart of accounts. However, he did not make deductions for pension purposes from this salary payable to department chairmen.

The hearing examiner concludes from an examination of all of the evidence that petitioner did in some degree perform supervisory duties, pursuant to the directions of the school principal outlined in Exhibit P-2. However, he finds it impossible in any precise manner to categorize the apportionment of all of those duties by percentage as being by nature supervisory, administrative or clerical. There was no evidence that the percentage of the duties which were supervisory were performed by direction of the Board of Education. Neither was there any evidence that respondent required a supervisor's certificate from any of the teachers who served as department chairmen. The fact that no chairman except petitioner possessed the certificate during all of the three-years' period in contention would appear to be the best evidence that no such certificate was prerequisite for such service.

* * * *

The Commissioner has considered the findings of the hearing examiner as set forth above.

The primary issue in this matter is whether or not petitioner has been

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deprived of any tenure rights he may have acquired as a supervisor by virtue of duties performed as chairman of a school department. Any resolution of the contention relative to this issue requires an examination of the conditions that must be fulfilled before tenure has been obtained. Perhaps the broad principle applicable hereto is most succinctly stated in *Ahrensfeld v. State Board of Education*, 126 *N.J.L.* 543, 19 A 2*d* 656 (1941) and again in *Zimmerman v. Board of Education of Newark*, 38 *N.J.* 65 (1962):

> " * * * It is axiomatic that the right of tenure does not come into being until the precise condition laid down in the statute has been met. * * *"

In the instant matter, petitioner clearly performed supervisory duties with the requisite supervisor's certificate for a significant portion of each day. However, the primary precise condition necessary for the accrual of tenure in this work is notably absent; namely, appointment of petitioner by the Ocean Township Board of Education to a position as a supervisor of instruction with Board-approved duties established as a job description. Such an appointment by the Board and such recognition of the nature of the position are necessary prerequisities of a tenure right, and such power may not be delegated to school officials or usurped by them. In a recent decision, *Zielenski v. Board of Education of the Town of Guttenberg, Hudson County*, decided by the Commissioner July 16, 1970, the Commissioner considered a petition of a teacher who was initially employed by the Superintendent of Schools as a substitute for a period of months immediately preceding three full contract years of employment as a regular teacher in the same position. The Commissioner, in holding that the teacher had not acquired tenure because her initial employment did not receive an affirmative action of the Board said:

> "* * * the Commissioner holds that any engagement undertaken by a Superintendent to employ a teacher, without the necessary affirmative action by the employing board in accordance with the statutes, cannot constitute employment within the meaning of the tenure law. * * *"

In the instant matter, petitioner was assigned supervisory duties by another school official, a principal, but there was no affirmative act of the Board to make petitioner a supervisor.

The power of the Board to appoint teaching staff members and prescribe rules for their employment is clearly stated in *N.J.S.A.* 18A:27-1, which provides:

> "No teaching staff member shall be appointed, except by a recorded roll call vote of the full membership of the board of education appointing him."

and in 18A:27-4, which, states in relevant part:

> "Each *board of education* may make rules, not inconsistent with the

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> provisions of this title, governing the employment terms and tenure of employment * * * of teaching staff members for the district * * *. (Emphasis added.)

Petitioner received an initial appointment as a teacher in 1952. However, subsequent to that time, it is clear that the Board did not designate petitioner as a supervisor. Such specific designation resulting in an appointment to a specific position is an essential prerequisite for the acquisition of tenure. Therefore, the Commissioner holds that petitioner's appointment by the Board as chairman of the social studies department in 1965 was one to perform limited duties auxiliary to his basic appointment as a teacher, and that any accrual of time served in the performance of these auxiliary duties may only be credited to his service as a teacher.

In the case of *Grasso v. Board of Education of Hackensack*, 1960-61 *S.L.D.* 137, the Commissioner defined "supervision" in the broad sense of the word when he said:

> " * * * Supervision deals with the development and maintenance of high standards of curriculum, instruction and guidance and the continuous improvement thereof. It includes, among other things, the observing, advising and directing of teachers in their instructional and guidance activities inside and outside the classroom. Through advice, either upon request or otherwise, through programs of in-service training and through curriculum improvement activities, the supervisory staff acquaints the classroom teacher with the aims, materials and methods of education and encourages and assists them to achieve the objectives of the schools. * * *"

It is apparent from a review of the testimony and exhibits that petitioner did perform such supervisory duties during part of his day, although the hearing examiner has found it impossible to define the precise proportions thereof. The Commissioner holds, however, that teachers should not be given such duties, basically supervisory in nature, unless the assignment is made by the employing board of education and defined succinctly within the framework of a job description or table of organization. Such a description was authorized for only one employee in this school system according to Exhibit R-1. This was the supervisor of instruction. No such authorization was in evidence for a department chairman.

The testimony clearly demonstrates that no other department chairman in respondent's schools possessed or was required to possess a supervisor's certificate, yet the inference is reasonable that all department chairmen performed duties similar to those performed by petitioner. If respondent wished to employ department chairmen in the capacity of supervisors, it had the right and opportunity to say so. The evidence demonstrates, however, that no such election was made by respondent either as to petitioner or any other department chairman, and the unauthorized assignment of supervisory duties to department chairmen by the principal cannot be construed to confer tenure rights upon

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them. To hold otherwise would transfer the power and duty to confer tenure from the Board of Education to its administrative officers. Such a result, the Commissioner holds, is clearly not the intent of the statutes recited, *ante*.

The twentieth edition of "Rules Concerning Teachers Certificates," referred to, *ante*, details the following authorization as a prerequisite for the issuance of a certificate to a person who may be employed as a "Supervisor" as differentiated from "subject supervisor":

"This certificate is required for supervisors of instruction who do not hold an administrative certificate. The supervisor shall be defined as any school officer who is charged with authority and responsibility for the continuing direction and guidance of the work of instructional personnel." However, the mere holding of this or any other certificate does not imply that the person holding it has a right to tenure in the employment covered by the certificate. Many teachers hold more than one certificate, but this fact alone cannot be construed to confer a tenure right.

The Commissioner attaches no probative significance to respondent's testimony that on certain reports and budget forms petitioner was or was not recorded as a supervisor. While such forms should be correctly prepared, they do not in themselves establish legal rights.

Finally, the Commissioner is cognizant of other decisions of the Commissioner and courts that have held that a wide range should be given to applicability of the tenure law to confer tenure status on the basis of duties performed. *Barnes et al. v. Board of Education of the City of Jersey City, Hudson County, New Jersey*, 1961-62 *S.L.D.* 122; *Quinlan v. Board of Education of the Township of North Bergen*, 1959-60 *S.L.D.* 113; *Giannino v. Board of Education of Paterson*, 1968 *S.L.D.* 160; *Bruner v. Board of Education of Camden*, 1959-60 *S.L.D.* 155; *Sullivan v. McOsher*, 84 *N.J.L.* 380 (*E. & A.* 1913) However, he holds that the litigation *sub judice* presents differing circumstances in that an affirmative act by the Ocean Township Board of Education involving assignment of the title of supervisor or a delegation by the Board of the duties of the office was notably absent.

Accordingly the petition herein is dismissed.

COMMISSIONER OF EDUCATION

December 17, 1970

Pending before State Board of Education.

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Board of Education of the Town of Newton,

Petitioner,

v.

The Newton Teachers' Association, Sussex County,

Respondent.

COMMISSIONER OF EDUCATION

Decision on Motion to Dismiss

For the Petitioner, Dolan and Dolan (William M. Cox, Esq., of Counsel)

For the Respondent, Cassel R. Ruhlman, Jr., Esq.

The Board of Education of the Town of Newton, petitioner, requests the Commissioner to decide whether certain "articles" presented to it by the Newton Teachers' Association, respondent, are, or may be, subjects for agreement among the parties following negotiations conducted pursuant to *Chapter* 303, *Laws* of 1968. Respondent maintains the Commissioner lacks jurisdiction to decide and has moved for dismissal of the charges.

The motion for dismissal is argued in a brief of counsel for respondent dated June 12, 1970. Counsel for petitioner also filed a brief, opposed to the motion, on June 18, 1970, and is supported by a brief of the same date from counsel for the New Jersey School Boards Association as *amicus curiae.* Oral argument was waived by the parties.

The petition herein is grounded in the mandate contained in *Chapter* 303, *Laws* of 1968, and incorporated in the statutes as *N.J.S.A.* 34:13A-1 *et seq.,* which imposes on boards of education throughout the State the obligation to negotiate the "terms and conditions" of employment with their employees. Pursuant to this obligation petitioner recognized respondent as the exclusive representative of the teachers in the Newton school district, and the two parties entered into negotiations. In the course of these negotiations, respondent presented petitioner with a set of articles, attached to the petition as "Schedule A," to be included as part of the terms and conditions of a proposed contract. Petitioner has refused to include any of the articles as part of a contractual relationship on the grounds that such articles will or may cause restraints on the statutory powers of petitioner. Petitioner admits to uncertainty as to whether or not the articles are proper subjects for agreement. If they are, it requests guidance as to what forms the agreements should take.

Respondent's motion for dismissal is grounded in a contention that the Commissioner lacks jurisdiction to decide disputes arising under the statutes (*N.J.S.A.* 34:13A-1, *et seq., supra*). It maintains instead that the Commissioner's power is limited to the adjudication of disputes arising from the laws directly

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related to education as embodied in *N.J.S.A.* 18A, Education, and that disputes arising under other titles do not become justiciable issues, subject to litigation before the Commissioner, simply because such disputes affect school employees. To the contrary, respondent argues that *N.J.S.A.* 34:13A-1 *et seq., supra*, affects all public employees. It avers that the statutes cannot be limited solely to the schools and thus are not part of the school law of the State. He further contends that sole jurisdiction for the adjudication of such disputes as herein itemized is vested in the Public Employment Relations Commissioner, hereinafter "P.E.R.C." In support of these contentions he cites *Amorosa v. Board of Education of the City of Bayonne*, 1966 *S.L.D.* 214; *Baratelli v. Jersey City Board of Education*, 1956 *S.L.D.* 80; *Reilly v. Camden City Board of Education*, 127 *N.J.L.* 490 *(Sup. Ct.* 1941); *East Brunswick Board of Education v. East Brunswick Township Council*, 48 *N.J.* 94 (1966).

Petitioner maintains, on the other hand, that only the Commissioner has authority to determine the extent to which a board of education may contract with its employees within the purview of the phrase "terms and conditions of employment" and that the questions of this appeal are questions of law rather than fact. In this regard, petitioner avers that the Commissioner has already made it clear that a board of education has a duty to meet with employee representatives to discuss grievances and proposals, and that in *Perth Amboy Teachers' Association et al. v. Board of Education of the City of Perth Amboy*, 1965 *S.L.D.* 159, the Commissioner pointed out that "final decisions must reflect the independent judgment of the local board."

Petitioner finds no language in *Title* 34:13A-1 *et seq., supra*, delegating to P.E.R.C. the power to determine issues of the kind raised in this appeal. To the contrary, petitioner contends that the primary function of P.E.R.C. is to help reach voluntary agreement between public employers and employees, and absent such agreement petitioner avers the Commissioner retains jurisdiction in educational matters because *N.J.S.A.* 34:13A-8.1 says:

> "Nothing in this act shall be construed to annul or modify * * * any statute or statutes of this State. * * * "

In support of petitioner's position, the *amicus curiae* cites *Porcelli v. Titus*, 1968 *S.L.D.* 218 to buttress the contention that a clear demarcation of the limits, within which boards of education must negotiate, is required from the Commissioner to avoid abdication of authority given to such boards by the education statutes.

In the Commissioner's judgment, petitioner's pleadings in this case do not rise to the status of legally enforceable rights. There is no allegation herein that the provisions of a school law have been broken, but, instead, it is a request for the Commissioner's interpretation of a law affecting public employees at all levels of government. The law, *supra*, is not a "school" law, within the purview of *N.J.S.A.* 18A, although it affects school employees.

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The pertinent statute from *N.J.S.A.* 18A from which the Commissioner derives his authority to adjudicate issues is found in *Chapter* 6-9 and reads as follows:

> "The commissioner shall have jurisdiction to hear and determine * * * all controversies and disputes *arising under the school laws* * * * or under the rules of the state board or of the commissioner." (Emphasis supplied.)

Petitioner would have the Commissioner extend the jurisdiction given to the Commissioner by this statute to embrace a controversy affecting school employees within the context of a law that affects many other groups. He holds that he has no such jurisdictional authority. Rather, the Commissioner believes that the adjudication of disputes arising under *N.J.S.A.* 34:13A-1 *et seq.* must be left to the courts or to an agency specifically delegated to hear such disputes by the Legislature. To hold otherwise would be an open invitation to possible contradictory interpretations of the law. The Commissioner of Education alone could not, in the instant matter, produce a decision interpreting the phrase "terms and conditions of employment" in a way that would have universal application to all of the groups covered by the legislative enactment.

It is clear that the Commissioner must restrict his power to hear and decide disputes to that given him by statute involving "school laws." Thus, in *East Brunswick Board of Education v. East Brunswick Township Council*, 48 *N.J.* 84 (1966), the court said:

> " 'Where the controversy does not arise under the school laws it is outside the Commissioner's jurisdiction *even though it may pertain to school personnel.*' " (Emphasis supplied.)

The Commissioner has had previous occasion to acknowledge just such a lack of jurisdiction. In *Baratelli v. Jersey City Board of Education*, 1956-57 *S.L.D.* 80, he was asked to intervene to determine the tenure status of a recreation instructor under the Veterans Tenure Act. He declined. In *Reilly v. Camden City Board of Education*, 127 *N.J.L.* 490 *(Sup. Ct.* 1941), the New Jersey Supreme Court also found the Commissioner lacking in jurisdiction to hear and decide a school janitor's claim for pension under *R.S.* 43:4-2. See also *Board of Trustees of Teachers' Pension and Annuity Fund v. La Tronica, et at.*, 81 *N.J. Super.* 461 (*App. Div.* 1963).

In the instant matter, the petition herein was filed jointly with P.E.R.C. and with the Commissioner in the early months of 1970. P.E.R.C. dismissed it for lack of jurisdiction in October 1970 following the decision of the New Jersey Supreme Court in *Burlington County Evergreen Park Mental Hospital v. Cooper*, 56 *N.J.* 579 (July 24, 1970). In that decision, the Court said that the powers of P.E.R.C. were limited and did not extend to hearing and deciding unfair labor practice charges. In the course of its argument the Court made it clear that administrative agencies were limited in the exercise of adjudicatory powers to those instances when those powers are conferred expressly or by unavoidable

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implication. Thus, on page 598 the Court said:

> "Whether P.E.R.C. should be invested with authority to hear and decide unfair labor practice charges and to issue various types of affirmative remedial orders respecting them is an important policy question. In our judgment, a policy question of that significance lies in the legislative domain and should be resolved there. *A court should not find such authority in an agency unless the statute under consideration confers it expressly or by unavoidable implication.* In this case, obviously the statute does not expressly confer the power sought to be exercised by P.E.R.C. And, in our judgment, *the statutory language does not justify a judicial determination that power of such magnitude resides there by implication.*
>
> " * * * In situations where such an important public policy matter is involved the *proper course* for the judicial branch of the government to follow *is to deny the power and to assume that if the legislative branch desires P.E.R.C. to have the authority*, it will *bestow it in unmistakable terms.* * * * " (Emphasis supplied.)

In the instant matter, it can hardly be argued that a power to issue affirmative remedial orders regarding the interpretation of the act with respect to terms and conditions of employment denied to P.E.R.C., the agency established to administer *Chapter* 303, *Laws* of 1968, must, by default, be assumed by the Commissioner of Education for school employees. Certainly, if the Legislature had wanted him to assume jurisdiction over disputes arising under *N.J.S.A.* 34:13A-1 *et seq., supra*, with regard to school employees, it would have said so. Rather, the Legislature saw fit to include school enployees with all other public employees in the area of labor negotiations involving "terms and conditions of employment." It can only be assumed that the Legislature believed that there is an expertise required in this area that is not necessarily present in an administrative agency concerned with education. In any event, the Commissioner can find no wording in the statute, *supra*, that confers on him, by "unavoidable implication," the power to interpret this law or any part of it in an advisory manner where schools are concerned.

The Commissioner must, however, point out the limited nature of this decision. In it he is declaring that he cannot assume jurisdiction over the interpretation of a law which is not a school law. He is not declining jurisdiction over those decisions of boards of education which may, as a result of negotiation, be in a direct dichotomy with the school laws as embodied in *N.J.S.A.* 18A. He refers in particular to those laws that confer specific powers on boards of education that may not be abrogated nor usurped by agreement. *Clinton Smith et al. v. the Board of Education of the Borough of Paramus and George Hopkins, Superintendent of Schools of the Borough of Paramus, Bergen County*, 1968 *S.L.D.* 62, 64.

In arriving at the decision herein the Commissioner is aware of the need that many boards of education feel for assistance with the interpretation of

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N.J.S.A. 34:13A-1 *et seq.* Having determined that he is powerless to interpret a law which is not a school law, he also recommends that such interpretation be sought in the courts or through legislative enactment so that the confusion now existent may be terminated.

Accordingly, the motion to dismiss is granted, and the petition herein is dismissed.

COMMISSIONER OF EDUCATION

December 31, 1970

DECISIONS RENDERED BY THE STATE BOARD OF EDUCATION, SUPERIOR COURT (APPELLATE DIVISION), AND SUPREME COURT ON CASES PREVIOUSLY REPORTED

In The Matter Of The Tenure Hearing Of Thomas Appleby, School District of the City of Vineland, Cumberland County.

STATE BOARD OF EDUCATION

Decision

For the Complainant-Appellee Vineland Board of Education, Frank J. Testa, Esq.

For the Respondent-Appellant Thomas Appleby, Harold A. Horwitz, Esq.

This is an appeal from a decision of the Commissioner of Education of the State of New Jersey dated November 25, 1969, that the respondent teacher, Thomas Appleby, as the result of several instances of conduct unbecoming a teacher, demonstrated unfitness for continuation in his employment as a teacher with the Board of Education of the City of Vineland. The hearing consumed 33 separate days between June 7, 1967, and September 8, 1969, producing a transcript in excess of 4,000 pages.

There were 25 instances of misconduct charged against respondent. 2 were abandoned by the local Board before hearing. On 2 others, no evidence was introduced. 10 others were found unsupported by the evidence presented. Of the remaining 11 instances, 9 were found to be supported by the evidence, and as to 2 others, while not proved as charged, the proofs which were introduced were deemed sufficient to constitute conduct unbecoming of a teacher.

The decision of the Commissioner is amply supported by the record, and it is, therefore, affirmed. However, we will comment on certain procedural aspects of the case.

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Respondent contends, among other things, that he was (1) denied adequate discovery by way of interrogatories and (2) denied access to personal records of student witnesses and written statements made by some of the student witnesses on matters which were the subjects of their testimony, for purposes of attacking their credibility.

77 pages of extensive interrogatories were propounded consisting of 58 inquiries, with several subdivisions, embracing more than 250 questions. Of the more than 250 questions, all but 24 were fully answered. The information supplied was more than sufficient to enable respondent to identify and locate all witnesses, to fully investigate all charges and specifications, and to advise him of the nature of the testimonial and other evidence to be introduced at the hearing. The 24 which were refused requested copies of statements of possible witnesses, and the refusal was defended on the ground that the information requested was protected by the "work product" privilege.

At the hearing, the Commissioner denied respondent access to personal records of student witnesses, and denied access to those statements of student witnesses on the subjects under inquiry which he considered protected by the "work product" privilege. Respondent made no palpable showing that would suggest error in these rulings. The record presents no indication of any resulting prejudice to respondent in its preparation for the hearing, cross examination of witnesses, or presentation of any evidence that might probably have affected the ultimate findings made.

We find no procedural infirmity.

The remaining contentions of respondent lack merit.

October 7, 1970

Pending before Superior Court, Appellate Division.

Thomas Cambria, Et Al.,

Petitioners-Appellants,

v.

Board of Education of the Borough of Cliffside Park, Et Al., Bergen County,

Respondents-Appellees.

Decided by the Commissioner of Education, December 2, 1968.

STATE BOARD OF EDUCATION

Decision

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

September 8, 1970

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Mary C. Donaldson,

Petitioner-Appellant,

v.

Board of Education of the City of North Wildwood, Cape May County,

Respondent-Appellee.

Decided by the Commissioner of Education, August 21, 1969.

STATE BOARD OF EDUCATION

Decision

For the Petitioner-Appellant, Perskie & Perskie (Marvin D. Perskie, Esq., of Counsel)

For the Respondent-Appellee, Edwin W. Bradway, Esq.

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

September 8, 1970

Pending before Superior Court, Appellate Division.

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The Board of Education of the City of Elizabeth in the County of Union, a body corporate of the State of New Jersey,

Petitioner-Respondent,

v.

City Council of the City of Elizabeth, Union County,

Respondent-Appellant.

Decided by the Commissioner of Education, July 17, 1969.

DECISION OF THE SUPREME COURT

Argued March 2, 1970 – Decided, March 17, 1970.

On appeal from the State Commissioner of Education.

Mr. John R. Weigel argued the cause for respondent-appellant (*Mr. Edward W. McGrath*, attorney; *Mr. Weigel*, of counsel and on the brief).

Mr. Joseph G. Barbieri argued the cause for petitioner-respondent.

Mr. George F. Kugler, Jr., Attorney General of New Jersey, filed a statement in lieu of brief on behalf of the State Board of Education (*Mrs. Virginia Long Annich*, Deputy Attorney General, of counsel).

PER CURIAM.

The prime question on this appeal is whether the State Commissioner of Education has the authority with respect to type I (*N.J.S.A.* 18A:9-2) school districts to direct an increase in the annual school appropriation, *i.e.*, the amount to be raised by local taxation, over the amount fixed by local officials. *Board of Education of Township of East Brunswick* v. *Township Council of Township of East Brunswick*, 48 *N.J.* 94 (1966) held that he did with respect to type II (*N.J.S.A.* 18A:9-3) districts.

In type II districts (formerly known as chapter 7 districts), the members of the board of education are elected by the voters at the annual school election. *N.J.S.A.* 18A:12-11. The board prepares the annual budget. *N.J.S.A.* 18A:22-7. In districts of this type not having a board of school estimate, the amount to be raised by local taxation is submitted to the electorate at the annual school election for approval. If approved, such amount is certified to the county board of taxation for inclusion in the taxes to be assessed, levied and collected in the municipality comprising the district. *N.J.S.A.* 18A:22-33. If rejected, the governing body of the municipality is directed to fix and certify the amount to be raised by taxation which it determines "to be necessary to be appropriated for each item appearing in such budget to provide a thorough and efficient system of schools in the district." *N.J.S.A.* 18A:22-37, as amended *L.* 1969, c. 303.

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In type I districts (formerly known as chapter 6 districts), the members of the board of education are appointed by the chief executive officer of the municipality. *N.J.S.A.* 18A:12-7. The board prepares the annual budget as in the case of type II districts. *N.J.S.A.* 18A:22-7. But the budget is submitted to the board of school estimate (composed of two members of the board of education, two members of the municipal governing body and the chief executive officer of the municipality, *N.J.S.A.* 18A:22-1). This body determines "the amount of money necessary to be appropriated for the use of the public schools in the district for the ensuing school year, exclusive of the amount which shall have been apportioned to it" by the state Commissioner of Education, and certifies such amount to the municipal governing body and the board of education. *N.J.S.A.* 18A:22-14. The governing body is directed to appropriate automatically the amount so certified and include it in the tax ordinance, except that "the governing body shall not be required so to appropriate any amount in excess of 1½% of the assessed valuation of the ratables of the municipality, but may do so if it so determines by resolution." *N.J.S.A.* 18A:22-15, - 17.

Elizabeth is a type I school district. This controversy involves the appropriation for the school year commencing July 1, 1969. The board of education submitted to the board of school estimate a budget which called for a local tax appropriation of $10,967,401.23, about one and one-half million dollars more than the appropriation for the preceding year. The board of school estimate, by a 3-2 vote, determined and certified to the governing body a figure of $9,539,333.23, which was only about $50,000 more than the preceding year's appropriation. After public hearings and consultation with the board of education, the city governing body finally fixed the sum to be raised by local taxation for school purposes at $9,967,339.23, the amount which is included in the current tax levy. This was approximately $428,000 more than the board of school estimate had certified, but still about $1,000,000 less than the requested figure in the board of education's budget. This difference represents for the most part salary increases for instructional personnel negotiated by the board of education pursuant to *L.* 1968, *c.* 303 and commensurate increases for non-instructional employees. All figures involved are more than twice the amount of 1½% of assessed valuations for the year, a situation which has existed for at least the last decade.

The board of education filed a petition of appeal with the Commissioner of Education, pursuant to *East Brunswick*, seeking relief from the governing body's reduction. After a plenary hearing, which entailed a testimonial review of all budgetary items, the Commissioner determined that an additional appropriation of $866,702, (substantially referable to salary increases and to compensation for substitute teachers, an item which had been stricken in its entirety by the local authorities) "is necessary for the maintenance and operation of a thorough and efficient system of public schools in the City of Elizabeth for the 1969-70 school year" and directed the governing body to take such steps as are required to make an additional appropriation of that amount for the board of education. This has not been done, although the board of education has been administering the school system, including the payment of

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salaries, as if it had.

The governing body appealed to the State Board of Education. *N.J.S.A.* 18A:6-27. Before the appeal was heard, both the Elizabeth board of education and the governing body petitioned us under *R.* 1:1-2 to relax our rules and allow a direct appeal from the Commissioner's decision without the exhaustion of administrative remedies. Because of the urgency and importance of the matter, we granted the petition and advanced the matter for argument.

The governing body's principal contention is that the legislative schemes for the fixing of annual school appropriations are so different between type I and type II districts as to evidence the intent that the governing body's determination in type I districts shall be final. This result is claimed to be particularly dictated where the appropriation exceeds 1½% of assessed valuations. Therefore, it is urged, there is no controversy or dispute arising under the school laws (*N.J.S.A.* 18A:6-9) and the Commissioner has no jurisdiction to review and increase a type I district appropriation fixed by the local governing body.

We cannot find any such intended distinction. See *Board of Education of the City of Elizabeth* v. *Board of School Estimate of the Elizabeth School District*, 95 *N.J. Super.* 284, 288 (*App. Div.* 1967). The New Jersey constitutional and legislative plan to provide and administer public education, and the role of the Commissioner therein, was thoroughly outlined and canvassed by Justice Jacobs in *East Brunswick, supra* (48 *N.J.* at 103-107) and need not be fully repeated here. Everything there said is no less applicable to type I districts. The Constitution, *Art.* VIII, *sec.* IV, *par.* 1, mandates that "[t]he Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." The Legislature has implemented the mandate administratively and financially by providing for local school districts with taxing power, with overall supervisory and control authority in the State Board of Education, *N.J.S.A.* 18A:4-10, and in the Commissioner as the chief executive and administrative officer having general charge and supervision of the work of the department of education and as the official agent of the state board for all purposes, *N.J.S.A.* 18A:4-22. Thus it is the duty of the Commissioner to see to it that every district provides a thorough and efficient school system. This necessarily includes adequate physical facilities and educational materials, proper curriculum and staff and sufficient funds.

The local and supervisory obligation must apply to type I as well as to all other types of districts and there is utterly no legislative indication to the contrary. Otherwise there can be no assurance that the constitutional mandate will be fulfilled in type I districts (which are primarily city school systems.) The type I local governing body, when it is brought into the fund raising process, must perform its function under no less a standard than applies in any other case. What was said in *East Brunswick* in this connection equally applies:

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> "The governing body may, of course, seek to effect savings which will not impair the educational process. But its determinations must be independent cnes properly related to educational considerations rather than voter reactions. In every step it must act conscientiously, reasonably and with full regard for the State's educational standards and its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community." (48 *N.J.* at 105-106).

And the Commissioner's function remains the same. Again *East Brunswick* puts it properly as to all types of districts:

> "Thus, if he finds that the budget fixed by the governing body is insufficient to enable compliance with mandatory legislative and administrative educational requirements or is insufficient to meet minimum educational standards for the mandated 'thorough and efficient' . . . school system, he will direct appropriate corrective action by the governing body or fix the budget on his own within the limits originally proposed by the board of education." (48 *N.J.* at 107).

The 1½% provision (*N.J.S.A.* 18A:22-17) does not evince any different intent. All that provision means is that if the amount fixed by the board of school estimate is less than 1½% of the assessed valuation of the municipal ratables, the governing body must accept that figure and provide for a tax levy to meet it (*Gualano* v. *Board of School Estimate of the Elizabeth School District*, 39 *N.J.* 300, 304 (1963)), but that if the amount fixed by the board exceeds that percentage, the governing body may reduce the amount, acting in accordance with the standard previously mentioned, to a sum not less than the 1½% figure. The provision has nothing whatever to do with the authority and obligation of the Commissioner.(1)

The governing body also urges that the Commissioner has failed to stay within the scope of his jurisdiction under the cirumstances here in his evaluation of the amount of local taxes needed to provide minimum educational standards for the required thorough and efficient school system. The point essentially is that the Elizabeth schools can get along well enough without increasing personnel salaries.

The nature of the judicial inquiry in reviewing administrative determinations is well settled: " 'whether the findings made could reasonably have been reached on sufficient credible evidence present in the record,' considering 'the proofs as a whole,' with due regard to the opportunity of the one who heard the witnesses to judge of their credibility . . ., and, in case of

(1) It is at least interesting to note that when an additional appropriation is required during the school year, the governing body must accept the figure therefor fixed by the board of school estimate, even though the additional plus the original appropriation exceeds 1½%. *N.J.S.A.* 18A:22-23, covering this situation, does not contain the percentage provision.

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agency review, with due regard also to the agency's expertise where such expertise is a pertinent factor." *Close* v. *Kordulak Bros.*, 44 *N.J.* 589, 599 (1965). Here there is no dispute as to the underlying facts and no element of credibility is present, but the matter of the Commissioner's expertise is very much involved. Indeed, it is the paramount factor in this kind of case and a court should be most hesitant to disagree with his express finding that the "additional $866,702 is necessary for the maintenance and operation of a thorough and efficient system of public schools in the City of Elizabeth for the 1969-70 school year." Although the Commissioner specifically found that the governing body's determination was not arbitrary or capricious – which we assume means in the present context that it was made in good faith and not irresponsibility – his scope of review and obligation goes much beyond that criterion. As *East Brunswick* pointed out, he "is charged with the overriding responsibility of seeing to it that the mandate for a thorough and efficient system of free public schools is being carried out." 48 *N.J.* at 106. We are thoroughly satisfied that, especially in the light of his expertise in the latter field, his conclusion is eminently supported by the proofs and that we should not disturb it.

To be a bit more detailed, the governing body criticizes the Commissioner's finding that the crucial across-the-board salary increases "are necessary to keep salaries in Elizabeth in a reasonably competitive posture, either with respect to other school districts or, where applicable in the case of non-professional employees, with respect to private employment." It suggests that a competitive salary posture is not an element of a thorough and efficient public school system. We think that the Commissioner could properly find that it is, in the light of his experience, current knowledge and educational expertise. It goes without saying that instructional personnel are the core of every school system. General competence, motivation, dedication and high morale are absolutely essential to proper education. Adequate salaries in an inflationary economy bear a strong relationship to the presence of these factors, in order to hold teachers and other employees from leaving the system, to give them incentive to do a top-notch job and to attract good replacements for the inevitable vacancies that occur. All of this is just as true, if not more so, in an urban school district than in suburban districts, because of the larger number of underprivileged children generally found in city schools. Salaries that are greatly below those being paid in nearby cities or in non-urban school districts in the geographical area can only result in an urban school system running downhill. There is no suggestion that the Elizabeth salary scale, with the increases, is unreasonably high, competitively. Sound reason indicates the relation of competitive salary posture to a thorough and efficient school system in Elizabeth. To us it is at the same time an element of the makeup of the community and minimum educational standards which, as said in the previous quotations from *East Brunswick*, enter into the picture of a reasonably thorough and efficient school system in a particular case.

The governing body also projects in its brief in this court, for the first time, a claimed constitutional issue. As we understand it, the contention is that the constitutional mandate directing the Legislature to provide for the

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maintenance and support of a thorough and efficient public school system requires that body to furnish, presumably out of state revenues, the funds to attain such a system, at least where a municipality claims to be unable to provide it out of local property taxes. The corollary is that the present local tax process, which is practically geared to the community's wealth and willingness to pay, is unconstitutional. We have grave doubts whether the question is properly one for the judiciary. In any event no record has been made with reference to it and it has not been adequately briefed, even by the proponent. We therefore decline to consider it at this time. We are fully cognizant of the financial difficulties of the older cities of the state which unquestionably have a declining property tax base in relation to growing demands for governmental services, including schools, than do most suburban communities, the problem which underlies the governing body's position in this case. We only suggest that the source of a solution appears to be more legislative than judicial.

The order of the Commissioner of Education directing the City Council of Elizabeth to take such steps as are required to make an additional appropriation of $866,702 for the school year 1969-70 for the Board of Education is affirmed. No costs.

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Jeffrey Goodman, by his parent and natural guardian, Samuel Goodman; Donald Strauss, by his parent and natural guardian Dr. F. Strauss; Daniel Lippman, by his parent and natural guardian Dr. H. E. Lippman; Kenneth Schachat, by his parent and natural guardian Herbert Schachat; Gina Novendstern, by her parent and natural guardian Leon Novendstern; Nancy Oxfeld, by her parent and natural guardian Emil Oxfeld; Jill Kessler, by her parent and natural guardian Edward Kessler; Peter Shapiro, by his parent and natural guardian Dr. Myron J. Shapiro,

Petitioners-Appellants,

v.

Board of Education of the School District of South Orange-Maplewood, Essex County,

Respondent-Appellee.

Decided by the Commissioner of Education, June 18, 1969.

STATE BOARD OF EDUCATION

Decision

For the Petitioners-Appellants, Chasan, Leyner & Holland (Lewis M. Holland, Esq., of Counsel)

For the Respondent-Appellee, Cummis, Kent & Radin (Clive S. Cummis, Esq., of Counsel)

By consent of the parties, this matter is remanded to the Commissioner of Education for final disposition.

November 4, 1970

Pending before Commissioner on Remand

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Magdalene Lichtenberger,

Petitioner-Appellee,

v.

Board of Education of the Borough of Maywood, Bergen County,

Respondent-Appellant.

STATE BOARD OF EDUCATION

Decision

For the Petitioner-Appellee, Francis J. Feeley, Esq.

For the Respondent-Appellant, Fred G. Van Riper, Esq.

The decision of the Commissioner of Education of the State of New Jersey, dated September 26, 1966, is affirmed for the reasons set forth therein.

October 7, 1970.

In the Matter of the Tenure Hearing of James Norton, School District of the Borough of Ridgefield, Bergen County.

Decided by the Commissioner of Education, September 2, 1969.

STATE BOARD OF EDUCATION

Decision

The appeal from the decision of the Commissioner of Education is dismissed for lack of prosecution.

September 3, 1970

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Victor Porcelli, Et Als.,

Plaintiffs-Petitioners,

v.

Franklin Titus, Superintendent of the Newark Board of Education and the Newark Board of Education, Essex County,

Defendants-Respondents.

Decided by the Commissioner of Education, October 22, 1968, and December 13, 1968.

Affirmed by the State Board of Education, May 7, 1969.

Affirmed by Superior Court, Appellate Division, November 7, 1969.

Petition for Certification denied, New Jersey Supreme Court, January 13, 1970.

Jack Rosenman,

Petitioner-Appellant,

v.

Board of Education of the Township of Howell, Monmouth County,

Respondent-Appellee.

Decided by the Commissioner of Education, August 19, 1969.

STATE BOARD OF EDUCATION

Decision

The appeal from the decision of the Commissioner of Education is dismissed for lack of prosecution.

September 8, 1970

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Peter J. Saker, Inc., a body corporate of the State of New Jersey,

Petitioner-Appellant,

v.

Board of Education of the Matawan Regional School District, Monmouth County, and Michael Riesz & Co., Inc., a body corporate of the State of New Jersey, Fords, New Jersey,

Respondents-Appellees.

Decided by the Commissioner of Education, May 27, 1969.

STATE BOARD OF EDUCATION

Decision

For the Petitioner-Appellant, Parsons, Canzona, Blair & Warren (William G. Bassler, Esq., of Counsel)

For the Respondent-Appellee, Board of Education of the Matawan Regional School District, Vincent C. DeMaio, Esq.

This is an appeal by a rejected bidder on school construction projects from a determination made by the Commissioner of Education of New Jersey on May 27, 1969, holding that at the time petitioner filed its appeal, the work performed by the accepted bidder had proceeded to a point beyond recall, and that no practicable relief could be afforded petitioner by the Commissioner. No stay, restraint or other *ad interim* or extraordinary relief was sought by petitioner before any administrative or other tribunal to prevent commencement or completion of the projects.

At the time of argument of the appeal to the State Board of Education, July 23, 1970, the projects were fully completed, and the issue of the propriety of the award of contracts was thereby made moot.

The only relief available to petitioner lies in a civil action before a competent tribunal. The decision of the Commissioner is therefore affirmed.

September 8, 1970

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Board of Education of the Borough of South Belmar,

Petitioner-Appellant,

v.

Board of Education of the City of Asbury Park,

Respondent-Appellee, and

Board of Education of the Borough of Manasquan,

Respondent-Appellant.

Decided by the Commissioner of Education, November 21, 1969.

STATE BOARD OF EDUCATION

Decision

For the Petitioner-Appellant, Harold Feinberg, Esq.

For the Respondent-Appellee Board of Education of the City of Asbury Park, Joseph N. Dempsey, Esq.

For the Respondent-Appellant Board of Education of the Borough of Manasquan, Pearce, Pearce & Connolly (Owen B. Pearce, Esq., of Counsel)

Petitioner-Appellant, Board of Education of the Borough of South Belmar, seeks relief under *N.J.S.A.* 18A:38-13 from a sending-receiving relationship between it and the Board of Education of the City of Asbury Park. The Commissioner of Education of the State of New Jersey, in his decision dated November 21, 1969, held that the sending-receiving relationship was governed by the provisions of *N.J.S.A.* 18A:38-12, and denied the relief sought upon the ground that there had not been shown "good and sufficient reason" under *N.J.S.A.* 18A:38-13 for granting such relief.

N.J.S.A. 18A:38-13 requires a showing of "good and sufficient reason" before such relief can be granted and permits equitable determinations to be made in such cases.

The decision of the Commissioner is affirmed for the reasons expressed in his decision of November 21, 1969. However, we are mindful of the difficulties that can occur where, as here, 33% of South Belmar's pupils are affected by this determination and are required hereunder to attend school in the Asbury Park system. This is particularly so where the record shows that for an extensive period of time Asbury Park had not sought compliance by South Belmar with the terms of the applicable statute, *N.J.S.A.* 18A:38-12, and additionally, because of the fact that the 1970-71 school term has already commenced. A requirement of immediate compliance with our decision would not be in the

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best interest of the pupils involved.

We hold, therefore, that not less than 11% in the school year, 1971-72, not less than 22% in the school year, 1972-73, and 33% in the school year, 1973-74, of South Belmar's pupils shall be sent to the Asbury Park School District.

October 7, 1970

Emil F. Tomecek,

Petitioner-Appellant,

v.

Board of Education of the Borough of Verona, Essex County,

Respondent-Appellee.

Decided by the Commissioner of Education, December 4, 1969.

STATE BOARD OF EDUCATION

Decision

The motion to dismiss the appeal from the decision of the Commissioner of Education is granted on ground of mootness.

September 8, 1970

Board of Education of the City of Trenton,

Petitioner-Appellee,

v.

City Council of the City of Trenton, Mercer County,

Respondent-Appellant.

Decided by the Commissioner of Education, November 10, 1969.

STATE BOARD OF EDUCATION

Decision

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

September 8, 1970