1-08

#1-08

OAL DKT. NO. EDU 9716-07
AGENCY DKT. NO. 228-8/07

LORI-ANNE CUMMINGS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/02/08

Date of Mailing: 1/03/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 09716-07
AGENCY DKT. NO. 228-8/07

LORI-ANNE CUMMINGS,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,
Respondent.

Jennifer Borja, Esq., (Timothy R. Smith & Associates, LLC, attorneys) for petitioner

Karen A. Murray, Esq., (The Murray Law Firm) for respondent

Record Closed: November 20, 2007 Decided: November 21, 2007

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

The Department of Education Bureau of Controversies and Disputes transmitted this matter to the Office of Administrative Law (OAL) on September 19, 2007 for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to –15 and N.J.S.A. 52:14F-1 to –13. As a result of several conferences, the parties settled the matter.

On November 20, 2007, the parties submitted the attached copies of a Settlement Agreement and General Release as well as the Board's Resolution.

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

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

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

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

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

November 21, 2007
DATE

JESSE H. STRAUSS, ALJ

Date Received at Agency: 11-27-07

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

NOV 27 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

id

THE MURRAY LAW FIRM, LLC.
3 Revmont Drive, Suite 318
Shrewsbury, New Jersey 07702
(732) 389-1010
Attorneys for Respondent, Elizabeth Board of Education

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2007 NOV 20 A 9:37
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

LORRI-ANNE CUMMINGS, Petitioner, v. ELIZABETH BOARD OF EDUCATION, Respondent.	STATE OF NEW JERSEY COMMISSIONER OF EDUCATION/ OFFICE OF ADMINISTRATIVE LAW OAL DKT. NO. EDUOR 09716-2007N AGENCY DOCKET NO. 208-8/07

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release is made by and between the Elizabeth Board of Education (the "Board") whose administrative offices are located at 500 North Broad Street, Elizabeth, New Jersey 07207 and Lorri-Anne Cummings ("Cummings"), whose address is 9 Petunia Drive, Apartment 2E, North Brunswick, New Jersey 08902. In consideration of mutual promises and undertakings contained in this Settlement Agreement and General Release and for good and valuable consideration the receipt of which is hereby acknowledge, the undersigned parties state:

WHEREAS, on March 30, 2007, Cummings was employed as a teacher by the Board;

WHEREAS, on that date, Criminal Complaints were issued against Cummings for certain acts alleged to have occurred while Cummings was in the employ of the

Board. Copies of the Municipal Court Complaints under Docket Nos. S-2007-002969-2004 and S-2007-2968-2004 which are attached hereto as Exhibit A;

WHEREAS, on May 31, 2007, Elizabeth Municipal Court dismissed the above-referenced criminal complaints against Cummings. Copies of the dispositions reflecting said dismissals are attached hereto as Exhibit B;

WHEREAS, pursuant to N.J.S.A. 18A:16-6.1, Cummings' defense counsel forwarded a demand letter to the Board, on or about June 21, 2007, seeking reimbursement from the Board for Cummings' attorney's fees and costs associated with the legal defense the Elizabeth Municipal Court Complaints under Docket Nos. S-2007-002969-2004 and S-2007-2968-2004;

WHEREAS, the parties have determined that it is in their respective best interests to enter into this Settlement Agreement and General Release to avoid the need for further litigation; and

NOW, THEREFORE, in consideration of the mutual promises and covenants, the parties agree as follows:

1. The Board will pay to the New Jersey Education Association (N.J.E.A.) the sum of Four Thousand Four Hundred Thirty-Eight Dollars and Thirteen Cents ($4,438.13), as full and complete indemnification of the attorney's fees incurred by Cummings in relation to the Elizabeth Municipal Court Complaints under Docket Nos. S-2007-002969-2004 and S-2007-0002968-2004. A check for the Indemnification shall be sent to Cummings' legal counsel, Timothy R. Smith & Associates L.L.C., whose offices are located at 76 South Orange Avenue, Suite 201, South Orange, New Jersey, 07079.

2. For and in consideration of the Indemnification set forth in Paragraph One (1) above, Cummings and her heirs, executors, administrators, successors and assigns, hereby forever release and discharge the Elizabeth Board of Education, its members, successors and assigns and all of its or their past or future members and all of its or their past or future members, officers, agents, employees, administrators, attorneys, fiduciaries, successors and assigns (whether acting as agents for the Board, its affiliates or its related entities or in their individual capacities) from any and all claims, demands, causes of action, fees and liabilities of any kind whatsoever (upon any legal or equitable theory, whether contractual, common-law, statutory, federal, state, local, or otherwise), whether known or unknown, which Cummings ever had, now has or hereafter may have against the Board by reason of any actual or alleged act, omission, transaction, practice, conduct, occurrence or other matter relating to any and all allegations contained in Municipal Court Complaints under Docket Nos. S-2007-002968-2004 and S-2007-002969-2004.

3. This Settlement Agreement and General Release are subject to the approval of the Commissioner of Education and the Administrative Law Judge pursuant to N.J.A.C. 6A: 3-1.13 and N.J.A.C. 1:1-19.1.

4. Cummings, in consideration of the Indemnification provided in Paragraph One (1), shall withdraw her Petition, with prejudice, pursuant to N.J.A.C. 1:1-19.2.

5. The parties agree that if any of the provisions, terms, clauses, waivers and releases of claims and rights contained in this Settlement Agreement and General Release are declared illegal, unenforceable, or ineffective in a legal forum of competent

jurisdiction, such provisions, terms, clauses, waivers and releases of claims or rights shall be modified, if possible, in order to achieve, to the extent possible, the intentions of the parties. If any such provisions, terms, clauses, waivers and releases of claims and rights contained in this Settlement Agreement and General Release cannot be modified, the remaining provisions, terms, clauses, waivers and releases of claims and rights contained in this Agreement shall remain in full force and effect.

6. This Settlement Agreement and General Release sets forth the entire terms between the parties, and fully supersedes any and all prior Agreements or understanding between them pertaining to the subject matter thereof, if any.

7. Nothing contained in this Settlement Agreement and General Release constitutes an admission of any wrongdoing by either party, and neither party shall be considered to be a prevailing party in this matter.

8. All terms of this Settlement Agreement and General Release are deemed material. The parties agree that this Settlement Agreement and General Release may not be altered, amended, modified, superseded, canceled or terminated except by an express written Agreement duly executed by all the parties or their attorneys on their behalf, which makes specific reference to this Settlement Agreement and General Release.

9. Cummings agrees that she has been fully and fairly represented by legal counsel throughout this proceeding.

10. This Settlement Agreement and Release contains the entire agreement between the parties, and no other representations, whether verbal or in writing shall be binding upon them.

11. This Agreement shall not be precedential with respect to any similar claims raised against the Elizabeth Board of Education by the Elizabeth Education Association (E.E.A.), the New Jersey Education Association (N.J.E.A.) and/or any of their respective members.

12. This Settlement Agreement and General Release is an agreement that shall be construed in accordance with the laws of the State of New Jersey.

13. All parties hereby agree that the terms of this Settlement Agreement and General Release are binding upon all parties, their heirs and their assigns.

TIMOTHY R. SMITH & ASSOCIATES, L.L.C.

Jennifer Borja, Esquire
Attorney for Lorri-Anne Cummings

Dated: 10/17/07

THE MURRAY LAW FIRM, LLC

Karen A. Murray, Esquire
Attorney for the Elizabeth Board of Education
Dated: 11/15/07

LORRI-ANNE CUMMINGS

Lorri-Anne Cummings

Dated: 10/17/07

ELIZABETH BOARD OF EDUCATION

Harold E. Kennedy, Jr.
Board Secretary/School Business Admin.
Dated: 11/15/07

EXHIBIT A

POLICE CASE NO.	
07-676A	
COURT (NAME, ADDRESS, TELEPHONE NO.)	
ELIZABETH CITY ONE POLICE PLAZA ELIZABETH NJ 07201 908-558-6800	
COUNTY OF UNION N.J.	COURT CODE 2004
COURT DOCKET NUMBER(S) 1 THRU 2	

The State of New Jersey
vs.

S-2007-002968-2
PAGE 1 OF

Defendant Name [redacted] CUMMINGS

Address NJ HOLAC BETTLER SCHOOL #21

City, State ELIZABETH NJ 07202

SS No.

Date of birth 00-00-0000 Date of arrest 00-00-0000

Number of co-defendants 000 Dr. Lic.# SBI No.

COMPLAINT - SUMMONS

Complainant Name: SHAKEMA CUMMINGS [redacted]

of

(IDENTIFY DEPARTMENT OR AGENCY REPRESENTED)

Upon oath says that, to the best of (his) (her) knowledge, information and belief, the named defendant on or about the

29 day of 03 20 2007, in ELIZABETH CITY MUNICIPAL CODE NO. 2004 County of UNN N.J.

did;

WITHIN THE JURISDICTION OF THIS COURT, DID CAUSE BODILY INJURY TO SHAKEMA HEMMINGWAY'S DAUGHTER ZAHIRAH HEMMINGWAY (4 YRS OLD) BY GRABBING HER BY THE AR

IN VIOLATION OF NJ S 2C:12-1A

WITHIN THE JURISDICTION OF THIS COURT, WITH THE PURPOSE TO ANNOY AND HARASS SHAKEMA HEMMINGWAY'S DAUGHTER ZAHIRAH, DID ENGAGE IN A COURSE OF ALARMING CONDUCT, BY CALLING HER DAUGHTER FAT.

IN VIOLATION OF NJ S 2C:33-4B

PROBABLE CAUSE IS (IS NOT) FOUND FOR THE ISSUANCE OF THESE COMPLAINTS.

In Violation Of: ☐ Domestic Violence - Confidential

Charge Number 1		Charge Number 2		Charge Number	
N.J.S. 2C:12-1A	ACSX	N.J.S. 2C:33-4B	ACSX	N.J.S.	ACSX
Charge Number 1 As Amended		Charge Number 2 As Amended		Charge Number As Amended	
N.J.S.	ACSX	N.J.S.	ACSX	N.J.S.	ACSX

Subscribed and sworn to before me this 30 day of March, 2007.

Signed [redacted] Signed [redacted]
(NAME AND TITLE OF PERSON ADMINISTERING OATH) (COMPLAINANT)

YOU ARE HEREBY SUMMONED TO APPEAR BEFORE THIS COURT TO ANSWER THIS COMPLAINT. YOU FAIL TO APPEAR ON THE DATE AND AT THE TIME STATED, A WARRANT WILL BE ISSUED FOR YOUR ARREST.
DATE SUMMONS ISSUED 03/29/2007 DATE TO APPEAR 04/30/2007 TIME 08:45 AM

[redacted] TITLE
(SIGNATURE PERSON ISSUING SUMMONS)

(IF YOU INTEND TO PLEAD NOT GUILTY, YOU MUST NOTIFY THE COURT AT LEAST SEVEN DAYS IN ADVANCE OF YOUR SCHEDULED COURT APPEARANCE DATE.)

POLICE CASE NO.	
	07-4764
COURT (NAME, ADDRESS, TELEPHONE NO.)	ELIZABETH CITY ONE POLICE PLAZA ELIZABETH NJ 07201 908-558-5600
COUNTY OF UNION N.J.	COURT CODE 2004
COURT DOCKET NUMBER(S)	1 THRU 2

The State of New Jersey
vs.

S-2007-002969-20

Defendant Name ALISA CUMMINGS

Address NICHOLAS BUTLER SCHOOL #3

City, State ELIZABETH NJ 07202

SS No.

Date of birth 00-00-0000 Date of arrest 00-00-0000

Number of co-defendants 000 Dr. Lic.# SBI No.

COMPLAINT - SUMMONS

Complainant Name: SHAKEMA CUMMINGS of [redacted]

(IDENTIFY DEPARTMENT OR AGENCY REPRESENTED)

Upon oath says that, to the best of (his) (her) knowledge, information and belief, the named defendant on or about the 29 day of 03 20 2007 in ELIZABETH CITY MUNICIPAL CODE NO. 2004 County of UNN N.J.

did;

WITHIN THE JURISDICTION OF THIS COURT, DID CAUSE BODILY INJURY TO SHAKEMA HEMMINGWAY, BY HITTING HER FINGER WITH A CELL PHONE

IN VIOLATION OF NJ S 2C:12-1A

WITHIN THE JURISDICTION OF THIS COURT, WITH THE PURPOSE TO ANNOY AND HARASS SHAKEMA CUMMINGS, DID ENGAGE IN A COURSE OF ALARMING CONDUCT, BY THREATENING TO DO HER HARM.

IN VIOLATION OF NJ S 2C:33-4B

PROBABLE CAUSE IS (IS NOT) FOUND FOR THE ISSUANCES OF THESE COMPLAINTS

In Violation Of: ☐ Domestic Violence - Confidential

Charge Number 1		Charge Number 2		Charge Number	
N.J.S. 2C:12-1A	ACSX	N.J.S. 2C:33-4B	ACSX	N.J.S.	ACSX
Charge Number 1 As Amended		Charge Number 2 As Amended		Charge Number As Amended	
N.J.S.	ACSX	N.J.S.	ACSX	N.J.S.	ACSX

Subscribed and sworn to before me this 30 day of March, 20 07

Signed _____ (NAME AND TITLE OF PERSON ADMINISTERING OATH)

Signed _____ (COMPLAINANT)

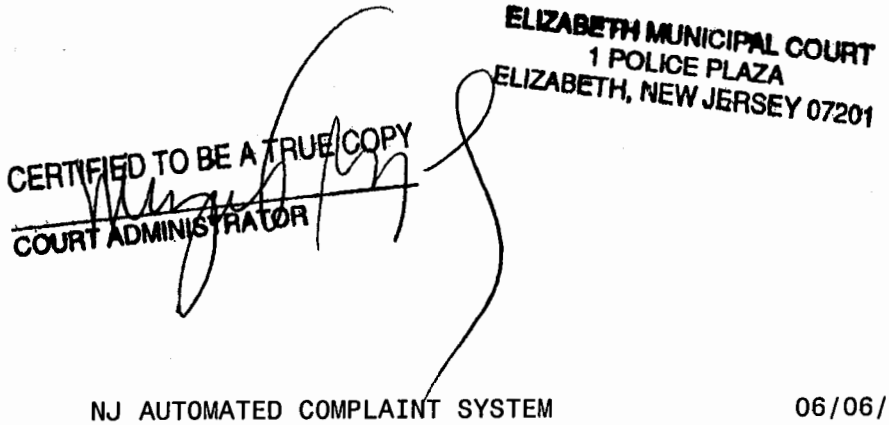
YOU ARE HEREBY SUMMONED TO APPEAR BEFORE THIS COURT TO ANSWER THIS COMPLAINT. YOU FAIL TO APPEAR ON THE DATE AND AT THE TIME STATED, A WARRANT WILL BE ISSUED FOR YOUR ARREST.

DATE SUMMONS ISSUED 03/29/2007 DATE TO APPEAR 04/30/2007 TIME 08:45 AM

(SIGNATURE PERSON ISSUING SUMMONS) TITLE

(IF YOU INTEND TO PLEAD NOT GUILTY, YOU MUST NOTIFY THE COURT AT LEAST SEVEN DAYS IN ADVANCE OF YOUR SCHEDULED COURT APPEARANCE DATE.)

EXHIBIT B



ELIZABETH CITY NJ AUTOMATED COMPLAINT SYSTEM 06/06/2007
CMM1101 COMPLAINT SUMMARY 16:15

COMPLAINT NO: S 2007 002969 COURT CODE: 2004 COURT DATE: 05 31 2007
ASSIGNED DATE: OFFICER ID
COURT APPR: Y PAYABLE: N MUN OF OFFENSE: 2004 RELATED COMP: N
TTL CHRGS: 002 OFFNS: 2C:12-1A ACSX: AUX OFFNS:
DRUG CODE: DEGREE: N DOMESTIC VIOLENCE IND: N DORA DATE: 00 00 0000
DESC: SIMPLE ASSAULT OFFENSE STATUS: DISP COMPLAINT STATUS: DISP
ISSUE DATE: 03 29 2007 OFFENSE DATE: 03 29 2007 ARREST DATE:
AMENDED OFFENSE: DESC:
AGY/OFF/UNT: 2004 9999 COMP NAME: SHAKEMA HEMINGWAY
DEFENDANT NAME : LORRI-ANNE CUMMINGS ENTERED BY: JULXD4

WARRANT NUMBER: 0000000000 WARR DATE : WARR STATUS:
EXECUTED BY : ASSIGNED AGENCY: WARR SERVED DATE:

BAIL RECPT NO. : SURETY NAME:
BAIL SET : 0.00 BAIL POSTED: 0.00 BAIL STATUS:
BAIL SEQ NUMBER: 000000 COMPLAINT PLEA: 2 FINDING: 3 FINDING DATE: 05 31 2007
CONDITIONAL DISCHARGE STATUS:
APPEAL STATUS : APPEAL DATE:

ENTER - COMPLAINT INQUIRY MENU PF1 - ASSESSED PAID SUMMARY

4-© 1 Sess-1 172.16.1.27 TM200408 1/2

CERTIFIED TO BE A TRUE COPY
COURT ADMINISTRATOR

ELIZABETH MUNICIPAL COURT
1 POLICE PLAZA
ELIZABETH, NEW JERSEY 07201

ELIZABETH CITY NJ AUTOMATED COMPLAINT SYSTEM 06/06/2007
CMM1101 COMPLAINT SUMMARY 16:15

COMPLAINT NO: S 2007 002968 COURT CODE: 2004 COURT DATE: 05 31 2007
ASSIGNED DATE: OFFICER ID
COURT APPR: Y PAYABLE: N MUN OF OFFENSE: 2004 RELATED COMP: N
TTL CHRGS: 002 OFFNS: 2C:12-1A ACSX: AUX OFFNS:
DRUG CODE: DEGREE: N DOMESTIC VIOLENCE IND: N DORA DATE: 00 00 0000
DESC: SIMPLE ASSAULT OFFENSE STATUS: DISP COMPLAINT STATUS: DISP
ISSUE DATE: 03 29 2007 OFFENSE DATE: 03 29 2007 ARREST DATE:
AMENDED OFFENSE: DESC:
AGY/OFF/UNT: 2004 9999 COMP NAME: SHAKEMA HEMINGWAY
DEFENDANT NAME : LORRI-ANNE CUMMINGS ENTERED BY: JULXD4

WARRANT NUMBER: 0000000000 WARR DATE : WARR STATUS:
EXECUTED BY : ASSIGNED AGENCY: WARR SERVED DATE:

BAIL RECPT NO. : SURETY NAME:
BAIL SET : 0.00 BAIL POSTED: 0.00 BAIL STATUS:
BAIL SEQ NUMBER: 000000 COMPLAINT PLEA: 2 FINDING: 3 FINDING DATE: 05 31 2007
CONDITIONAL DISCHARGE STATUS:
APPEAL STATUS : APPEAL DATE:

ENTER - COMPLAINT INQUIRY MENU PF1 - ASSESSED PAID SUMMARY

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and Petitioner, Lorri-Anne Cummings, have discussed the resolution of a dispute before the Commissioner of Education and Office of Administrative Law (OAL) under OAL Docket Number EUDOR-09716-2007N and Agency Docket Number 208-8/07, in lieu of a hearing, and;

WHEREAS, in the interest of cost effectiveness and judicial economy, the parties have amicably agreed to resolve the above-referenced case, with prejudice;

NOW, THEREFORE, BE IT RESOLVED, that the Board hereby agrees to accept the Confidential Settlement Agreement on file with the School Business Administrator/Board Secretary.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON OCTOBER 18, 2007

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary

#2-08

OAL DKT. NO. EDU 12194-05
AGENCY DKT. NO. 247-9/05

ANGELA COSIMANO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAINSIDE, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/02/08

Date of Mailing: 1/03/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 12194-05

AGENCY DKT. NO. 247-9/05

ANGELA COSIMANO,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF MOUNTIANSIDE, UNION COUNTY,

Respondent.

Wayne J. Oppito, Esq., for petitioner

David B. Rubin, Esq., for respondent

Record Closed: November 19, 2007 Decided: November 26, 2007

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

This matter was transmitted to the Office of Administrative Law (OAL) on November 7, 2005, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

A hearing was scheduled on October 29 and October 30, 2007. Prior to the date of hearing the parties settled the matter. The attached Stipulation of Settlement was submitted on November 19, 2007, indicating the terms of agreement which are incorporated herein by reference.

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

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

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

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

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

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

November 20, 2007
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency: 11-29-07

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

NOV 29 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

da

DAVID B. RUBIN, P.C.
Attorney At Law
44 Bridge Street
P. O. Box 4579
Metuchen, New Jersey 08840
(732) 767-0440
Attorney for Respondent

ANGELA COSIMANO,	:	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
Petitioner,	:	Agency Docket No. 247-9/05
v.	:	
MOUNTAINSIDE BOARD OF EDUCATION, UNION COUNTY,	:	
Respondent.	:	**STIPULATION OF SETTLEMENT**

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This matter having been amicably resolved by the parties, the within petition is hereby dismissed with prejudice, on the following terms:

1. Respondent, Mountainside Board of Education, shall pay petitioner for thirteen accumulated vacation days, at her rate of pay for the 2004-2005 school year, her final year of employment with respondent, in satisfaction of all claims that were, or could have been, asserted in this matter including, but not limited to, any claims for mileage reimbursement.

2. In consideration of the payment set forth in paragraph 1, petitioner releases respondent, Mountainside Board of Education, its members, employees, agents and representatives, from any claims of any nature, based on events preceding the execution of this Stipulation of Settlement.

3. The undersigned counsel represent that they have consulted with their respective clients concerning the terms hereof, and execute this Stipulation of Settlement with due authority.

WAYNE J. OPPITO, ESQ.
Attorney for Petitioner

BY: Wayne J. Oppito
WAYNE J. OPPITO, ESQ.

DAVID B. RUBIN, P.C.
Attorney for Respondent

BY: _____
DAVID B. RUBIN, ESQ.

3-08

#3-08

OAL DKT. NO. EDU 13142-05
AGENCY DKT. NO. 263-10/05

JUDITH RICHBURG,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ORANGE TOWNSHIP, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 1/02/08

Date of Mailing: 1/03/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 13142-05
AGENCY DKT. NO. 263-10/05

JUDITH RICHBURG,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE TOWNSHIP, ESSEX COUNTY,

Respondent.

Charles I. Auffant, Esq., for petitioner

Melvin Randall, Esq., for respondent (Love & Randall, attorneys)

Record Closed: December 3, 2007 Decided: December 4, 2007

BEFORE **JAMES A. GERAGHTY,** ALJ:

This matter was transmitted to the Office of Administrative Law on December 29, 2005 for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

A hearing was scheduled before the undersigned on December 3, 2007. On that date the parties appeared and reached a settlement and executed the enclosed Stipulation of Settlement indicating the terms of settlement.

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

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

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

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

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

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

12/4/07
DATE

JAMES A. GERAGHTY, ALJ

Date Received at Agency: 12-5-07

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

DEC 6 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

pb

CHARLES I. AUFFANT
Attorney at Law
661 Franklin Avenue
Nutley, New Jersey 07110
973-661-4545
Attorney for Petitioner

JUDY RICHBURG Petitioner vs. ORANGE TOWNSHIP PUBLIC SCHOOLS Respondent	STATE OF NEW JERSEY COMMISSIONER OF EDUCATION OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO.: **EDUOR - 13142-2005N** **STIPULATION OF SETTLEMENT**

WHEREAS, Judy Richburg, a tenured teacher in the Orange School District, had her salary increment withheld at the conclusion of the 2004-2005 school year; and

WHEREAS, the subject increment withholding was based on less than the statutorily required number of evaluations/observations; and

WHEREAS, the aforementioned adverse employment action was the first received by Ms. Richburg in her 24 years of employment with the district; and

WHEREAS, Ms. Richburg appealed the increment withholding by filing a Petition with the Commissioner of Education; and

WHEREAS, prior to the hearing, counsel for the Board met with counsel for Ms. Richburg and the Administrative Law Judge in an effort to amicably settle the matters in dispute; and

WHEREAS, the Board believes that a Settlement is in the best interest of all parties;

NOW THEREFORE BE IT RESOLVED, that the parties hereby agree to settle the pending cause of action pursuant to the following terms and conditions:

1. Judy Richburg shall be returned to her proper step on the salary guide based on her 24 years of service to the Orange School District;
2. The Board shall not be required to pay Ms. Richburg for the increment withheld;
3. The Board shall not be required to pay petitioner's counsel fees.

By Melvin Ranon ((Bd Atty

Dated: 12/3/07

ORANGE BOARD OF EDUCATION

Dated: 12/3/07

Judy Richburg

JUDY RICHBURG

G:\CORRESPO\Richburg, J\Settlement.wpd

CHARLES I. AUFFANT
Attorney-At-Law

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FAX COVER SHEET

DATE: December 4, 2007

FROM: Charles I. Auffant

RE: Judy Ricyburg v.Orange Township Public School

DELIVER TO: Judge Geraghty

LOCATION:

FAX NUMBER: **973-648-6124**

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Here is a corrected First Page.

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4-08

WILLIAM NEWSOME,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF DUMONT, BERGEN COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner – a tenured health and physical education teacher employed by the district for more than twenty-nine years – appealed the district's withholding of his salary increment for the 2006-07 school years as arbitrary, capricious and unreasonable. The respondent contends that the increment withholding was based upon petitioner's need to improve his instructional management and use of disciplinary procedures following a number of incidents in which petitioner used inappropriate language, derogatory names, and demeaning disciplinary techniques with his students.

The ALJ found, *inter alia*, that: during the 2005-06 school year, petitioner had engaged in a form of discipline that required students to sit on a chair inside a storage closet; during the same time period, petitioner used demeaning and derogatory names toward students being disciplined; and petitioner had previously been warned about similar behavior and had received a three day suspension with pay in 2002. The ALJ concluded that petitioner had not met his burden of proving that the respondent's action to withhold his increment was arbitrary, capricious, unlawful, or induced by improper motive. The ALJ recommended dismissal of the petition with prejudice.

Upon a full and independent review of the record, the Commissioner agreed with the ALJ, for the reasons expressed in her decision, that the withholding of petitioner's increment was a reasonable exercise of the Board's lawful discretionary authority. Accordingly, the Initial Decision was adopted as the final decision in this matter.

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

January 4, 2008

OAL DKT. NO. EDU 11390-06
AGENCY DKT. NO. 382-10/06

WILLIAM NEWSOME,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF DUMONT, BERGEN COUNTY,	:	
RESPONDENT.	:	

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

Upon review, the Commissioner – having no basis, pursuant to *N.J.S.A.* 52:14B-10(c), to question the credibility determinations of the Administrative Law Judge or the findings of fact based upon them – concurs that the Board of Education's withholding of the petitioner's 2006-07 increment was a reasonable exercise of the Board's lawful discretionary authority.

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

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 1/04/08

Date of Mailing: 1/04/08

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11390-06

AGENCY DKT. NO. 382-10/06

WILLIAM NEWSOME,

Petitioner,

v.

DUMONT BOARD OF EDUCATION,

Respondent.

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

James L. Plosia, Jr., Esq., for respondent
(Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: November 8, 2007 Decided: November 27, 2007

BEFORE **JOANN LASALA CANDIDO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, William Newsome, a teacher employed by the Dumont Board of Education (respondent), appeals the denial of a salary increment for the 2006-2007 school term based upon his performance for the 2005-2006 school year. On October 20, 2006, petitioner appealed to the Department of Education claiming the respondent's decision to withhold his salary increment was arbitrary, capricious and unreasonable. On November 8, 2006, the School District filed its Answer asserting

that it acted appropriately pursuant to N.J.S.A. 18A:29-14. The matter was then transmitted to the Office of Administrative Law (OAL) as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. Hearings were held on July 20 and October 26, 2007, whereupon the record remained open for the submission of post hearing briefs. Following receipt of the parties' briefs, the record closed on November 8, 2007.

The issue in dispute is whether respondent's withholding of the petitioner's increment was arbitrary, capricious and unreasonable.

FACTUAL DISCUSSION

Petitioner is a tenured health and physical education teacher who has worked at the Lovell J. Honiss School (Honiss School) in Dumont for the past twenty-nine and a half years. In addition to teaching, he also coaches various sports teams. On February 16, 2005, Principal Bennett informed petitioner of her concerns of his class management techniques when he grabbed a student by the arm and used demeaning names towards the student. Petitioner admitted in his testimony that in 2002 he was disciplined by respondent for inappropriate use of language for which he received a three day suspension with pay.

In March 2006, the parents of B.S. and the mother of J.K. complained to school administrators that petitioner had disciplined students by forcing them to sit in the storage closet and referring to them with demeaning names. On March 7, 2006, Principal Karen Bennett interviewed B.S., J.K., and six other Honiss School students. Of the eight students interviewed, four stated that they had to sit in the storage closet and three stated that they had witnessed other students who had to do the same. In addition, five of the students interviewed submitted written statements on March 7, 2006 stating that they heard petitioner refer to those students being disciplined as "jerk", "jackass," "retard," "handicap," "spastic," "mentally ill," "stupid," "donkey" and "idiot." (Exhibit R-2)

On March 7, 2006, Principal Bennett met with petitioner to discuss these allegations. Petitioner admitted using the term "spastic" and did admit that he had B.S., a minor student, sit in the storage closet, but next to the refrigerator which is near the doorway.

On March 9, 2006, Principal Bennett observed petitioner's class followed by a written report about petitioner's classroom management techniques. (Exhibit R-3). On April 5, 2006, petitioner wrote a rebuttal statement in which he admitted using the word "spaz," referring to coordination of body parts, but denied that that term was directed towards any individual student and further denied using other derogatory words. He admitted that on two occasions he had students sit within the open doorway of the closet while he stood a foot away. (Exhibit P-3)

On May 12, 2006, Principal Bennett held a formal conference with petitioner to discuss his performance during the 2005-2006 school year, including the incidents occurring in March 2006. Principal Bennett recommended that petitioner's increment be withheld. Superintendent Montesano also recommended that petitioner's increment be withheld based upon petitioner's need to improve on instructional management and his use of disciplinary procedures. (Exhibit "R-7") Principal Bennett testified that the storage closet is a non-instructional area and students are not permitted in this area for safety reasons.

Petitioner testified on his own behalf. He stated that he never directed inappropriate language towards any student since he had been teaching. He admitted to using the term "spaz" or "spastic", but denied directing that term at particular student. He testified as to an incident which occurred in February 2006 involving student, B.S., who was not following directions during volleyball and was told to sit on the side of the gym. When B.S. allegedly put his foot out onto the volley ball court to disrupt other students, petitioner moved B.S. to sit next to him in front of the storage closet. He claimed that a photograph he produced [Exhibit P-1(a)] depicts the chair in front of the storage closet where petitioner placed the student.

Prior to this incident, another incident occurred in December 2005 involving the discipline of student A.Y. Petitioner claimed that A.Y also sat on a chair outside the storage closet and further claimed that the students made up the allegations in order to retaliate against him.[1] He also claimed that there was a conspiracy among the students with respect to the incident in 2006[2] and a prior incident in 2002 of using derogatory names.

Four of the students who had given statements to Principal Bennett testified at the hearing. Each confirmed that petitioner used derogatory terms towards students and placed students inside the closet, not at the doorway as testified to by petitioner. Their testimony was consistent with each of their prior statements made to Principal Bennett on March 7, 2006 except for P.R. In Bennett's report and her testimony, Bennett stated that P.R. said that he did not know of any students being put in the closet which was confirmed in P.R.'s written statement. However, at the hearing, P.R. testified that students were put in the closet. He further testified that, when he was questioned by Principal Bennett, he stated that he was not asked about the closet and that is why it was not addressed in his statement.

Petitioner produced two character witnesses, Herbert Reinhert and Laura Van Buren, both of whom worked with petitioner in his coaching capacity. While both considered petitioner to be an excellent coach and never hearing him use inappropriate language, neither was present to the events alleged or aware of these proceedings.

James Hunt, a seventh grade health and physical education teacher at Honiss School also testified on behalf of petitioner. He testified that both he and petitioner

[1]Petitioner claimed that B.S. had a negative progress report, but that report was not produced. He also claimed that J.K.'s sister was cut from the volleyball team. J.K. testified, however, that he was not aware of this. Petitioner further claimed that students in general enjoy getting teachers into trouble.

[2] The students testified that on March 7, 2006, they did not know why they were being called into Principal Bennett's office for questioning and had not spoken with other students about the investigation of petitioner.

had placed students in a chair within the entrance way to the storage closet, using that form of discipline more than ten times during the school year. He said that when student B.S. was told to sit at the storage closet entrance, petitioner stood next to him the entire time. However, he could not recall whether he or petitioner stood next to the students on each and every occasion. He also stated that on some occasions students were told to sit in the hall by the juice machine. He was not aware of any instances where petitioner used derogatory names in referring to students. He further claimed that students and their parents will try to get a teacher, such as petitioner, in trouble for no apparent reason.

When facts are contested, the trier of fact must assess and weigh the credibility of the witnesses for purposes of making factual findings. Credibility is the value that a finder of fact gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality, its internal consistency, and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (8th Cir. 1963). Based upon these principles, the testimony of Bennett and the students was deemed credible and compelling. All were straightforward in recounting the events and were clear in their independent recollections. The testimony of these witnesses had the ring of truth and the evidence respondent presented is entitled to substantial weight. The testimony of petitioner, on the other hand, was not deemed credible since his answers were conflicting and his demeanor argumentative. Petitioner's claim that the students were out to get him lacked a ring of truth.

FINDINGS OF FACT

Based upon a consideration of the testimonial and documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following **FACTS:**

1. Petitioner is a tenured health and physical education teacher who has been assigned to the Lovell J. Honiss School for the past twenty-nine years.
2. During the course of his classes in the 2005-2006 school year, petitioner had engaged in a form of discipline of requiring students to sit on a chair inside a storage closet.
3. During that same time period, petitioner resorted to use of demeaning and derogatory names towards those students being disciplined.
4. In 2002, petitioner was warned and disciplined for his inappropriate use of demeaning names towards students. He was suspended with pay for three days.
5. In 2005, Petitioner had been warned by the principal about his use of inappropriate discipline techniques and again about his inappropriate use of demeaning names towards that student. These warnings preceeded the events presented here.
6. As the result of the 2005 action where petitioner grabbed a student, demeaned that student, and the incidents of placing students in the storage closet as a form of discipline, and his continued use of name calling, the respondent withheld his salary increment for the 2006-2007 school year.

LEGAL ANALYSIS

Salary increments are controlled by N.J.S.A. 18A:29-14, which provides that:

> Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned. The member may appeal from such action to the commissioner under rules prescribed by him. The

> commissioner shall consider such appeal and shall either affirm the action of the board of education or direct that the increment or increments be paid. The commissioner may designate an assistant commissioner of education to act for him in his place and with his powers on such appeals. It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment.
>
> [Ibid.]

An increment is not a statutory right but "a reward for meritorious service to the school district." North Plainfield Educ. Ass'n v. North Plainfield Bd. of Educ., 96 N.J. 587, 593-594 (1984). The statute was intended to vest local school boards "with the ability to withhold increments from teachers who had not performed well during the previous year." Probst v. Haddonfield Bd. Of Educ., 127 N.J. 518, 526. (1991). A local board's exercise of its discretionary powers "may not be upset unless patently arbitrary, without rational basis or induced by improper motives." Kopera v. West Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960). The issues to be determined are: (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, bearing in mind their expertise. Id. at 296-297.

The determination to be made is whether the district "had a reasonable basis for its factual conclusion." Id. at 295. Indeed, it has been observed that:

> [a] school district has no duty to prove by a preponderance of credible evidence that the allegations against petitioner are true. To do so would convert an increment withholding action into a tenure case and accordingly shift the burden of proof to the board. Such is not the purpose of an appeal to the Commissioner under the provisions of N.J.S.A. 18A:29-14.
>
> [Reilly v. Parsippany-Troy Hills Twp. Bd. of Educ., 1989 S.L.D. 1830, 1843, citing Colavita v. Hillsborough Township Board of Education, 1983 S.L.D. 1205.]

Moreover, the decision to withhold an increment has been held to be "a matter of essential managerial prerogative which has been delegated by the legislature to the board." Ibid. citing Bernards Township Board of Education v. Bernards Township Education Association, 79 N.J. 311, 321 (1979). In contesting a salary increment withholding, a teacher has the burden of proof of demonstrating that the decision was unreasonable, arbitrary, without rational basis or induced by improper motives. Kopera, supra, at 297.

Courts have used varying language when trying to elaborate on the 'arbitrary, capricious or unreasonable' standard. Despite the variations, the common element among all of the decisions is that board of education actions are given a strong presumption of validity. See Thomas v. Board of Education. Twp. Of Morris, 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd o.b., 46 N.J. 581 (1966) (school board decisions "entitled to a presumption of correctness"). "A board of education has broad discretionary authority and its actions are entitled to a presumption of lawfulness and good faith." Quinlan v. North Bergen BOE, 73 N.J.Super 40, 46 (App. Div. 1962). Not only are board actions entitled to a "presumption of correctness" they have a presumption that those actions "will be upheld by the Commissioner of Education, absent a showing of bad faith, illegal motive or a lack of rational basis." Raimondi v. Westwood Regional Board of Education, EDU 5904-04, Initial Decision (Sept. 26, 2005), adopted, Comm'r (Dec. 27, 2005), affirmed, State Board (June 9, 2006) <http://lawlibrary.rutgers.edu/oal /search.html>.

Here the respondent withheld petitioner's increment for the 2006-2007 school year based upon his failure to implement appropriate instructional managerial practices and disciplinary procedures in his gym classes, despite prior warnings in the previous school years. During the school year 2005-2006, petitioner continued to use derogatory names towards students and required that they sit within the storage closet as a form of discipline.

While petitioner claimed that the students were trying to get him in trouble, he failed to present any competent or credible evidence to support this contention.

Having focused largely on attacking the credibility of the students, petitioner failed to present even a modicum of evidence that the action of the school board in withholding his increment was arbitrary, capricious and unreasonable.

In a proceeding such as this, the burden of proof by a preponderance of the competent and credible evidence is upon the petitioner. In re Polk License Revocation, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962).

Based upon the facts adduced and the legal principles cited above, I **CONCLUDE** that petitioner has not met his burden of establishing that respondent's action was arbitrary, capricious, unlawful, or induced by improper motive. To the contrary, respondent had a reasonable basis for its action.

ORDER

Based upon the foregoing, it is hereby **ORDERED** that petitioner be and is hereby denied a salary increment for the school year 2006-2007. And it is further **ORDERED** that the appeal filed by petitioner be and is hereby **DISMISSED WITH PREJUDICE**.

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

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

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

November 27, 2007
DATE

JOANN LASALA CANDIDO, ALJ

Date Received at Agency:

11-27-07

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

NOV 28 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

ljb

APPENDIX

Witnesses

For Petitioner

William Newsome
Herbert Reinert
Laura Van Buren
James Hunt

For Respondent

Karen V. Beckford-Bennett
JK, student
BS, student
SY, student
PR, student
James Montesano

Exhibits

For Petitioner

P-1(a) Photo of petitioner in front of storage closet by chair and doorway
P-1(b) Photo of chair and doorway
P-1(c) entrance/exit door in gymnasium
P-2 Photo of procedure and ground rules on gymnasium wall
P-3 Petitioner's rebuttal statement dated April 5, 2006
P-4 Observation Form dated November 30, 2006
P-5 Letter from student Kate Rovito
P-6 Letter from James Hunt dated March 15, 2006
P-7 Letter from James Hunt dated May 18, 2006
P-8 Photo of storage closet with basketballs
P-9 Photo of storage closet with hockey sticks

For Respondent

D-1 Observation Report dated February 15, 2005
D-2 Investigation report of March 2006 incident
D-3 Observation Form dated March 9, 2006
D-4 Observation Form dated March 15, 2006
D-5 Rebuttal Statement from petitioner dated April 5, 2006

D-6 Annual Summary Evaluation dated May 8, 2006
D-7 Letter from James Montesano, Superintendent dated May 26, 2006
D-8 Letter from James Montesano, Superintendent dated June 5, 2006
D-9 Teacher Job Description
D-10 Conduct/Discipline Policy
D-11 Harassment, Intimidation, Bullying or Hazing Policy
D-12 2004-2005 Honiss School Faculty Handbook
D-13 Report card of SY
D-14 Report Card of BS
D-15 Report Card of JK
D-16 Report Card of PR
D-17 Letter from James Montesano, Superintendent dated April 27, 2006
D-18 Petitioner's notes

5-08

OAL DKT. NO. EDU 10176-07
AGENCY DKT. NO. 362-11/07

S.D., ON BEHALF OF MINOR CHILD, B.D.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 1/04/08
Date of Mailing: 1/04/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION - SETTLEMENT
OAL DKT. NO. EDU 10176-07
AGENCY DKT. 362-11/07

S.D. O/B/O MINOR CHILD, B.D.
Petitioner

v.

BOARD OF EDUCATION OF THE FREEHOLD REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,
Respondent

S. D., father of petitioner

John E. Croot, Jr., Esq., appearing for Freehold Regional School District, (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: December 4, 2007 Decided: December 7, 2007

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

This matter was transmitted to the Office of Administrative Law on November 29, 2007, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

It commenced as an emergent hearing on December 4, 2007.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement indicating the terms thereof, which is attached and fully incorporated herein. (J-1). Pursuant to the terms of settlement, there no longer remain any issues which require any due process hearing, all such issues having been resolved by the parties.

After being placed under oath the parties stated that they fully understood and agreed to be bound by the terms of the settlement.

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

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

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

3. The settlement has been signed by the attorney for the respondent, Board of Education, in addition to the signature of the Assistant Superintendent who represents that he can bind it to all of the terms of the settlement.

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

I hereby **FILE** my initial decision with the **MERIT SYSTEM BOARD** for consideration.

This recommended decision may be adopted, modified or rejected by the **MERIT SYSTEM BOARD,** which by law is authorized to make a final decision in this matter. If the Merit System Board does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

December 7, 2007
DATE

JOHN R. FUTEY, ALJ

Date Received at Agency:

Mailed to Parties:

DEC 12 2007
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

EXHIBIT

Jointly submitted

J-1 Stipulation of Settlement

WITNESSES

For petitioner

S.D., petitioner pro se and parent of B.D.

E.D., mother of B.D.

For respondent

Dr. Patricia Emmerman, Assistant Superintendent

Stipulation of Settlement

O-1
Admn
12-4-07
PB

S.D. o/b/o B.D. v Board of Education of the Freehold Regional High School District

Agency Dkt. No. 362-11/07
OAL Dkt. No. EDU 10176-07

(1) Both parties agree that B.D.'s interest and well being are paramount.

(2) The Freehold Regional High School District Board of Education determined that B.D. should remain at the RAISE Academy until the end of the third marking period (April 19, 2008) if she cooperates and has a record of success there based on the review of the Superintendent;

(3) Following settlement discussions held on 12/4/07, the Board of Education now agrees that the Superintendent of Schools will interview B.D. ~~at the~~ and review her progress at the end of the second marking period (in or about February 2008) to determine her readiness to transfer to Marlboro High School;

(4) If the Superintendent determines to recommend B.D.'s transfer to Marlboro High School after the second marking period, he will make that recommendation to the Board of Education in closed executive session; there is no guarantee that the Superintendent will recommend transfer the second marking period or that the

Board will approve it;

(5) The Board of Education will consider the Superintendent's recommendation and make the ultimate decision regarding B.D's placement;

(6) Beatrice must comply will all rules and regulations, maintain good grades and work to the best of her ability.

(7) This resolves all issues, there is no further need for due process.

We hereby consent to the terms of the foregoing settlement

Stephen Dworkowitz, Pro Se

Dr. Patricia Emmerman
Assistant Superintendent

Stefana Dworkowitz, Pro Se

John E. Croot Jr.
Attorney at Law

#6-08

6-08

OAL DKT. NOS. EDU 8763-05, EDU 8745-06, EDU 4488-07 and
EDU 6800-07 (CONSOLIDATED)
AGENCY DKT. NOS. 257-9/05, 322-9/06, 132-5/07 AND 209-8/07

IN THE MATTER OF THE TENURE HEARING OF MICHAEL RICH, SCHOOL DISTRICT OF THE TOWNSHIP OF FRANKLIN, SOMERSET COUNTY,	:	
AND	:	COMMISSIONER OF EDUCATION
MICHAEL RICH, PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, SOMERSET COUNTY, RESPONDENT.	:	

The record of these consolidated matters, the parties' proposed Settlement Agreement, and the Initial Decision of the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon such review, the Commissioner finds that the proposed settlement is consistent with established standards governing settlement of tenure matters, *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846, and concurs with the ALJ that approval is appropriate.

Accordingly, the settlement is hereby approved and the tenure matter dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 1/03/08

Date of Mailing: 1/04/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NOS. EDU 8763-05,
EDU 8745-06, EDU 4488-07 and EDU 6800-07
AGENCY DKT. NOS. 257-9/05,
332-9/06, 132-5/07 and 209-8/07

IN THE MATTER OF THE TENURE HEARING OF MICHAEL RICH, FRANKLIN TOWNSHIP SCHOOL DISTRICT, SOMERSET COUNTY,

and

MICHAEL RICH,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, SOMERSET COUNTY,

Respondent.

Robert M. Tosti, Esq., for Michael Rich (Wilson, Elser, Moskowitz, Edelman & Dicker, attorneys)

Russell Weiss, Jr., Esq. for Franklin Township Board of Education (Parker, McCay, attorneys)

Record Closed: November 20, 2007 Decided: November 23, 2007

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

These matters involving the tenure removal of an athletic director and three successive increment withholding appeals were transmitted to the Office of Administrative Law (OAL) on four separate dates, for hearings as contested cases. On September 7, 2007, the cases were consolidated by Letter Order.

The hearing commenced on October 5, 2007. The parties entered into settlement negotiations and, as a result, resolved the within matter subject to the approval of the Commissioner.

On October 30, 2007, the parties placed the essential terms of the settlement on the record before me.

On November 20, 2007, the original Settlement Agreement was received and the record closed on that date.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures. (J-1) The Board approved the settlement as reflected by petitioner's counsel letter of November 16, 2007. (P-1)

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

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and N.J.A.C. 6A:3-5.6 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

November 23, 2007
DATE

Ana C. Viscomi
ANA C. VISCOMI, ALJ

Date Received at Agency:

NOV 29 2007
DATE

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

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

BRESSLER, AMERY & ROSS
A Professional Corporation
325 Columbia Turnpike
Florham Park, New Jersey 07932
P.O. Box 1980
Morristown, New Jersey 07962
(973) 514-1200
Attorneys for Michael Rich

IN THE MATTER OF THE TENURE CHARGES AGAINST MICHAEL RICH, FRANKLIN TOWNSHIP BOARD OF EDUCATION, MICHAEL RICH, vs. FRANKLIN TOWNSHIP BOARD OF EDUCATION SOMERSET COUNTY	OFFICE ADMINISTRATIVE LAW DOCKET NOS: EDUTH 4488-07S EDU 8763-05S EDU 8745-06S EDU 6800-07S (CONSOLIDATED CASES) Civil Action SETTLEMENT AGREEMENT

The parties have reached a complete settlement on all issues contained in the above captioned matters, which matters concern tenure charges alleged by the Board of Education, and three appeals of successive increment withholding actions by the Board, based on the same allegations as the tenure charges and the restoration of two out of three increments by the Board, in exchange for Mr. Rich's agreement to accept the withholding of one increment and to accept a transfer to a position of vice principal. The parties believe that this settlement is a reasonable compromise on all of the issues, and achieves an outcome that is responsible and realistic. The following factors are the keys to this settlement.

First, from the Board's perspective, the most serious of the infractions alleged in the tenure charges is the misappropriation of approximately $5,000.00 in gate receipts. From the beginning of the Board's investigation into this matter, it was believed that the money in question had been stolen by either Mr. Rich, the Bursar (who also handled gate receipts from time to time), or both; Mr. Rich has always vigorously resisted these allegations. In addition, at the time the instant charges were filed, the Bursar had resigned from the District. Thus, the tenure charges were only filed against Mr. Rich.

In the meantime, the Office of the Somerset County Prosecutor investigated a claim that the Bursar, on numerous occasions, had failed to deposit similar types of receipts, which she had collected from persons running non-athletic events. As a result of this investigation by the Prosecutor a criminal complaint and a warrant for the arrest of the Bursar (whose whereabouts are currently unknown), have been issued. In light of this development, the Board is now prepared to accept that the Bursar is likely to have misappropriated the athletic funds in question.

Second, by accepting a transfer to the position of vice principal, the Board is satisfied that none of the allegations in the tenure charges will occur again, because of the significant differences between the responsibilities of the two positions. Thus, the pursuit of tenure charges in order to achieve termination from the position of Director of Athletics, Health and Physical Education is no longer necessary. In addition, the Board is satisfied that Mr. Rich's experience in education and supervision will enable him to perform well as a vice principal, a belief shared by Mr. Rich.

Third, Mr. Rich acknowledges that he had not adequately supervised the athletic department and accordingly accepts the consequences of this settlement.

Fourth, the circumstantial nature of all of the charges would require many days of hearing to present the charges, and to defend against them, resulting in significant loss of administrative time and an expenditure of considerable funds for legal fees by the Board.

Finally, this settlement serves the public interest by achieving finality and certainty, with a responsible outcome.

The terms of the settlement are:

1. The tenure charges will be withdrawn.

2. The increment appeals will be withdrawn.

3. Mr. Rich will agree to a reassignment/transfer to the position of full-time vice principal, which shall be at the elementary level through June 30, 2008.

4. Mr. Rich will receive payment for 120 days of withheld salary, in the gross amount of $36,283.62.

5. Increments

   5.1 The increment withheld by the Board for the 2005-06 school year ($3,788.58) will be restored, and paid retroactively. Mr. Rich's 2005-06 salary will be $116,881.

   5.2 The increment withheld by the Board for the 2006-07 school year ($3,973.95) will be restored, and paid retroactively. His 2006-07 salary will be $120,855.

   5.3 The increment withheld by the Board for the 2007-08 school year (value not yet established at this point) will not be restored. Mr. Rich's 2007-08 salary will remain at its 2006-7 level ($120,855), and will not be adjusted for the 2007-08 school year, regardless of any salary adjustment eventually negotiated by FTSAA for the 2007-08 school year, for members of that bargaining unit.

   5.4 Following the 2007-08 school year, Mr. Rich's salary will be governed by FTSAAA negotiated settlement.

6. Mr. Rich will continue to receive salary payments at his current rate of pay, $113,092 until the settlement is approved by the Commissioner, all litigation has been dismissed and Mr. Rich has commenced employment as vice principal.

7. Upon his return to employment, Mr. Rich's salary will be increased as set forth above.

   7.1 Mr. Rich will receive payment for the retroactive salary adjustments set forth above.

   7.2 Mr. Rich will receive payment for the difference between his agreed upon salary for 2007-08 ($120,855) and his current salary ($113,092), for the time period between July 1, 2007 and the date he actually commences employment as vice-principal.

   7.3 Mr. Rich will receive payment in the amount of $315.60, representing the difference between the amount he received for payment of unused vacation time for 2005-06 and the amount at his adjusted salary.

   7.4 Mr. Rich will receive payment in the amount of $646.80, representing the difference between the amount he received for payment of unused vacation time for 2006-07 and the amount at his adjusted salary.

8. The Board recognizes that Mike Rich has tenure and seniority in the position of Director of Athletics, Health and Physical Education, which status survives this settlement.

9. Mr. Rich and the Board agree that there will be no further litigation/claims or other action related to this matter.

10. Mr. Rich has entered into this agreement with a full understanding of his rights.

11. The Board of Education has consented to the terms of this settlement.

Nov 15, 2007 Robert M. Tosti
Robert M. Tosti, Esq.

Nov 15, 2007 Michael Rich
Michael Rich

11/15/07 Edward Seto

11/16/07 Board of Education Edward Seto
Superintendent

11/15/07 Russell Weiss, Esq.
Board Attorney

7-08

OAL DKT. NO. EDU 7627-06
AGENCY DKT. NO. 167-5/06

PATRICIA FARINA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/04/08

Date of Mailing: 1/04/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 07627-06

AGENCY DKT. NO. 167-5/06

PATRICIA FARINA,

Petitioner,

v.

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

Respondent.

Wayne J. Oppito, Esq., for petitioner

Andrew M. Wubbenhorst, Esq., for respondent (Johnson, Murphy, Hubner, McKeon, Wubbenhorst, Bucco & Applets, P.C., attorneys)

Record Closed: November 30, 2007 Decided: December 3, 2007

BEFORE **MUMTAZ BARI-BROWN,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on July 17, 2006, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

A hearing was scheduled on April 11, 2007. Prior to the dates of hearing the parties settled the matter. The attached Stipulation of settlement was submitted on November 30, 2007, indicating the terms of agreement which are incorporated herein by reference.

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

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

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

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

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

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

December 3, 2007
DATE

MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

12-5-07
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 6 2007
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

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STIPULATION OF SETTLEMENT

PATRICIA L. FARINA (hereinafter "Ms. Farina") and the **BELLEVILLE BOARD OF EDUCATION** (hereinafter "the Board") have reached the within Settlement and Release, in final settlement of any and all disputes between and among them from the beginning of time until the present.

NOW THEREFORE, in consideration of the mutual covenants and undertakings set forth herein, the parties hereby agree as follows:

1. Ms. Farina shall withdraw the current matter before the Commissioner of Education, entitled Patricia L. Farina v. Belleville Board of Education, OAL Docket No. EDUOA 07627-2006N, Agency Ref. No. 167-5/06 and the matter before the Public Employment Relations Commission, entitled Belleville Board of Education -and- Belleville Administrators Association, Docket No. CO-2006-321.

2. The Board agrees to compensate Ms. Farina in the total amount of FOUR THOUSAND DOLLARS to be allocated as retroactive salary for the period of February 1, 2007 through December 31, 2007. The school district's business administrator shall make the customary and usual deductions. The school district's business administrator shall also be responsible for providing the information to the New Jersey Division of Pensions in accordance with Division of Pensions Fact Sheet #43, included with this agreement.

3. The parties agree that by entering into this Agreement, it is not an admission nor acknowledgement of wrongdoing by either party, but rather a decision to resolve the issues, given the expense and uncertainty of litigation.

4. Mutual Releases and Discharge

a. In consideration of the mutual promises contained herein, Ms. Farina, on behalf of herself, her heirs, successors, representatives, privies, assigns, agents and their respective successors in interest, and each and every one of them, does hereby forever, fully, finally and completely remise, release and discharge the Board, each of its members individually and collectively, its officers, administrators, agents, employees, servants, and representatives, and each and every one of them, from all, and all manner of, currently cognizable actions and causes of action, legal actions, suits at equity, administrative actions, guarantees, notes, liens, liabilities, dues, bonds, claims, counterclaims and demands whatsoever of any kind in any forum or jurisdiction, including any claim for attorney's fees, arising out of the employment relationship between the Board and Ms. Farina, with the exception of any claim that she may have for benefits from the Pension Board, claims for at-work injury pursuant to the New Jersey Workmen's Compensation Act, or other rights not waivable under statute. Nothing herein is intended or shall be understood to waive or restrict the Board's obligation to indemnify and defend Ms. Farina consistent with N.J.S.A. 18A:16-6 for civil or administrative actions which may be brought against her for actions arising out of and in the course of her employment with the Board. This Release shall not bar either party from seeking the specific enforcement of the terms of this Agreement.

b. In consideration of the mutual promises contained herein, the Board, on behalf of itself, its members individually and collectively, its successors, representatives, privies, assigns, agents and their respective successors in interest, and each and every one

of them, does hereby forever, fully, finally and completely remise, release and discharge Ms. Farina from all, and all manner of, currently cognizable actions and causes of action, legal actions, suits at equity, administrative actions, guaranties, notes, liens, liabilities, dues, bonds, claims, counterclaims and demands whatsoever of any kind in any forum or jurisdiction, administrative, or disciplinary actions, including without limitation any disciplinary action, termination; contractual performance or reimbursement obligations, it may have against Ms. Farina, contingent upon her performance of the terms of this Agreement and subject to the other provisions of this Agreement. The Board further acknowledges its obligation to defend and indemnify Ms. Farina for such civil or administrative actions as may be filed against her arising out of and in the course of her employment consistent with the provisions of N.J.S.A. 18A:16-6. Nothing herein is intended or shall be understood to waive said indemnification and defense obligation. This Release shall not bar either party from seeking the specific enforcement of the terms of this Agreement.

5. Execution of Agreement and Release

The parties to this Agreement have consulted with their respective legal counsel and representatives regarding the terms and conditions of this Agreement, have carefully read this Agreement, and understand and acknowledge the contents hereof. The parties expressly acknowledge and agree that they each execute this Agreement generally, and each provision hereof specifically, of their own free will and without duress or undue influence by any individual or entity other than the parties themselves.

6. Agreement Review and Revocation Period

Ms. Farina confirms that she was advised that he has up to twenty-one (21) days to review this Agreement and that he had the opportunity to review this Agreement and her rights, responsibilities and obligations set forth hereunder with her attorney. Ms. Farina also acknowledges that, if she elected to execute this Agreement prior to the expiration of the twenty-one (21) day review period, said execution was undertaken voluntarily and because she did not require any additional time to review this Agreement. Ms. Farina further confirms that she was advised and understands that she has seven (7) days after her execution of this Agreement to revoke her signature to the Agreement by hand delivering written notice of said revocation to the Board's Special Counsel, Andrew M. Wubbenhorst, Esq., at Johnson, Murphy, Hubner, McKeon, Wubbenhorst, Bucco & Appelt, Riverdale South, 51 Route 23 South, Riverdale, New Jersey 07457. This Agreement shall, therefore, not be deemed effective or enforceable until the eighth (8th) day after the date that Ms. Farina executed the Agreement

7. Materiality of Provisions

The parties mutually acknowledge that each and every provision of this Agreement is material, and the breach of any provision shall be considered a material breach, which would relieve the non-breaching party of its performance obligations.

8. Effective Date

This Agreement and the accrual of all obligations set forth herein shall be effective and binding upon the parties on the date this Agreement is approved by the New Jersey Commissioner of Education.

9. Governing Law

This Agreement shall be construed under, governed by, and enforceable under the laws of the State of New Jersey. Jurisdiction and venue for the enforcement of this Agreement shall lie in the Superior Court of New Jersey, Chancery Division, General Equity Part, Essex County.

10. Entire Agreement

This Agreement constitutes the full and complete agreement and understanding between the parties with respect to its subject matter. This Agreement supercedes all prior discussions or understandings relating to its subject matter. This Agreement or any provisions of it may only be amended, modified or waived upon the execution of a written document signed by all parties and setting forth the precise amendment, modification or waiver.

11. Authority to Execute Agreement and Release

The signatories to this Agreement affirm and represent that they have authority to execute this Agreement and do thereby bind the party which they represent to this Agreement. In the case of the Board, this authority is understood to include each member of the Board, individually and collectively.

IN WITNESS WHEREOF, and intending and understanding themselves to be legally bound, the parties have executed this Agreement on the date written below.

Dated: 10-29-07

By: Patricia L. Farina
PATRICIA L. FARINA

Dated: 10/29/07

Attest: Wayne J. Oppito
WAYNE J. OPPITO, ESQ.
ATTORNEY FOR MS. FARINA

BELLEVILLE BOARD OF EDUCATION

Dated: 11/16/07

By: William Fillano
WILLIAM FILLANO, President

Dated: 11/21/07

Attest:
ANDREW M. WUBBENHORST, ESQ.
ATTORNEY FOR THE BOARD OF EDUCATION

In the example, both the base salary and the pension rate were determined by the period of time covered by the reinstatement.

PERS AND TPAF MEMBERS ONLY

Chapter 62, P.L. 1994, eliminated the 2% Social Security offset in employee pension contributions as of July 1, 1995, and established a flat 5% pension rate of contribution. The 5% rate took effect for employees enrolled on or after July 1, 1994. The law provided for a gradual implementation of the new rate for members enrolled prior to July 1, 1994. As of July 1, 1995, if the full rate was 6% or more, it was changed to 5%. If the full rate was less than 6%, it was changed to 4% as of July 1, 1995, and 5% as of July 1, 1996. In accordance with Chapter 115, P.L. 1997, the member rate was lowered to 4.5% as of January 1, 1998.

Chapter 115, P.L. 1997 made possible a one-time accounting change which resulted in the systems being fully funded. Beginning January 1, 1998, employee pension contributions for the PERS and TPAF were reduced for calendar years 1998 and 1999, and for calendar year 2000 for the TPAF, from 5% to 4.5%. Effective January 1, 2004 the TPAF member contribution rate returned to 5% of pensionable salary.

DATES FOR CHANGES TO CONTRIBUTION RATES

PERS/TPAF MEMBERS	JULY 1, 1994	JULY 1, 1995	JULY 1, 1996	JULY 1, 1998
Enrollment date before July 1, 1994.	No change in rate or Social Security offset.	If full rate was 6% or more, the rate changed to 5%. If full rate was less than 6%, the rate changed to 4%. 2% Social Security offset eliminated.	Rate remained 5%. Rate increased to 5%.	4.5%
Enrollment date July 1, 1994 or later.	Rate of contribution set at 5%. No Social Security offset.	Rate of contribution set at 5%. No Social Security offset.	Rate of contribution set at 5%. No Social Security offset.	4.5%

Chapter 415, P.L. 1999, reduced the PERS pension contribution rate from 4.5 % (the reduced rate under Chapter 115, P.L. 1997) to 3 % of pensionable salary. The rate change was effective January 1, 2000 and remained in effect until July 1, 2004 for State PERS members and until January 1, 2005 for local PERS members when contribution rates returned to the full 5% of pensionable salary.

PERS MEMBERS ONLY	JANUARY 1, 2000	JULY 1, 2004	JANUARY 1, 2005
	3% All PERS members	5% for State PERS members	5% for local PERS members

If you have questions concerning settlement, please contact the Audit/Billing Section at (609) 292-3630.

This fact sheet has been produced and distributed by:
New Jersey Division of Pensions and Benefits • PO Box 295 • Trenton, New Jersey 08625-0295
(609) 292-7524 • TDD for the hearing impaired (609) 292-7718
URL: http://www.state.nj.us/treasury/pensions • E-mail: pensions.nj@treas.state.nj.us
This fact sheet is a summary and not intended to provide total information.
Although every attempt at accuracy is made, it cannot be guaranteed.

Back Pay Settlements and Retirement Credit

Public Employees' Retirement System • Teachers' Pension and Annuity Fund
Police and Firemen's Retirement System • State Police Retirement System

AWARDS OF BACK PAY

A member who appeals the suspension or termination of his or her employment and is awarded back pay for all or a portion of such suspension or termination, shall receive retirement credit for the period covered by the award. This retirement credit is given regardless of the amount of back pay awarded, provided that the full normal employee pension contribution is received from the member or deducted from the value of the award.

The amount of the pension contribution will be determined by the provisions of the award.

1. If the member receives full back pay, including normal salary increases, then the contribution will be computed on the base salaries that the employee would have earned for the reinstated period of suspension or termination.
2. If the settlement is less than full back pay, the pension contributions will be based upon the salary that the member was receiving for pension purposes, prior to the suspension or termination of employment.

If the amount of back payment awarded is insufficient to deduct the value of the normal pension contributions due, such contributions shall be paid by the member.

EMPLOYER'S RESPONSIBILITIES

The certifying officer is responsible for providing the Division of Pensions and Benefits with the following:

1. A letter attesting to the base salary or salaries to be used to compute pension contributions.
2. A copy of the resolution or legal document that details the terms of the settlement. This settlement agreement must specifically state:
   - **a. That an award of back pay has been made to the member.**
   - **b. The amount of back pay.**
   - **c. The dates covered by the award.**

This information, along with pension and contributory life insurance premiums, if applicable, should be sent to the attention of the Supervisor of the Audit Section, Division of Pensions and Benefits, PO Box 295, Trenton, NJ 08625-0295. The Division cannot process a settlement agreement that does not contain this required information.

Members of the Teachers' Pension and Annuity Fund and the Public Employees' Retirement System who are covered under the contributory group life insurance must remit life insurance premiums. These premiums are computed on the same base salary as the pension contributions and remitted in the same manner as described above.

Once the required information and contributions have been received and audited, the member will be credited with service for the period covered by the award.

To determine the pension contributions due, you should use the appropriate base salary(ies) as priviously explained in "Awards of Back Pay". **The pension rate to be used is determined by the rate in effect for the reinstated period.** For example, a local PERS member appealed his August 1, 2004 termination, and on March 1, 2005, he was ordered reinstated with full back pay. The member's full pension rate in effect on August 1, 2004 was 3% and on January 1, 2005 increased to 5%. The annual base salaries for the reinstated period were $24,000 for August through November, and $25,500 from December through February. Pension contributions would be computed as shown in the following example:

Period 2004/05	Base Salary	Pension Rate*	Total Pension Contribution Due
August	$2,000	3%	$60.00
September	$2,000	3%	$60.00
October	$2,000	3%	$60.00
November	$2,000	3%	$60.00
December	$2,125	3%	$63.75
January	$2,125	5%	$160.25
February	$2,125	5%	$160.25
TOTAL	$14,375	—	$516.25

** For awards to members of PERS or TPAF covering 7-1-96 through 1-1-05, refer to the charts on page 2.*
For awards to members of PFRS use 8.5%.
For awards to members of SPRS use 7.5%.

12-08

IN THE MATTER OF THE SUSPENSION :
OF THE TEACHING CERTIFICATION
OF TARA HEMERICK, GREY CHARTER :
SCHOOL, ESSEX COUNTY.
:

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

In October 2007, the petitioning charter school served an Order to Show Cause upon respondent, requiring her to show cause why an order should not be entered suspending her certificate – pursuant to *N.J.S.A.* 18A:26-10 and 18A:28-8 – for resigning her position as Kindergarten teacher without providing the notice required by her contract, and the 60-day notice required by law. The respondent failed to answer the order. Respondent was duly advised that, pursuant to *N.J.A.C.* 6A:3-1.5(e), failure to respond would cause each allegation in petitioner's papers to be deemed admitted, and might result in summary decision by the Commissioner.

There being no response to the order to show cause, the Commissioner concluded that the allegations – which respondent has chosen not to deny – may be deemed admitted, and are sufficient to justify suspension of respondent's certification. Accordingly, summary decision is granted to petitioner, and respondent's certificate is suspended for a period of one year from the date of the filing of this decision – a copy of which has been forwarded to the State Board of Examiners for the purpose of effectuating this order.

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

Date of Mailing 1/10/08

AGENCY DKT. NO. 290-10/07

IN THE MATTER OF THE SUSPENSION :
OF THE TEACHING CERTIFICATION OF TARA HEMERICK, GREY CHARTER SCHOOL, ESSEX COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

For Petitioner, Sills Cummis & Gross

Respondent: No appearance by or on behalf of Tara Hemerick

This matter was opened before the Commissioner of Education on October 9, 2007, by way of an Order to Show Cause served by petitioner, Grey Charter School, upon respondent, Tara Hemerick, requiring respondent to show cause why an order should not be entered suspending her teaching certificate, pursuant to *N.J.S.A.* 18A:26-10 and 18A:28-8, for resigning without providing the amount of notice required by her contract with respondent, and for failing to provide the 60 days notice required by law. By notice dated October 9, 2007, the Bureau of Controversies and Disputes (the Bureau) acknowledged receipt of proof of service upon respondent of the order to show cause.

On November 21, 2007, the Bureau sent respondent a final notice, via regular and certified mail, directing respondent to file an answer within ten days. The final notice advised that, pursuant to *N.J.A.C.* 6A:3-1.5(e), failure to respond would cause each allegation in petitioner's papers to be deemed admitted, and might result in summary decision by the Commissioner. Neither the notice sent by certified mail nor the notice sent by regular mail was returned., and no answer to the order to show cause has been filed as of this date.

As stated above, the final notice to respondent clearly advised that if an answer was not filed within ten days of receipt of same, each allegation in the papers supporting the order to show cause would be deemed to have been admitted and the Commissioner might decide the matter on

a summary basis. The Commissioner now concludes that the allegations, which respondent has chosen not to deny, may be deemed admitted pursuant to *N.J.A.C.* 6A:3-1.5(e), and are sufficient to justify an order suspending respondent's teaching certification.

Accordingly, IT IS ORDERED that summary decision is granted to petitioner, and respondent's teaching certification is suspended for a period of one year pursuant to *N.J.S.A.* 18A:26-10 and 18A:28-8.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 1/09/08

Date of Mailing: 1/10/08

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

15-08

S.M., ON BEHALF OF MINOR CHILDREN, S.M. AND Y.M.,

PETITIONER,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner filed a residency appeal on behalf of her children, who were enrolled as high school students in the Bloomfield School System in September 2007. The respondent sought reimbursement of tuition for the period of S.M. and Y.M.'s alleged ineligible attendance. Petitioner failed to appear at a November 2007 hearing, and respondent moved to dismiss the petition on the basis that petitioner failed to prosecute her case.

The ALJ found that: petitioner failed to prosecute her appeal, leaving no basis to consider overturning the residency determination of the respondent Board, and respondent's proofs as to ineligibility and tuition rate were convincing and satisfy its burden of proof for the counterclaim The ALJ concluded that petitioner must pay the respondent tuition in the amount of $2,404.42 for the period of ineligible attendance.

The Commissioner concurred with the ALJ, adopted the Initial Decision as the final decision in this matter, ordered petitioner to compensate the Board for tuition owed, and dismissed the petition. The Commissioner noted that no findings were made with respect to the suggestion in the Initial Decision that petitioner may be homeless, and that the procedures of *N.J.A.C.* 6A:17-2.1 *et seq.* must be implemented if petitioner now claims to be so.

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

Date of Mailing 1/11/08

15-08

OAL DKT. NO. EDU 9962-07
AGENCY DKT. NO. 262-9/07

S.M., ON BEHALF OF MINOR CHILDREN, S.M. AND Y.M.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	
RESPONDENT.	:	

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

Upon review, the Commissioner concurs that the petitioner – having failed to appear at hearing or file an explanation for such failure – has not demonstrated S.M. and Y.M.'s entitlement to attend the schools of the district pursuant to *N.J.S.A.* 18A:38-1, and that the Bloomfield Board of Education is entitled to collect tuition for the period of their ineligible attendance in the district.*

Accordingly, the Initial Decision of the OAL – directing disenrollment of S.M. and Y.M. from the Bloomfield schools and petitioner's reimbursement to the Board of $2,404.42 in tuition – is adopted as the final decision in this matter. In so holding, the Commissioner stresses that no findings are made herein with respect to any suggestion (Initial Decision at 4-5) that the petitioner may be homeless; however, if she now claims

* In the interest of clarity, the Commissioner notes – with respect to the ALJ's statements in the Initial Decision at 5 – that the burden of proof in this matter rests with petitioner, notwithstanding the Board's counterclaim for tuition.

to be such, the parties and the Essex County Superintendent of Schools – by copy of this decision – are reminded that the procedures of *N.J.A.C.* 6A:17-2.1 *et seq.* must be implemented forthwith.

IT IS SO ORDERED.[2]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 1/11/08

Date of Mailing: 1/11/08

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 09962-07

AGENCY DKT. NO. 262-9/07

S.M., ON BEHALF OF MINOR CHILDREN, S.M. AND Y.M.,

Petitioners,

v.

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

Respondents.

S.M., pro se, Failed to Appear

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

Record Closed: November 21, 2007 Decided: November 29, 2007

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

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

The petitioners (S.M.) appealed on September 12, 2007 from the denial by the Board of Education of the Township of Bloomfield, Essex County (respondent/BOE) to allow her children (S.M. and Y.M.) to be educated in the Bloomfield School System. Bloomfield denied the petitioner's attendance at its school, based on the fact that the children were not domiciled in the District. The respondent filed an Answer and

Counterclaim requesting the re-imbursement of tuition for Y.M.[1] from the period beginning September 2007. The matter was forwarded to the Office of Administrative Law (OAL) on October 3, 2007 and set down for a hearing on November 21, 2007. By 10:00 a.m. on the date of the hearing, the petitioner had failed to appear. The Board then moved to dismiss S.M.'s petition, on the basis that she failed to appear and prosecute her case. The District presented proof that on November 14, 2007 Mr. Wenczel, attorney for the Board of Education, had left a copy of the documents, that it planned to rely upon at the hearing and a copy of the subpoenas, that it had served on the petitioner's alleged landlord, at the last known residence of the petitioner. The respondent's motion was granted on the understanding that the file would be held for 24 hours to allow the petitioner to contact the court if there was a good reason why she did not appear. Since the petitioner did not contact the OAL, the District's motion is granted. The District presented its case for tuition reimbursement.

ISSUE

1. Whether the respondent is entitled to tuition reimbursement.

FINDINGS OF FACT

Based on the testimony presented and the documentary evidence submitted, and having had an opportunity to observe the witness and to assess her credibility, I make the following **FINDINGS OF FACT:**

1. S.M. came to the office of the Bloomfield Board of Education in September 2007 and asked for registration forms to register her two children in the school system.
2. Dr. Nicolette Salerno, administrator of residency for the District, requested that S.M. present proof of residency, such as a lease, mortgage documents or utility bill to show proof of residency. S.M.

[1] The Board is not requesting tuition re-imbursement for S.M. because they believe that, because he is a special education student, they cannot seek re-imbursement.

stated that she was staying with her father. The District asked for an affidavit from the father and the completion of certain residency forms provided by the District. S.M. refused to complete the requested forms. The only information provided was a letter from Grandville Lawrence (not notarized) stating that S.M. and her children were living with him.

3. Dr. Salerno requested that S.M. show establishment of residency by opening a bank account, or showing an address on a pay stub or providing a change of address from the post office. S.M. did not provide this information.

4. S.M. did provide certain personal information regarding her children. However, she failed to provide a copy of her children's birth certificates, which was requested.

5. Vincent Barba, compliance officer for the Bloomfield BOE conducted surveillance at the alleged residence of the petitioner on November 13, 2007 at 3:00 p.m. At 4:00 a woman identifying herself as an owner of the building (later identified as Ms. Chitty) left the residence. Mr. Barba identified himself and asked if S.M. and her children were tenants in the upstairs apartment. Ms. Chitty answered no and then proceeded to call her mother (co-owner of the residence) on her cell phone. Mr. Barba asked if S.M. lived in the upstairs apartment. The woman (Mrs. Wilson) stated that the tenants on the second floor had asked if S.M. and her family could live with them for a short time until she got on her feet. Ms. Wilson allowed this under those circumstances. However, S.M. and her children were no longer living at the property and had not lived there for several months.

6. Ms. Chitty testified that S.M. and her children had moved in with Mr. Granville Lawrence and his sister, Leeann Harris, during the summer of 2007. They all occupied a two bedroom apartment. The last time that she saw S.M. at the property was about one month ago. She never had a conversation with S.M.

7. Mrs. Wilson testified that Ms. Harris had asked her to allow a family member, who was having difficulties, to live in the apartment until she

got on her feet. Since this situation had occurred before and Mrs. Wilson had not had any problem, she said that she would allow it on a short term basis. Mrs. Wilson did not know that S.M. would be moving in with her children.

8. The landlord never received rent from S.M. and did not consider her a tenant.

9. Prior to moving to the Bloomfield address, S.M. and her children had a four month residency in Irvington. However, the last school that they attended was in Newark.

10. Y.M. is a 9th grade student. He attended school for 45 school days. Tuition for a student in that grade is $9,778 per year. The per diem rate is $53.43 based on dividing the annual tuition by 180 days. On that basis the district is owed $2,404.42 for tuition for Y.M. for the period he attended the school district.

LEGAL DISCUSSION

Public education must be provided free to persons over six and up to twenty years of age, who are domiciled within the School District - N.J.S.A. 18A:38-1(a). "The domicile of a person is a place where he has his true, fixed, permanent home and principal establishment, into which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving...." In the Matter of Unanue 255 N.J. Super. 362, 374 (Law Division 1991). Minors lack the capacity to choose their own domicile and thus their domicile is that of their parent or guardian.

N.J.S.A. 18A:38 b(2) allows the district to apply for removal of the child from the District, if they do not meet the statutory requirement and to ask for the reimbursement of tuition costs during the period of ineligibility. The petitioner failed to appear and present proof that she and her children were domiciled in Bloomfield. From the testimony elicited from Mrs. Wilson it is clear that she gave her tenants permission to have S.M. live at the residence for a short period of time. In fact, S.M. no longer lives at the address provided to the District. If the petitioner is homeless, her homelessness did

not arise out of her residency in Bloomfield, but rather from Newark or Irvington. Therefore, the District is not responsible for educating S.M. and Y.M.

CONCLUSION

Based on the testimony and proofs presented, I **CONCLUDE** that the District has met its burden under N.J.S.A. 18A:38 b(2) that S.M. and Y.M. were not domiciled in Bloomfield and therefore are not entitled to a free education in the District. I further **CONCLUDE** that Y.M. was educated in the district for a period of 45 days at the tuition rate of $53.43 per day for a total of $2,404.42 for which the district is entitled to reimbursement.

ORDER

I **ORDER** that the District's application for tuition reimbursement in the amount of $2,404.42 is hereby **GRANTED** and S.M. and Y.M. are **ORDERED** to be immediately disenrolled from the District.

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

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

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

11/29/07
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Date Received at Agency: 11/29/07

Mailed to Parties:
Laura Sanders
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

NOV 30 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

id

APPENDIX

Witnesses

For Petitioner:

None

For Respondent

Vincent Barba

Raquijah Wilson Chitty

Dr. Nicolette Salerno

Sandra Wilson

Exhibits

For Petitioner

None

For Respondent

R-1 Computer Printout

R-2 Registration Checklist

R-3 Basic Student Information

R-4 Registration Checklist

R-5 Notice of Defect

R-6 Letter from Grandville Lawrence

R-7 Memo from Vincent Barba

R-8 School Calendar

J.G. on behalf of minor child, C.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
GALLOWAY COMMUNITY CHARTER SCHOOL, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner sought an order from the Commissioner to compel respondent charter school to expunge certain records from her son's school file. Respondent contended that petitioner's appeal was time-barred, having been filed on June 29, 2007, well beyond 90 days after the August 2006 letter which informed the petitioner that respondent had refused her request for expungement.

The ALJ found that: C.G.'s statements, included in the records that petitioner seeks to expunge, demonstrate conduct of such character as to constitute a continuing danger to the physical well-being of other pupils, pursuant to *N.J.S.A.* 18A:37-2; petitioner provided no evidence that respondent either acted in bad faith or did not act reasonably when compiling C.G.'s student records, nor does petitioner assert that these incidents did not occur; and petitioner should have filed her request for expungement of C.G.'s records within 90 days of August 21, 2006, but waited approximately eleven months to do so. Accordingly, the ALJ concluded that the appeal is time barred pursuant to *N.J.A.C.* 6A:3-1.3(i), denied the petitioner's motion for partial summary decision, and dismissed the petition.

The Commissioner concurred with the ALJ that the petition is properly dismissed for failure to meet the 90 day rule, and denied petitioner's motion for partial summary decision.

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

Date of Mailing 1/11/08

16-08M

OAL DKT. NO. EDU 6122-07
AGENCY DKT. NO. 185-7/07

J.G. on behalf of minor child, C.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
GALLOWAY COMMUNITY CHARTER SCHOOL, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

This matter comes before the Commissioner by way of a "Motion for Partial Summary Disposition," wherein petitioner, J.G., requested that most of her minor child's (C.G.) disciplinary record be expunged. The Commissioner has reviewed the record, the Initial Decision of the Office of Administrative Law (OAL), and the parties' exceptions and reply exceptions, and concurs with the Administrative Law Judge (ALJ) that petitioner's appeal was not timely filed.

While C.G. was in seventh grade, he was disciplined for inappropriate behavior towards other students. Incident reports regarding the discipline, and other undated and unsigned writings describing the behavior, were put into his student file. The appeal before the Commissioner does not challenge the discipline itself, but rather demands removal of the documents describing C.G.'s behavior.

As outlined in the respondent's brief – the better part of which was set forth in the Initial Decision – petitioner was provided with a copy of C.G.'s file, including the portions reflecting disciplinary matters, on or about July 19, 2006. She wrote to respondent on August 21, 2006, appealing "its decision to keep certain records in [C.G.'s] files." (Exhibit E of

"Respondent's Brief in Opposition to Petitioner's Motion for Partial Summary Disposition.") Respondent declined to change its position and petitioner eventually filed a petition of appeal to the Commissioner on June 29, 2007.

The respondent urged, and the ALJ agreed, that petitioner should have filed her appeal to the Commissioner concerning the records within 90 days of August 21, 2006, the date of the letter that indicated that respondent had refused petitioner's request for expungement of the materials in C.G.'s file. The Commissioner notes, however, that on October 4, 2006, the parties executed a "Consent Order," which was included in the record of this matter.[1] The Consent Order delineated a schedule for evaluations of C.G. after which a meeting was to take place to develop an Individual Education Program (IEP) for him; the last paragraph of the order provided that the petitioner reserved "all rights to future action with respect to any program, placement, and record issues." (Emphasis added.) Petitioner argues that the Consent Order extended the limitations period for filing an appeal concerning C.G.'s records.

The Commissioner finds that it is not unreasonable to regard the limitations period as having been consensually extended for the time period required for the terms of the "Consent Order" to be effectuated. However, the facts show that those terms – *i.e.,* completion of evaluations and the scheduling of an IEP meeting – appear to have been accomplished before March 28, 2007, when C.G. returned to school. Thus, even if the Commissioner deemed the appeal deadline to have been deferred until after the agreed upon evaluations were completed and an IEP meeting was held, the petition was still not timely filed.

Pursuant to *N.J.A.C.* 6A:3-1.3(i), petitioners are required to file their appeals within 90-days of the action about which they complain. This limitations period was established many years ago to ensure a measure of repose in education matters. *Kaprow v. Board of Educ.*

[1] The "Order" does not appear to have been signed by the ALJ.

of Berkeley Tp., 255 *N.J. Super.* 76, 86 (App. Div. 1992). It has been the subject of many appeals to the courts, which have explained that an agency's construction of such a statute over a period of years without legislative interference is to be given great weight as reflecting conformity with legislative intent. Nor has the Legislature expressed any disagreement with the Commissioner's and State Board of Education's construction of the regulation. *Id.* at 87.

The general language in the last paragraph of the Consent Order cannot serve as a proper basis upon which to indefinitely defer the filing before the Commissioner of petitioner's claims. Accordingly, the Commissioner denies petitioner's motion for partial summary decision and dismisses the petition for untimeliness.

IT IS SO ORDERED.[2]

Lucille T Davy
COMMISSIONER OF EDUCATION

Date of Decision: 1/11/08

Date of Mailing: 1/11/08

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

17-08

TODDLERTOWN CHILD CARE CENTER,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	COMMISSIONER OF EDUCATION
RESPONDENT,	:	DECISION
AND	:	
TODDLERTOWN CHILD CARE CENTER,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY, AND NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF EARLY CHILDHOOD EDUCATION,	:	
RESPONDENTS.	:	

SYNOPSIS

Petitioning preschool contends that respondent Board did not provide proper notification of intent not to renew its Abbott provider contract for the 2007-08 school year, and appeals both the Board's decision and the NJDOE Division of Early Childhood Education's affirmation of it.

The ALJ found, *inter alia*, that: the Board failed to adhere to the procedural requirements of *N.J.A.C.* 6A:10A-2.3(b) in notifying the petitioner of its intent to nonrenew; petitioner's efforts to address tasks as agreed to in a 2005-06 corrective action plan (CAP) support petitioner's contention that it is able and willing to provide required preschool services; and respondents failed to prove that petitioner is not able and willing to continue as an Abbott preschool provider. The ALJ ordered that the decision of the Division of Early Childhood Education, affirming the Board's action, be reversed; the ALJ further recommended that the Board enter into a contract for the 2007-08 school year with petitioner, and provide appropriate notice of same to parents of preschool-eligible students in the district.

Upon careful and independent review, the Commissioner rejected the Initial Decision of the OAL. The Commissioner found that, under the particular circumstances of this matter, the Board's technical violation of *N.J.A.C.* 6A:10A-2.3(b) did not prevent petitioner from receiving adequate notice, that CAP and budget approval are not, in themselves, sufficient to demonstrate ability and willingness to meet Abbott standards, and that the Board and Department demonstrated a sufficient basis for their conclusion that nonrenewal of petitioner's contract was appropriate and consistent with law.

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

January 14, 2008

OAL DKT. NOS. EDU 3041-07 and EDU 5430-07 (CONSOLIDATED)
AGENCY DKT. NOS. 58-2/07 and 129-5/07

TODDLERTOWN CHILD CARE CENTER,[1]	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	COMMISSIONER OF EDUCATION
RESPONDENT,	:	DECISION
AND		
TODDLERTOWN CHILD CARE CENTER,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY, AND NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF EARLY CHILDHOOD EDUCATION,	:	
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have exceptions from the Irvington Board of Education (Board) and the Department of Education (Department) – both filed in accordance with *N.J.A.C.* 1:1-18.4 and 1:1-18.8 – and the petitioner's reply to same.

[1] The petitioner in this matter is variously identified – throughout the papers and by all parties including the petitioner itself – as either "Toddlertown" or "Toddler Town." Although the latter appears on the school's official letterhead, the former is retained in the present decision because the parties' dispute was pleaded, and has proceeded from the outset, under this appellation.

Substantially reiterating arguments raised at the OAL, the Board's exceptions urge rejection of the Initial Decision in its entirety. The Board again asserts that it met the necessary procedural requirements for nonrenewal of its contract with the petitioner by providing: 1) notice of such nonrenewal on or before March 1 as stipulated by the contract – which does not require a statement of reasons; and 2) reasons for its dissatisfaction in documented communications throughout the course of the preceding year, and again during the review process at the Department as required by *N.J.A.C.* 6A:10A:2.3(b) – which does not set a date or prescribe limitations of time for such provision. The finding of the Administrative Law Judge (ALJ) to the contrary, according to the Board, places form over substance and ignores that the petitioner had – at the very least – ample constructive notice of the matters of concern to the Board, so that it was fully able to defend its own position before both the Department and, later, the OAL. (Board's Exceptions at 2, 5-9)

The Board further reasserts that the petitioner is *not* "able and willing" to comply with standards for provision of Abbott preschool programs, as evidenced by the significant financial, operational and facility issues identified by the Office of Compliance Investigation (OCI) report – several of which remain outstanding – and the judgment of the Department liaison to the Board (Jessica Peters), who testified at length as to her observations of, and experience with, the petitioner's operations and facility. To the contrary, the Board contends, the record evinces a "long and documented history of, among other concerns, excessive lease payments; questionable payroll, food and other expenditures; inferior classroom sizes; inadequate security; and various other financial irregularities and educational program-related deficiencies…the existence of which was

not denied and the remediation of which was woefully incomplete." (Board's Exceptions at 1, 3, 9-12; quotation at 1 and 3)

The Department's exceptions, likewise reiterating prior OAL argument, also urge rejection of the Initial Decision. The Department first takes exception – for reasons similar to those of the Board – to the ALJ's findings on the petitioner's ability and willingness to meet Abbott standards (Department's Exceptions at 1-3). It further asserts that it did not act arbitrarily or unreasonably in affirming the Board's decision not to renew petitioner's contract, since in reviewing this decision, it had before it ample evidence of both the petitioner's noncompliance with Abbott standards and the Board's history of written communications with the petitioner – the latter ensuring that the petitioner would (and, in fact, did) have sufficient opportunity to refute the Board's decision consistent with the intent and purpose of *N.J.A.C.* 6A:10A:2-3(b). (*Id.* at 3-6)

The petitioner, on the other hand, urges adoption of the Initial Decision in its entirety, addressing the Board's and the Department's (respondents) respective exceptions in a single reply that, like respondents' exceptions, substantially renews arguments raised at the OAL. The petitioner first contends the ALJ correctly found it "able and willing" to meet Abbott standards, since the OCI report so heavily relied upon by the respondents is not current and petitioner is in "substantial compliance" with the ensuing corrective action plan (CAP); further, according to the petitioner, any claims of breach of contract are belied by the fact that the Board never once invoked the process set forth in rule (*N.J.A.C.* 6A:10A-2.3(d)) for addressing such claims. The petitioner also asserts that the ALJ rightly rejected the respondents' contentions with respect to classroom size, attendance at training sessions, use of preschool premises as a law office,

and lack of security, since the respondents have engaged in a "disingenuous pattern" of misrepresentation to "portray a lopsided and incomplete version of events" through "overblown assertions" having little or no basis in fact. In sum, according to the petitioner, the respondents were "unable to effectively demonstrate [either] a single breach of the Abbott preschool contract, [or] a single instance of noncompliance with the Code by Petitioner." (Petitioner's Reply at 1-5, 20; quotations at 1-5 *passim* and 20)

On the question of the Board's compliance with applicable nonrenewal procedure, the petitioner reiterates its argument that *N.J.A.C.* 6A:10A:2-3(b) requires reasons for a nonrenewal decision to be given along with the decision, asserting that the interpretation espoused by the respondents would leave a provider to guess at a board's reasons for nonrenewal, thus precluding it from mounting a prompt and thorough refutation within the very short time frame allowed by the rule and causing all manner of procedural confusion and delay. According to the petitioner, there can be no doubt that the Board violated *N.J.A.C.* 6A:10A:2-3(b) or that the Department acted arbitrarily and unreasonably in upholding the Board's decision despite such violation, since the Board's "evidence" of its purported notice is nothing more than a series of "cherry-picked" communications that are erroneous, disputed, unclear, or devoid of mention of nonrenewal as a consequence – while the Department had no authority to ignore a duly promulgated administrative rule, nor to interpret it in a manner contrary to its obvious purpose and intent. (Petitioner's Reply at 5-10, 10-20, 20-22)

Upon careful review and consideration, for the reasons that follow, the Commissioner rejects the Initial Decision and dismisses the petition of appeal.

Initially, the Commissioner fully concurs with the petitioner and the ALJ that *N.J.A.C.* 6A:10A:2.3(b) does, in fact, contemplate that a statement of reasons will be given to a provider contemporaneous with notice of a board's decision not to renew its contract, and that the Board herein failed to take this specific action. However, she also concurs with the Department that – under the particular circumstances here present – the Board's violation was effectively technical and does not act to preclude substantive review of the Board's underlying reasons, either by the Department or by the Commissioner on appeal.

There is no question that the Board in this matter did not articulate its reasons for nonrenewal within the body of – or in any addendum to – the letter notifying the petitioner of its intent not to renew the petitioner's contract for the 2007-08 school year, notwithstanding that the letter itself was provided within the time frame specified by the parties' contract.[2] However, given the documented history of escalating communications between the parties regarding ongoing problems perceived by Board officials – many of them validated by on-site observations of Department staff and Department assessment of CAP implementation issues arising from an OCI report which, it is noted, the petitioner did not appeal – the petitioner cannot creditably claim that it was taken by surprise on receiving notice, as the contractual deadline approached, of a Board decision not to renew – notwithstanding the absence of prior specific mention by the Board of nonrenewal as a consequence for its concerns; nor can it persuasively contend that it could not sufficiently fathom the reasons for such decision so as to undertake preparation of a meaningful rebuttal. Indeed, as the Department notes, the petitioner was,

[2] That preschool provider contracts are required to utilize a standard Department form with any alteration requiring Department approval (*N.J.A.C.* 6A:10A-2.2(c)-(d)) is yet another indication that the contract and nonrenewal rules are intended to work in tandem.

in fact, able to present a very substantial response to the Board's reasons during the course of its review – and again at the OAL hearing – so that the purpose of *N.J.A.C.* 6A:10A:2.3(b) was satisfied both at the Department level and on appeal, and the petitioner's claims of prejudice and denial of due process cannot reasonably stand.[3]

Consequently, in the Commissioner's view, while the Board should have articulated its reasons along with giving notice of intent as contemplated by rule, the omission of such articulation in this instance does not negate the past history of communications between the parties, nor does it render the Department's approval – which the record shows to have been based both on its own direct knowledge and the parties' extensive submissions on review – inherently arbitrary and unreasonable as found by the ALJ. Rather, it is clear that Department staff (appropriately) looked beyond the letter of the procedural rule to its intent in light of the underlying situation and – recognizing that the petitioner was well aware of the Board's (and the Department's) ongoing concerns with various aspects of the petitioner's operations and that the petitioner was being afforded the due process to which it was entitled – reviewed the matter on the merits and determined – both on an independent, individual basis and as a team – that the Board's decision to end its relationship with the petitioner had sufficient substantive basis, made appropriate provision for educating the petitioner's students

[3] The petitioner cautions that the Department's lax interpretation of the rule's requirement for reasons will lead to situations where a provider could be totally surprised by, or have to "dig" for reasons that might explain, a Board decision not to renew its contract. The Commissioner does not disagree that boards cannot be permitted to have *carte blanche* with respect to how and when they notify a provider that its contract will not be renewed. However, there is no question here of the rule's intended meaning, only of the Department's application of it under specific factual circumstances where it knew the provider to be well aware of the board's concerns. That the petitioner herein was able to prepare for Department review as it did was not, as the petitioner contends, due solely to the competence and dedication of its legal counsel and staff. (Petitioner's Reply at 16-17)

elsewhere, and did not place the Board in violation of Abbott law requiring utilization of community providers. (Testimony of David Joye, T4 at 46-128; testimony of Jessica Peters, T3 at 120-22, 134-54[4])

Thus, under these circumstances, the Commissioner finds that the Board may be deemed to have substantially complied with the notice requirements of *N.J.A.C.* 6A:10A:2.3(b), notwithstanding its technical violation, and that the Department did not err in so concluding. The question remains, however, as to whether the Board's decision to nonrenew and the Department's affirmation of it are arbitrary and unreasonable so as to warrant reversal by the Commissioner. On this point, the Commissioner, again, cannot concur with the Initial Decision, finding – as it did with the question of sufficiency of the Board's notice – that the decision effectively places form over substance, ignoring evidence demonstrating legitimate concerns on the part of the Board and minimizing the import of these concerns in terms of the provider's willingness and ability to meet Abbott standards.

In his recommended decision, the ALJ concludes that the petitioner was "able and willing" to continue as an Abbott preschool provider, as evidenced by its entry into a Board and Department-approved CAP which addressed budgetary and staffing issues, often without specific time frames for implementation, and by Department approval of the petitioner's 2005-06 and 2006-07 budgets – as well as by the respondents' failure to substantiate with sufficient evidence their claims as to classroom size, "no show" jobs, and failure to attend training sessions for the Curiosity Corner curriculum. (Initial Decision at 5-6)

[4] These and all subsequent similar citations refer to the transcripts of OAL hearings held on June 21, 2007 (T1), June 22, 2007 (T2), July 10, 2007 (T3) and August 10, 2007 (T4).

However, with respect to the Board's contentions regarding 1) a law practice and other businesses utilizing the school building while the Abbott program was being charged for the entire rent, 2) the security guard paid with Abbott funds not working in the budgeted position and found absent or not visible during site visits, and 3) questionable and disallowable expenditures, the undisputed fact that the petitioner has made material progress in meeting various elements of the CAP, and had its budgets approved for the period at issue, does not alter the equally obvious fact that the question of full Abbott usage of the petitioner's facility has still not been resolved to the Board's (or the Department's) satisfaction;[5] nor does it excuse inappropriate usage of budgeted staff positions[6] or dilatoriness in compliance with CAP directives and related Department or district requests, notwithstanding the absence of a fixed deadline.[7] Similarly, the fact that other providers still used by the Board may also have budget and accounting issues identified through OCI reports does not preclude the Board or Department from citing such issues as a basis for a decision not to renew a particular provider's contract. The Department's budget approval and OCI-CAP processes are separate and distinct from the process for review of nonrenewal decisions, and – although the results of one may have relevance to findings in another – budget and CAP approval cannot, in and of themselves,

[5] Testimony of George Henry (T3), Audrey Lassiter (T3 and T4), Jessica Peters (T3) and David Joye (T4), *passim*. The Commissioner does concur with the ALJ – as did the Department – that no evidence was presented to support the allegation that the petitioner's director also held another position as cruise director.

[6] With respect to the activities of the security guard, see T3 at 35, 47-49, 103-105, and 178-79.

[7] By way of example, law firm signage on a glass door was not removed until shortly before the June 22, 2007 hearing, notwithstanding it having been brought specifically to the petitioner's attention on October 27, 2006. (T2 at 85-88; T3 at 108-09)

be taken as sanctioning of actions or omissions later raised as concerns in a nonrewal proceeding so as to insulate these from Department (or Commissioner) review.[8]

With respect to the Board's remaining "unsubstantiated" reasons, the ALJ has effectively held the Board to proving its allegations precisely as they are stated in its February 21, 2007 and March 1, 2007 letters, while ignoring the fact that underlying the Board's inartful articulation were legitimate concerns which were more than adequately validated by the record, and of which all parties to this matter were clearly aware. In finding the Department's witness "unable to specify which 'no show' jobs [he found] troubling" (Initial Decision at 5), the ALJ has ignored the witness's explanation that he understood "no show" jobs to encompass questions of staff supported by Abbott funds performing non-Abbott work during the course of the school day. (T4 at 102) With respect to the Board's allegations of "substandard" classroom sizes despite "a significant amount of the building [being] used for office space," the record is clear that what Board and Department officials understood by "substandard" was not that the petitioner's classrooms were in violation of the regulatory minimum applicable to them as "grandfathered" spaces, but rather that usage of the petitioner's facility – in the interest of improving the students' educational environment – could have been, but was not, adjusted to decrease administrative space and increase classroom size to something closer to the current standard for "non-grandfathered" facilities. (T3 at 238-40, 137-40, 158-65, 175-76, 181; T4 at 11-26, 103-05) With respect to the Board's contention that the petitioner failed to attend Curiosity Corner training, the ALJ did not find in favor of the

[8] The Commissioner notes that, in any event – and as implicitly recognized in the ALJ's conclusions (Initial Decision at 10) – the approved budget did *not* include the rent increase sought by the petitioner based on its claim of full Abbott facility usage. (T4 at 99)

petitioner, as the petitioner suggests, but rather declined to make any finding at all because he judged the proofs to be in equipoise.

Compounding the problem is the Board's repeated use of the terms "breach" and "violation," which sound in termination for cause and permit the petitioner to counter (correctly) that 1) the Board cannot claim breach of contract where it never availed itself of contractual (*N.J.A.C.* 6A:10A-2.2(f)) and regulatory processes (*N.J.A.C.* 6A:10A-2.3(d)) specifically established to address such claims, and 2) the Board did not prove violation of any specified rule or statute. This matter, however, involves the nonrenewal – not the termination – of a preschool provider contract, so that it is not subject to the more stringent standards governing the latter; nor can it be overlooked that no provider is *entitled* to renewal of its annual contract, and a board is not *obliged* to give any particular provider a new contract so long as its decision to nonrenew can withstand Department scrutiny.

Under this circumstance, all the Department – and the Commissioner on appeal – need determine is that a board's decision has a reasonable basis, that alternative means exist to educate the provider's students, and that the board is not violating the prohibition against duplication of community provider services where available providers are able and willing to meet Abbott standards and use of their services is practical. In the Commissioner's view, adoption of the narrow, technical approach espoused in the Initial Decision sets a standard that would tie boards' hands in seeking optimal implementation of their preschool programs, effectively requiring providers to be noncompliant to the point of warranting mid-contract termination due to major deficiencies or egregious violation of law before a board can be allowed to cease offering

them annual contracts based on the reasonable belief that continued use of their services is not practical as a result of ongoing issues in the application of Abbott standards. This is particularly so where, as here, legitimate board and Department concerns are met with insistent denial, trivialization, misunderstanding or misrepresentation, and where compliance with the full range of stringent fiscal and accounting requirements associated with status as an Abbott provider is grudging at best and often open to question.[9]

In so holding, the Commissioner fully recognizes that the Board and its agents are not without fault in their handling of the nonrenewal of the petitioner's contract; indeed, many of the difficulties presented by this matter are due to the Board's lack of attention to proper procedure[10] and its imprecise articulation of the reasons for its underlying decision. However, under the circumstances here present, the appropriate

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[9] Examples abound in the record of this matter. For instance: The petitioner's witness (executive director) is adamant that no external legal work is being done at the petitioner's facility during Abbott hours, and plainly annoyed that the Board and Department continue to press this point (T1 and T2, *passim*); yet she states that the petitioner's in-house counsel (her daughter) – who she claims is a full-time, on-site Abbott employee – keeps an office in East Orange because she does not want to meet with law clients at the preschool facility during the business day. (T2 at 176-77) She is equally adamant that there is no issue with the security guard performing appropriate duties; yet when he was not at his station during an on-site visit by Board and Department staff, who were accompanied by the witness and her son, she stated in response to staff questioning that the guard had gone to get paper towels, then later advised them that she was mistaken because her son was the security guard and had been with them the whole time. (T3 at 35, 47-49, 102-106, 178-79) She insists that the OCI did not single out the petitioner for audit, and that the audit referenced in this matter was random, routine and performed on all providers in the district; yet the record is unequivocally clear that it was initiated by a referral from the Department liaison based on conversations with the district. (T1 at 85-90, 102-03; T4 at 65-66; Exhibit P-24) She denies receiving communications claimed to have been sent to her by Board staff, contending that they are after-the-fact "fakes" fabricated to bolster the Board's case. (T2 at 178-79) Throughout her testimony, she alternately claims that the Board's action is 1) in retaliation for the petitioner's exercise of its rights in challenging the Board, first in its (incorrect and unsuccessful) characterization of a teacher as unqualified and then in its claim that the petitioner's classrooms were "substandard" when they, in fact, met applicable space requirements, and/or 2) an attempt to fill its own new preschool with the petitioner's students; yet there is no evidence to support either of these contentions, which are at the very least countered by credible testimony from Board and Department witnesses. (T1 and T2, *passim*; T3 at 104, 132-148, 194-203)

[10] The Commissioner notes a Board witness's testimony as to use of a standard "form" letter notifying providers of nonrenewal, which was sent to the petitioner in this matter and has in the past been sent to other providers who have not appealed. (T2 at 218-20) In this regard, the Commissioner cautions the Board and its staff regarding the need to provide adequate notice to providers as required by *N.J.A.C.* 6A:10A:2.3(b).

remedy for the errors made by the Board is not to compel it to continue contracting with a provider with whom it has had ongoing, State-validated concerns – particularly where alternatives are now available and the petitioner's ability and willingness to freely meet the full range of Abbott standards is belied by the resistance it has shown on this record to requirements it considers unreasonable or trivial. While the ALJ is correct in observing that procedural rules are "not to be ignored" (Initial Decision at 9), in a matter of this type – in order to fulfill her obligation to ensure that Abbott programs are delivered, and Abbott monies spent in accordance with their intended purpose – the Commissioner cannot allow the letter of the law to prevail over its spirit and intent when the latter dictate a contrary result.

Accordingly, the Initial Decision of the OAL is rejected for the reasons expressed herein, and the petition of appeal is dismissed.[11]

IT IS SO ORDERED.[12]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 1/14/08
Date of ~~Mailing~~ FAXING: 1/14/08

[11] Based on statements in the petitioner's exceptions (at 23) and, more particularly, in papers filed before the State Board of Education in conjunction with the petitioner's motion for emergent relief seeking issuance of a final Commissioner decision by December 21, 2007 notwithstanding the provisions of the Administrative Procedure Act, the Commissioner is aware that a number of Board students continue to attend the petitioner's school, apparently without payment of tuition in whole or part. While the Commissioner clarifies that she intends nothing in this decision to compel parents to transfer their children mid-year to an Abbott facility within the district, she concomitantly clarifies that the Board is not responsible for the payment of tuition for any time these students have thus far attended, or continue to attend for the balance of the 2007-08 school year. The Commissioner further reminds the parties that emergent relief was denied in this matter, and that the ALJ's initial decision in the petitioner's favor was a recommendation having no force and effect unless and until adopted by the Commissioner; thus, any action the petitioner may now deem to be to its detriment was taken at its own peril.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 03041-07
Agency Dkt. No.: 58-2/07

TODDLERTOWN CHILD CARE CENTER,

Petitioner,

v.

TOWNSHIP OF IRVINGTON BOARD OF EDUCATION, ,

Respondent.

TODDLERTOWN CHILD CARE CENTER,

Petitioner,

OAL DKT. NO. EDU 05430-07
AGENCY DKT. NO. 129-5/07

v.

TOWNSHIP OF IRVINGTON BOARD OF EDUCATION AND N.J. STATE DEPARTMENT OF EDUCATION, DIVISION OF EARLY CHILDHOOD EDUCATION,

(CONSOLIDATED)

Eric Taylor, Esq. for petitioner
(Taylor & Mitchell, LLC, attorneys)

Kecia M. Clarke, Esq. for petitioner

Jennifer M. Carrillo-Perez, Esq. and **Sam Della Fera, Jr.**, Esq. for respondent, Irvington Board of Education
(Trenk, DiPasquale, Webster, Della Fera & Sodano, P.C. attorneys)

Melissa T. Dutton, Deputy Attorney General, for respondent, NJ Department of Education, Division of Early Childhood Education (Anne Milgram, Attorney General of New Jersey, attorney)

Record closed: September 4, 2007 Decided: October 15, 2007

BEFORE **IMRE KARASZEGI, JR.**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Irvington Board of Education ("Board") notified Toddlertown Child Care Center ("Petitioner") of its intent not to renew its preschool provider contract for the 2007-2008 school year. Petitioner contends that it did not receive proper notification from the Board. Petitioner appeals both the Board's decision and the Division of Early Childhood Education ("DECE") affirmation of that decision.

On February 27, 2007, petitioner sought an interim order from the Commissioner of the Department of Education enjoining the Board from withholding rental payments. OAL Docket No.: EDU03041-2007, Agency Docket No.: 58-2/07. (Toddlertown I) On March 15, 2007, petitioner filed an amended petition with the Commissioner challenging the non-renewal and a motion for emergent relief. On March 16, 2007, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") where it was filed as a contested case. After hearing oral arguments on March 22, 2007, I granted the motion for emergent relief. (Toddlertown II) On April 5, 2007, the Commissioner rejected my recommended Order on the basis that the Board's non-renewal of petitioner's contract had not been presented to DECE for affirmation or denial as required by N.J.A.C. 6A:10A-2.3(b). The Commissioner transferred the non-renewal matter to DECE and, after receipt of additional submissions from both the Board and petitioner by April 13, 2007, the DECE, on April 26, 2007, decided to affirm the Board's decision not to renew. On May 11, 2007, petitioner filed an appeal and a motion for emergent relief. After hearing oral argument on May 30, 2007, I declined to grant emergent relief. OAL Docket No.: EDU05430-2007, Agency Docket No.: 129-5/07. (Toddlertown III) I consolidated Toddlertown I, II, III and held hearings at the OAL

on June 21, 2007, June 22, 2007, July 10, 2007 and August 10, 2007. The record closed on September 4, 2007 upon the receipt of briefs.

FACTUAL DISCUSSION

The following facts are not in dispute, and I **FIND** them to be **FACTS** of this matter:

The Irvington public school district is an "Abbott" district which receives public state funds for the provision of free preschool services for all three and four year old children who reside within the Township of Irvington. The New Jersey Department of Education ("DOE"), specifically, its Division of Early Childhood Education ("DECE"), is charged with overseeing the publicly funded preschool programs throughout the state. Both the New Jersey Supreme Court and the DOE mandate that Abbott districts must collaborate with local child care providers to implement required preschool programs.

Beginning on or about 1999, the Board contracted with petitioner to provide Abbott preschool programs for the district on a year to year basis.

By letter of February 21, 2007, Audrey Lassiter, Director of Early Childhood Education for Board advised the district's Assistant Superintendent of a number of "problems with the management of Toddler Town Child Care with respect to honoring the conditions of the contract". Petitioner was not copied for purposes of this letter. By letter of February 23, 2007, petitioner was notified of the Board's decision not to renew the contract for the 2007-2008 school year. No reasons were given in the letter for the non-renewal decision. By letter of March 1, 2007 to the DECE, Lassiter reiterates the "problems" previously listed in the February 21, 2007 letter as "contributing factors" to the district's decision "not to renew". This letter, not copied to petitioner, informs the DECE that "due to the opening of the new in-district preschool, Irvington Public Schools has made a decision not to renew our contract with Toddlertown Child Care Center".

There is a dispute as to whether petitioner was "able and willing" to meet the quality standards of Abbott preschool programs and deliver the corresponding services. Lassiter enumerates, in her February 21, 2007 letter, a number of problems with respect to "honoring the conditions of the contract" and she subsequently repeats the identical problems or "contributing factors" as the basis for the Board's decision in her March 1, 2007 letter to the DECE. The following problems are specifically listed in both letters.

"The OCI report substantiates what has been our belief for several years that there is the existence of a law practice and other businesses utilizing the building while the Abbott Program is charged for total lease cost.

Refusal to comply with OCI auditor and early childhood liaison's request to remove law firm name from exterior glass door.

According to the OCI report findings, the director holds another position as cruise director

Eight out of the ten contracted classrooms have substandard classroom sizes although a significant amount of the building is used for office space

Salaries paid to workers for no show jobs

The fulltime paid security person is not working in the position budgeted for in the 2006-2007 contract

Toddler Town requested and was approved for a fulltime security guard during the operational hours of the Abbott Educational Program. We have found during site visits that the security person either absent or not visible during entry into the building and lack of a security desk located in the entry area of the building.

Constant submission of questionable and disallowable expenditures
Did not attend training of new curriculum, Curiosity Corner."

Jessica Peters, Education Program Development Specialist with DOE, highlighted DECE's reasons for affirming the Board's non-renewal;

1. Concerns regarding the budget
2. Outstanding OCI matters

3. Staffing concerns regarding "staff in budget not present"
4. Correspondence regarding non attendance at curriculum meeting.

On or about November 2005, the Office of Compliance Investigation (OCI) of the DOE commenced a limited review or "point in time" audit of the 2005-2006 school year contract, budget and financial records of petitioner. This review was completed in June 2006 and petitioner thereafter entered into a corrective action plan regarding the November 2005 audit. The plan enumerated the tasks at issue and provided actual or anticipated dates of completion. The corrective action plan agreed to by the Board and petitioner addressed the manner in which accounting and budget controls, budget and contract, facility, payroll and staffing and quarterly expenditure reports would be addressed. In instances where immediate action was necessary, the Board could, if they wished, recoup any disputed or inappropriate expenditure. The action would be reflected in the column labeled, status of task accomplishments, of the corrective action plan. David Joye, the budget/policy analyst for DECE emphasized that there was "nothing set in stone" as to a requirement when each task must be completed. Despite the concerns raised in the OCI Report and the ongoing efforts to address any outstanding budgetary concerns in the corrective action plan, petitioner's 2005-2006 and 2006-2007 budgets were subsequently approved. I **FIND** that the budgetary and staffing issues were addressed and a corrective action plan was agreed to by both the Board and petitioner.

Lassiter's February 21, 2007 letter also cites a concern about "substandard classrooms". Jessica Peters concedes that petitioner's classrooms met the "minimum requirements" as to classroom size. Thus, David Joye affirmed that non-renewal was "not based" on a concern regarding "substandard classroom size". Furthermore, during his testimony, Joye could not specify which "no show jobs" , referred to in both the February 21, 2007 and March 1, 2007 letters were troubling. The Board's contention that petitioner failed to attend the training sessions for the Curiosity Corner curriculum was disputed by petitioner's letter dated November 1, 2006. Since neither the Board or

petitioner could provide sufficient evidence to substantiate the accuracy of the sign in sheets for the training sessions in question, I decline to make a finding in this regard.

DECE's contention that petitioner was not "able and willing" to continue to provide services was not substantiated in the documents or testimony presented. In fact, neither the Board or DECE was able to substantiate their contention that petitioner was not "able and willing" to meet any of the quality standards of Abbott preschool programs as set forth in N.J.A.C. 6A:10A-2.2(b). I **FIND** that in asmuch as petitioner has, with the Board's approval, addressed and continues to address a majority of subject issues as well as the completion of tasks as agreed to in the 2005-2006 school year corrective action plan, this effort underscores petitioner's position that it is "able and willing" to provide the required services as an Abbott preschool program provider.

ISSUES

The issues are whether the Board properly notified petitioner of its intention not to renew the 2007-2008 contract and whether DECE's affirmance of that decision was arbitrary, capricious or unreasonable.

ANALYSIS AND CONCLUSIONS OF LAW

The Legislature created Abbott districts in response to the New Jersey Supreme Court's decision in Abbott v. Burke, 119 N.J. 287, 394 (1990). There are twenty-eight urban districts classified as special needs districts under the Quality Education Act of 1990. N.J.S.A. 18A:7F-3. Because Abbott districts do not have the local resources to provide their students with a thorough and efficient education, the State must assure that funding adequately provides for the unique educational needs of the districts. Abbott v. Burke, 119 N.J. 287, 295 (1990). Subsequent Abbott decisions have mandated the provision of preschool services for three and four year olds in these districts. Abbott v. Burke, 153 N.J. 480, 508 (1998). The New Jersey Commissioner of Education was required to promulgate regulations and guidelines codifying education

reforms incorporated in a judicially mandated school reform plan, including procedures and standards governing applications by individual schools and districts for needed programs and necessary funding. Id.

With the mandate to provide preschool services to three and four year olds in the district, the regulations provide that ". . .the district board of education shall contract with a child care provider . . .to implement required preschool programs and shall not duplicate programs or other services otherwise available in the community. The district board of education shall enter into an Abbott Preschool Program Contract with a child care center provider. . .to provide services to preschool children only when that provider is able and willing to meet the quality standards of Abbott preschool programs. . . ." N.J.A.C. 6A:10A-2.2(b). A district "must collaborate with local . . .licensed child care providers . . .whenever practical to implement required preschool programs." Abbott v. Burke, 163 N.J. 95, 114 (2000).

N.J.A.C. 6A:10A-2.3 provides for procedures to be utilized by both the district and provider in the event of non-renewal or termination of program contracts. Since this matter involves the non-renewal issue, the applicable regulation governing the procedure for non-renewal is found in N.J.A.C. 6A:10A-2.3(b) as follows;

> (b) The district board of education, child care provider, and Department shall use the following process for non-renewal of a child care center provider's Abbott Preschool Program Contract:
>
> 1. The school district shall notify, in writing, the child care center provider and the Department of the decision and reasons for non-renewal of the Abbott Preschool Program Contract.
>
> 2. The child care center provider may dispute the non-renewal of the Abbott Preschool Program Contract by written notification within 10

business days to the Office with a copy to the Department of Human Services, Office of Early Care and Education.

3. The Office may request additional information.

4. The Office shall affirm or deny the appropriateness of the non-renewal decision.

5. The non-renewal decision may be appealed to the Commissioner pursuant to N.J.A.C. 6A:10A-9.2.

The Board's position here is that petitioner was aware of the district's concerns, many of which are set forth in Lassiter's February 21, 2007 letter, prior to the district's official decision to not renew the 2007-2008 provider contract. The Board further contends that the OCI report of June 2006 placed the petitioner on notice of the Board's reasons for non-renewal. Therefore, the Board argues, its obligations under N.J.A.C. 6A:10A-2.3(b) had already been satisfied prior to the Board's formal notification to the provider/petitioner on February 23, 2007. DECE's position, in affirming the Board, is that since petitioner had not corrected the areas of concern contained in the OCI report and the corrective action plan, petitioner was not "able and willing" to continue to provide Abbott services as a preschool provider. I disagree as to both.

N.J.A.C. 6A:10A-2.3(b)(1) is very clear regarding the non-renewal process; "The school district shall notify, in writing, the child care center provider and the Department of the decision and reasons for non-renewal of the Abbott Preschool Program Contract". (emphases added) In the only letter to petitioner addressing the non-renewal of its 2007-2008 contract, the Board, on February 23, 2007, fails to provide any reasons for its non-renewal decision. While the Board argues that the petitioner had "constructive notice" of its intent not to renew, this position is perversely one-sided. Although the issues that had been the subject of correspondence or discussion between the Board and petitioner from 2005 to February 2007 may have involved numerous topics, and in

that respect, could arguably have created some form of "notice" as to those topics, the core question would still be; Notice of what? The Board has not proffered any testimony or document indicating that the correspondence and discussions between the Board and petitioner since 2005 served as any notice of the Board's intent not to renew. In her March 1, 2007 letter to DECE, Lassiter introduces a new "reason" for non-renewal, "due to the opening of the new in-district preschool . . . ." However, neither this "reason" or the letter was communicated to the petitioner.

Notwithstanding the fact that during the course of these hearings, issues regarding the alleged "misuse of state funds for salaries" or "use of state funds for questionable or disallowable expenditures" were advanced by both the Board and DECE, procedural requirements set forth in the regulations cannot be ignored. Salary concerns and expenditures were addressed in an agreed upon corrective action plan between the Board and petitioner regarding the 2005-2006 budget with the completion of the tasks at different stages of advancement. In addition, N.J.A.C. 6A:10A-7.1 and the FY 2007 Appropriations Act (P.L. 2006, c.45) expressly charge the Commissioner of DOE with ensuring, through careful scrutiny of district expenditures, that the very substantial amount of State funding received by Abbott districts is expended in a lawful, efficient and effective manner, and to take any affirmative action to achieve this end.

The documents and testimony submitted by the Board, specifically that of George Henry, Fiscal Specialist for the Irvington Office of Early Childhood, highlight an ongoing business relationship that involves requests for various budgetary documentation and the provider's response to the specific request. Fiscal specialist Henry emphasized, "I go over quarterly reports with provider every quarter". David Joye, in referring to the corrective action plan, testified that the dates of completion can be either "actual or anticipated". When asked if there was a "general expectation as to when corrective action plans - - a time line of when the tasks outlined in the corrective action plans, should ultimately be completed and corrected?" Joye responded, "We don't have anything set in stone, but depending on the severity of the finding may impact."

I **CONCLUDE** that the Board failed to adhere to the procedural requirements of N.J.A.C. 6A:10A-2.3(b). I also **CONCLUDE** that the decision of DECE to affirm the Board's decision is unreasonable given the Board's clear violation of the procedural requirement of notifying the petitioner/provider in writing of the decision and reasons for non-renewal. I **CONCLUDE** that the agreement to enter a corrective action plan and subsequent budget approvals fail to support the Board's or DECE's position that petitioner is not "able and willing" to continue as an Abbott preschool provider. Lastly, inasmuch as any issue regarding the payment of rental increases initially raised in Toddlertown I needs to be addressed, I **CONCLUDE** that since the Abbott preschool program budget between the Board and petitioner must be approved for each school year by the State of New Jersey and the Board and petitioner only contracts to provide preschool services on a year to year basis, any rent increase not approved for a particular school year is not authorized.

ORDER

Based upon the foregoing, it is hereby **ORDERED** that the decision of DECE be **REVERSED**. It is further **ORDERED** that the Board enter into a contract for the 2007-2008 school year with petitioner for the purpose of providing Abbott preschool services to all eligible students. It is also **ORDERED** that the Board provide notice to parents of preschool eligible students in Irvington of petitioner's participation in the Abbott preschool program for the 2007-2008 school year.

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

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

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

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

October 15, 2007

DATE

IMRE KARASZEGI, ALJ

Date Received at Agency: 10/15/07

Mailed to Parties:

OCT 16 2007

DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

APPENDIX

WITNESSES

Petitioner

Sharon Spearman

Respondents

Audrey Lassiter
George Henry
Jessica Peters
David Joye

EXHIBITS

Petitioner

P-1 Contract for Abbott Preschool Services
P-2 Letter of non-renewal to petitioner dated February 27, 2007
P-3 Letter of non-renewal to DECE dated March 1, 2007
P-4 Certification of mailing dated February 26, 2007
P-5 Lassiter letter to petitioner dated March 1, 2006
P-6 Measurement sheet and cover letter to Irvington dated March 8, 2006
P-7 Lassiter letter to petitioner dated October 31, 2006
P-8 Petitioner reply letter to P-7 dated November 1, 2006
P-9 Appraisal of Toddlertown facility
P-10 Lassiter letter to petitioner dated February 9, 2007
P-11 Petitioner letter to George Henry dated February 12, 2007
P-12 Letter from Irvington to petitioner dated October 31, 2006
P-14 Lassiter letter to petitioner dated February 12, 2006

P-15 Toddlertown Budget for 2007-2008
P-16 Petitioner letter to DECE dated April 11, 2007
P-17 Petitioner response letter dated April 13, 2007
P-18 DECE letter to petitioner dated April 26, 2007
P-24 Executive summary of OCI audit of Toddlertown
P-25 Corrective Action Plan
P-26 Petitioner's response letter dated September 25, 2006 regarding P-25
P-27 Petitioner's request for admissions April 5, 2007
P-28 Lassiter letter to petitioner dated May 14, 2007
P-29 Petitioner reply to P-27 dated May 14, 2007
P-30 NJDOE list of contracted Abbott preschool providers for 2007-2008
P-33 Letter from Jessica Peters to petitioner dated February 21, 2007
P-34 Petitioner letter to Irvington dated October 5, 2006

Respondents

R-4 Lease agreement between Toddlertown and AL&S Urban Renewal Corp.
R-5 George Henry e-mail dated November 14, 2006 to petitioner
R-6 Petitioner letter to Henry dated November 14, 2006
R-8 Petitioner letter to DECE dated January 30, 2007
R-9 George Henry letter to petitioner dated September 18, 2006
R-10 Lassiter letter to petitioner dated September 29, 2006
R-11 George Henry memo to petitioner dated October 17, 2006
R-12 George Henry memo to petitioner dated January 16, 2007
R-13 George Henry letter to petitioner dated January 22, 2007
R-14 George Henry letter to petitioner dated January 31, 2007
R-17 Lassiter letter dated February 21, 2007

DOE-2 Early Childhood Environment Rating Scale

20-08

OAL DKT. NO. EDU 7683-07
AGENCY DKT. NO. 189-7/07

IN THE MATTER OF THE TENURE HEARING	:	
OF KRISTA REYNOLDS, SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
THE BOROUGH OF HOPATCONG,	:	DECISION
SUSSEX COUNTY	:	
	:	

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

Upon such review, the Commissioner finds that the six standards articulated in *N.J.A.C.* 6A:3-5.6(a) have been met in this case. Accordingly, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case.

The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E. Davy
COMMISSIONER OF EDUCATION

Date of Decision: 1/17/08
Date of Mailing: 1/17/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INIITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 07683-07

AGENCY DKT. NO. 189-7/07

IN THE MATTER OF THE TENURE HEARING OF KRISTA REYNOLDS, SCHOOL DISTRICT OF THE BOROUGH OF HOPATCONG, SUSSEX COUNTY,

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Robert M. Tosti, Esq., for petitioner, the Board of Education (Bressler, Amery & Ross, P.C., attorneys)

Nancy I. Oxfeld, Esq., for respondent Krista Reynolds (Oxfeld Cohen, P.C., attorneys)

Record Closed: November 26, 2007 Decided: November 29, 2007

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

In this matter the School District of the Borough of Hopatcong (Board) charged tenured teacher Krista Reynolds with inefficiency and sought her removal or reduction in salary under N.J.S.A. 18A:6-10 et seq.

On July 10, 2007, the Board filed Tenure charges against Reynolds. On July 30, 2007, the Bureau of Controversies and Disputes of the New Jersey Department of Education (DOE) referred the matter to the OAL after having reviewed the Tenure

charges and having deemed them sufficient, if true, to warrant dismissal or reduction in salary.

The circumstances which gave rise to the Tenure charges were allegations that teacher Reynolds taught in an inefficient manner by failing to control the behavior of her students; failing to maintain a classroom culture conducive to learning; failing to provide and deliver to her students the appropriate grade level content in her German classes; failing to alter and adjust her teaching methods; creating inefficient lesson plans; failing to organize her classes such that appropriate assessment of student learning can be achieved; and failing to utilize the many resources available to her to enrich the educational experiences of her students.

At the commencement of the hearing on October 9, 2007, the parties engaged in extensive settlement discussions which led to a proposed settlement agreement subject to Board approval the terms of which were placed on the record. On November, 26, 2007, the Board submitted a fully executed Settlement Agreement and Board resolution accepting the settlement. See the attached copy.

Based upon a review of the record as well as the proposed settlement agreement and attached Board resolution, and the representation of the parties on the record of this matter, I make the following **FINDINGS:**

1. The nature of the charges has been documented by the submission of a Statement of Charges and Certificate of Determination.

2. The settlement is in the public interest as it conserves the Board's resources and delivers a final result whereby Reynolds will no longer be associated with the District of the Borough of Hopatcong rather than the unpredictable outcome of a hearing. Additionally, the salary cost approximates that which the District would have to spend during the hearing given the anticipated length of the hearing. The

public interest is not jeopardized by this settlement, a provision of which is Reynolds' retirement from her position, in that the nature of the charges do not involve criminal activity or unbecoming conduct as expressed in N.J.A.C. 6A:9-17.4.

3. The proposed settlement agreement is with the consent of all parties.

4. By the terms of the proposed settlement agreement and the representations of Reynolds at the hearing, the charged party has entered into this agreement with a full understanding of her rights.

5. Reynolds has been advised of the Commissioner's role in referring tenure resolutions to the State Board of Examiners for possible suspension or revocation of certificates.

I therefore **CONCLUDE** that this Settlement Agreement meets the requirements of N.J.A.C. 6A:3-5.6 and that approval of it is in the public interest. Inefficiency charges, standing alone without accusations of wrongdoing or conduct unbecoming, are not generally something which concerns the State Board of Examiners. Barshatsky v. Bd. of Educ. of the Freehold Regional High School District, 95 N.J.A.R. 2d (EDU) 71.

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

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

November 29, 2007
DATE

JESSE H. STRAUSS, ALJ

Date Received at Agency: 12-3-07

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

DEC 3 · 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

id

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

IN THE MATTER OF THE TENURE HEARING OF KRISTA REYNOLDS, HOPATCONG BOROUGH SCHOOLS, SUSSEX COUNTY

OAL DKT No. EDU 07683-07

SETTLEMENT AGREEMENT

The Hopatcong Board of Education and Krista Reynolds have agreed to amicably resolve this matter on terms set forth below. The parties agree this Settlement Agreement is in the public interest.

The nature of the charges are inefficiency, not misconduct, and this settlement is a rational resolution in what would be an arduous and lengthy hearing which would require payment of salary to the Respondent for at least as long as the time for salary to continue under the settlement. That is, even if the matter were to be tried, the salary payments would continue until at least May 15, 2008.

The Hopatcong Board of Education has passed the attached resolution attesting to its consent and to settle this matter on the terms set forth therein.

The teacher, Krista Reynolds ("KR"), in open court and under oath set forth her understanding of her rights to proceed to hearing and her satisfaction with her legal representation. KR has been advised of the Commissioner's role on referring tenure resolutions to the State Board of Examiners for possible suspension or revocation of certificates.

This settlement is in the public interest as it conserves district resources, delivers a final result rather than the unpredictable outcome of a hearing, and the salary cost approximates that which the district would have to spend during a hearing.

The terms, as set forth in the attached resolution are as follows:

1. KR's salary payments will resume November 1, 2007, as set forth in N.J.S.A. 18A:6-11 and continue through May 31, 2008;
2. KR will present a letter of retirement effective May 31, 2008 and her letter will be submitted to the Board for acceptance once this settlement is approved by the Commissioner of Education;
3. By signing this Agreement, KR waives and releases any claims she would otherwise maintain against the district other than ordinary benefits and endorsements of employment through May 31, 2008; and
4. The tenure charge will be withdrawn and KR's employment will be concluded as of May 31, 2008.

Krista Reynolds
Krista Reynolds

Wayne L. Threlkeld
Wayne L. Threlkeld, Superintendent

RESOLUTION

(October 22, 2007)

WHEREAS, pursuant to tenure charges of inefficiency against K.R. filed on or about June 25, 2007, a hearing has been scheduled to be heard beginning November 7, 2007, and

WHEREAS, pursuant to discussion held amongst the parties, with the assistance of the Administrative Law Judge assigned to the case, a tentative resolution to the tenure charges of inefficiency has been reached, and

WHEREAS, the parties have considered the uncertainty of the final result in such a complex case, the cost and expense of a lengthy hearing which is expected to take at least fifteen (15) hearing days, the expenditure of district funds for legal fees and the additional burden of administrative time and effort, and taking into consideration that the salary payments will resume for K.R. on or about November 1, 2007, and that the expected decision of the Commissioner is not anticipated to be issued until approximately May 15, 2008, and

WHEREAS, counsel for the respondent has indicated a willingness to have her client K.R. retire as of May 31, 2008, and K.R. has, under oath, expressed her willingness to accept the terms of the proposed settlement, and

WHEREAS, the Board has considered the certainty of result that such a resignation would achieve, and weighing the best interests of the district and the public fisc;

NOW, THEREFORE, be it resolved that the district authorizes counsel to enter a settlement of the tenure case on the condition that K.R. presents a letter of retirement effective May 31, 2008 and waives and releases any and all claims she could otherwise maintain against the district (other than ordinary benefits and emoluments of employment from November 1, 2007 to May 31, 2008), and that counsel may present said settlement to the Office of Administrative

Law on or about November 7, 2007, so that this matter may be concluded without further expense to the district, and

BE IT further resolved that upon approval of this settlement by the Commissioner that the Board will honor the terms thereof and that this matter will be concluded.

21-08

21-08

BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAINSIDE, UNION COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF BERKELEY HEIGHTS, UNION COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Mountainside Board of Education, which sends its high school students to the Berkeley Heights school district pursuant to a sending-receiving relationship established in 1997, contends it was overcharged for tuition over the years – during which the two districts calculated payments and credits through an *ad hoc* method rather than as set forth in regulation – and was due a cumulative credit/refund of $673,496. When, in the fall of 2006, Mountainside declined to pay invoiced tuition amounts based on this contention, Berkeley Heights cross-appealed.

Based on the parties' submissions and a limited hearing held for the purpose of taking expert testimony, the ALJ found, *inter alia,* that: the 90-day limitations period does not apply to bar the claims of either party; the proper method of calculating tuition credit is the method outlined in *N.J.A.C.* 6A:23-3.1(f)(6), and school districts are not free to agree to a method of calculating tuition that contradicts the provisions of statute and regulations; the issue of tuition credits for special education students is not encompassed in this matter; and, per the proper formula, Mountainside should pay Berkeley Heights $2,980,313.90 for the 2006-07 school year, additionally receiving a credit of $236,046.10 so as to bring the total estimated tuition for 2006-07 to $3,216,360.

Upon careful review and consideration, the Commissioner adopted the Initial Decision with modification and clarification. The Commissioner concurred with the ALJ that the matter was appropriately decided without plenary hearing, that the provisions of rule rather than any contractual agreement between the parties must govern calculation of tuition credits, and that special education costs are not appropriately considered in deciding the present dispute. The Commissioner further concurred that the 90-day rule did not foreclose consideration of the matter on the merits, although the Commissioner modified the ALJ's analysis on this point. Finally, the Commissioner concurred with the ALJ's methodology for determining how best to rectify the parties' past errors and bring them into compliance with law moving forward. The Commissioner directed Mountainside to remit tuition to Berkeley Heights for the 2006-07 school year in the amount necessary to bring its total payments for the year to $2,980,313.90, reflecting the total estimated tuition of $3,216,360 less $236,046.10 in prior year credit.

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

OAL DKT. NO. EDU 9700-06
AGENCY DKT. NO. 243-7/06

BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAINSIDE, UNION COUNTY,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF BERKELEY HEIGHTS, UNION COUNTY,	:	
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions and replies filed by the Mountainside Board of Education (Mountainside) and the Berkeley Heights Board of Education (Berkeley Heights) in accordance with *N.J.A.C.* 1:1-18.4 and 1:1-18.8.

On exception, Mountainside notes its agreement with the Initial Decision in most respects, urging the Commissioner to adopt the recommendations of the Administrative Law Judge (ALJ) as to: 1) the timeliness of the petition; 2) the need to resolve this matter by calculating estimated tuition and credit for overpayment for the years at issue in the manner advocated by Mountainside's expert, i.e., in strict accord with applicable rule rather than through the *ad hoc* method previously employed by the parties; and 3) the conclusion that Mountainside had been shortchanged over the years and was due credit by way of adjustment. (Petitioner's Exceptions at 2-7)

Mountainside disagrees, however, with the specific manner in which the ALJ actually implemented her substantive ruling, contending that she "erroneously inputted several data entries that distorted the bottom line result for the 2006-07 and 2007-08 school years, in a manner contrary to the very principles she intended to apply." According to Mountainside, "[while] these errors will net themselves out in the long run, they delay a full application of the formulas provided under the statute until the 2008-09 school year, which is unnecessary because it is possible to fully apply the statutory formulas in the current 2007-08 school year." (Petitioner's Exceptions at 7)

Mountainside explains that the ALJ's Attachment 2, which is intended to show tuition and credits actually paid over the years as corrected for an "overapplication" in 2005-06, errs in commingling actual and recalculated figures, with the result that certain amounts appearing as paid to Mountainside were not, in fact, received as they should have been according to the simulation developed in Attachment 1. Had the ALJ used the correct figures based on undisputed historical data, Mountainside concludes, she would have arrived at $638,431.90 as the amount of credit to be received by Mountainside in 2006-07, representing the sum of the credits due Mountainside from 2002-03 ($297,877.60) and 2003-04 ($354,141.50), adjusted for the difference ($13,587.20) between the credits actually received in 2000-01 through 2005-06 ($1,552,288) and the credits that should have been received for overpayments in 1997-98 through 2001-02 ($1,538,700.80). (Petitioner's Exceptions at 7-12) Mountainside adds that – since the 2006-07 school year has now ended – the $638,431.90 credit should be construed as "credit received" for that year, so that the regulatory formula can be fully

implemented during 2007-08 by crediting Berkeley Heights with the $138,811 underpaid by Mountainside in 2004-05. (*Id.* at 12)[1]

In reply, Berkeley Heights references its own exceptions (see below) and notes its disagreement with Mountainside's contention that the Initial Decision is correct in most respects. It also objects to Mountainside's characterization of the ALJ's methodology, since, according to Berkeley Heights, the ALJ adopted the methodology of *its* expert rather than that of Mountainside's, comparing the amount paid with the amount owed and then applying that reconciliation to the third year following – deviating only in one overapplication of credit in order to achieve balance for the 2006-07 school year and avoid reconciliation problems going forward. (Respondent's Reply at 2-3) Likewise infirm, Berkeley Heights asserts, is Mountainside's proposed modification of the ALJ's calculations, which commingle credits actually given – not always correctly – with credits properly due, thus failing to produce an accurate account of what would be owed and to whom during the 2006-07 school year if the regulatory formula had been properly implemented from the inception of the parties' agreement. (*Id.* at 3-4) Finally, Berkeley Heights contends that there remains an issue of fact as to whether the $402,500 credit received by Mountainside in 2005-06 was intended to satisfy all credits claimed up to that point – an issue which cannot be resolved without remanding the matter for testimony from individuals having personal knowledge of the parties' transactions. (*Id.* at 4)

In its primary exceptions, Berkeley Heights contends that the ALJ misconstrued applicable law and made findings that are arbitrary, capricious and

[1] Mountainside appends to its exceptions a proposed substitute for the ALJ's Attachment 2, reflecting the calculations advocated.

unreasonable – thus rendering the 90-day rule meaningless, omitting issues material to Berkeley Heights' claims and defenses, and reaching beyond both the scope of the parties' summary decision motions and the relief requested in the underlying petition and cross-petition. (Respondent's Exceptions at 1-2)

Following a detailed recitation of the evidence and proceedings before the ALJ from its own perspective (*Id.* at 2-13), Berkeley Heights argues that the ALJ should have dismissed Mountainside's appeal as untimely, since "[the] notion that a party to a sending-receiving agreement can go back in time many years seeking credits or additional tuition monies has no support in law and is anathema to the means by which school districts must behave." (Respondent's Exceptions at 15-16, quotation at 16)

According to Berkeley Heights, the ALJ erred in finding that Mountainside had an absolute statutory right to reimbursement, so as to render the 90-day rule inapplicable. Such finding, Berkeley Heights contends, ignores the fact that *Lavin v. Hackensack Board of Education,* 90 *N.J.* 145 (1982), was intended to create only a narrow exception to regulatory limitations periods, and that open-ended interpretation of *Lavin* in a matter of this type entirely undermines the requirement for reconciliations of tuition disparities to be made three years after the contract year at issue; it also, the Board continues, ignores recent case law applying the 90-day rule to a tuition dispute. (*Bd. of Ed. of the Township of Pemberton v. Bd. Of Ed. of the Burlington County Special Services School District,* Commissioner of Education Decision No. 134-07, decided April 12, 2007) (Respondent's Exceptions at 17-18)

The ALJ further erred, Berkeley Heights asserts, in finding that the parties' engagement in ongoing discussions about tuition credits due (or not due) to

Mountainside resulted in there being no single event that would have triggered the 90-day limitation period; to the contrary, the Board continues, it has consistently been held that attempts to resolve a dispute informally or through negotiation do not negate either the receipt of adequate notice – which Mountainside had at any number of points up to and including the March 16, 2006 meeting at the county office[2] – or the tolling of applicable limitations periods. (Respondent's Exceptions at 18-23, citing to *Kaprow v. Berkeley Township Board of Education*, 255 *N.J. Super.* 76 (App. Div. 1992), *aff'd*, 131 *N.J.* 572 (1993), and *Pemberton, supra,* among others) Berkeley Heights also reasserts that Mountainside's claims with respect to 2001-02 must be foreclosed – even assuming, *arguendo*, that its claims as to later years are not considered time-barred – based on prior decisional law finding the limitation period in a tuition dispute to have begun upon expiration of the period for collecting amounts due based on the reconciliation of estimated and certified tuition rates. (Respondent's Exceptions at 23-24, citing *Lord Sterling Schools, Inc. v. Bd. of Ed. of the Morris School District, Morris County,* Commissioner of Education Decision No. 277-02, decided July 19, 2002)

According to Berkeley Heights, the ALJ additionally erred in finding that relaxation of the 90-day rule was warranted, since 1) the public interest is best served by upholding the State's clear policy in favor of recognizing the need, with respect to exposure to disputes, for stability and repose in the fiscal and administrative affairs of

[2] Berkeley Heights states that "the undisputed facts reveal that [Mountainside] received notice of the certified tuition rates each year. It is also undisputed that [Mountainside] was aware that 'substantial arrearages in reimbursement [were] due' sometime between July and November 2005 and did nothing. Thereafter, [Mountainside] received a credit of $402,500, and did nothing to recoup the rest of the overpayments allegedly owed. [Mountainside] was never led to believe that the entirety of its demand would be satisfied and Berkeley Heights never admitted to owing same. Finally, [Mountainside] was specifically instructed to take action to protect its interests in March 2006, and did nothing." (Respondent's Exceptions at 22-23)

boards of education; and 2) the ALJ's perception of the "interests of justice" is based on the erroneous belief that Berkeley Heights gave no indication of any intent to argue untimeliness until it filed its cross-motion for summary decision, when, in fact, it was pleaded as an affirmative defense in the Board's answer to Mountainside's petition. (*Id.* at 25-26)[3]

Thus, Berkeley Heights asserts, the Commissioner should find that Mountainside's appeal is foreclosed by the 90-day rule; however, if she does not, the ALJ's determinations as to the parties' intent during their dealings and the actual figures at issue must then be rejected. According to Berkeley Heights, the parties' cross-motions for summary decision sought resolution of two questions only: the appropriate *method* to be applied in calculating credits – i.e., whether credit could be claimed based on the difference between the tentative tuition charged and the certified tuition rate without regard to payments actually made – and whether Mountainside's claim was barred by the statute of limitations. Berkeley Heights opines that, once the ALJ declined to grant summary decision on either motion, she should have advanced the matter to plenary hearing instead of holding a narrowly circumscribed hearing and then proceeding to rule on numerous issues of fact and law without benefit of testimony from individuals who had personal knowledge of the parties' interactions during the relevant school years – thereby making findings "predicated on an incomplete and prejudicial record," so as to result in a decision that is inherently arbitrary, capricious and unreasonable. (Respondent's Exceptions at 28-29)

[3] Since the ALJ based her conclusion that Berkeley Heights' cross-petition was timely solely on her prior determination with respect to Mountainside's petition, Berkeley Heights also reiterates its arguments before the ALJ as to why its own cross-petition was not untimely filed, for consideration by the Commissioner in the event that she determines to dismiss Mountainside's petition as untimely.

Specifically, Berkeley Heights contends, an issue of fact remains as to the nature of the $402,500 credit extended to Mountainside during the 2005-06 school year, of which the parties have taken very different views and on which the ALJ should not have reached any conclusion – particularly as to whether it resulted in either party waiving claims or defenses – without taking testimony on the parties' intent and making a concomitant evaluation of witness credibility. (Respondent's Exceptions at 29-31) An issue of fact also remains, Berkeley Heights continues, with respect to the $49,250 payment applied in the 2001-02 school year – which the ALJ accepted "based solely on unsworn representations of counsel, without benefit of witness testimony or supporting affidavits" as a payment toward prior tuition despite its manifest irregularity. (*Id.* at 31-32, quotation at 32) Berkeley Heights further asserts that the ALJ erred in precluding it from bringing evidence and testimony with respect to how the parties handled special education costs during the years in dispute, since the issue was sufficiently implicated in the parties' pleadings and Mountainside cannot fairly claim to have been "overcharged" without taking these costs into account. (*Id.* at 32-34)

Moreover, according to Berkeley Heights, the Commissioner must reject a number of the ALJ's specific determinations as without factual basis in the pleadings and testimony: 1) that Mountainside could reasonably have believed that its tuition claim was open to further negotiations after mediation at the office of the county superintendent; 2) that Berkeley Heights' business administrator retired on "short notice," suggesting that duress or problems relating to the current dispute may have been involved; 3) that the interactions between the parties' two business administrators were exactly as represented in Mountainside's brief and certifications, without testimony from – or cross-examination

of – either of the two men; 4) that Mountainside's "rough transcription" of a voicemail message allegedly left for its business administrator by the Berkeley Heights business administrator can be accepted as true for the matters asserted, likewise without testimony from, or cross-examination of, either of the two men; 5) that the dispute encompassed the 2004-05 school year notwithstanding that the petition did not include the latter; 6) that Berkeley Heights admitted that tuition should be reckoned in accordance with statute and rule and not by contract terms, in a context "sounding in the doctrine of waiver, requiring testimony on the parties' intent;" and 7) that Berkeley Heights' expert admitted that, should the ALJ find regulation applicable, then the amount of credit calculated by Mountainside for the period of 1997-99 was correct. (Respondent's Exceptions at 34-36, quotation at 36)

Finally, Berkeley Heights objects to the ALJ's statement regarding credit due Mountainside for the 2007-08 school year, since: 1) that year is outside the scope of both the petition and the cross-petition; 2) credits owed relating to the 2005-06 school year and beyond cannot be known until the Department of Education releases certified costs for those years; and 3) the parties have already agreed on an appropriate credit for the 2007-08 school year. (Respondent's Exceptions at 37-38)

In reply, Mountainside – after countering Berkeley Heights' factual and procedural recitation with one of its own (at 2-13) – first reiterates its arguments as to why its appeal is not untimely filed. (Petitioner's Reply at 13-30) It reasserts its contention that Mountainside has an absolute statutory entitlement to pay no more in tuition than Berkeley Heights' actual cost per pupil, citing *Lavin, supra*, and *Bd. of Ed. of the Borough of Alpha v. Alpha Educ. Ass'n.*, 188 *N.J.* 595 (2006), and distinguishing the

present matter – which is "simply a matter of inputting data into the regulatory formula" – from others where the 90-day rule was found applicable, noting that the latter involved employment benefits grounded in statute but dependent on discretionary action of a board of education. (*Id.* at 14-15) It further reasserts that review of the underlying facts demonstrates that Berkeley Heights cannot – as it must to invoke untimeliness as an affirmative defense – pinpoint any one objective event constituting a violation of Mountainside's rights so as to trigger running of the 90-day rule; to the contrary, according to Mountainside, to whatever extent such "plausible 'concrete events' " can be identified, its appeal was filed well within 90 days of each of them, and, moreover, each monthly tuition invoice can be deemed a continuing and separate cause of action pursuant to *Alpha, supra.* (*Id.* at 16-25, quotation at 25)

Mountainside then reiterates its arguments to the effect that – should the 90-day rule be found applicable and Mountainside determined to have filed beyond the regulatory deadline – relaxation of the rule is warranted. Mountainside again asserts that: 1) important public interests are at stake, since calculation of tuition is a matter of significance to every district sending students to another public school district; and 2) strict application of the rule would result in injustice, since the parties engaged in continuing dialogue with neither side signaling to the other that the point had come for legal action. (Petitioner's Reply at 25-30)

Mountainside further contends that Berkeley Heights cannot now claim that the ALJ erred in not conducting a plenary hearing, since it did not oppose Mountainside's motion for summary decision on grounds that material facts were in dispute, but rather cross-moved for summary decision on its own behalf in the belief that

the ALJ would decide in its favor based on the evidence and certifications submitted, without the need for live testimony. (Petitioner's Reply at 31-36) As to the ALJ's exclusion of claims for reimbursement of special education costs, Mountainside denies that such claims may be inferred from a cross-petition filed "for the sole purpose of recouping from Mountainside the tuition that Berkeley Heights had anticipated receiving in its budget for the 2006-07 school year," and asserts that – to the extent that they are included in Berkeley Heights' cross-motion for summary decision – the Board's moving papers presented no evidence in support of such claims. (*Id.* at 36-37, quotation at 36) With respect to Berkeley Heights' contention that the ALJ made factual findings not supported by the record, Mountainside counters that such findings are entirely grounded in the parties' evidential submissions, which the ALJ appropriately scrutinized for points of concession and instances where rebuttal evidence was either nonexistent or insufficient to raise a genuine issue of material fact. (*Id.* at 37-40)

To the extent that Berkeley Heights objects to the ALJ's acceptance of the testimony of Mountainside's expert over that of Berkeley Heights, Mountainside urges that the methodology proposed by Berkeley Heights errs in failing to recognize that "the calculation of tentative tuition to be billed to the sending district is separate from the calculation of any reimbursement due the sending district in those years, except to the extent that the receiving district chooses to prorate the reimbursement monthly as a credit against the tentative charge otherwise due from the sending district." Only in this way, Mountainside asserts, can the discrepancy between tuition charged and actual cost in any year be "squared up" over the four-year cycle as intended by the statute, whereas the methodology proposed by Berkeley Heights is "the financial equivalent of throwing the

sending district off the back of a moving train." (Petitioner's Reply at 40-44, quotations at 43, 44)

Finally, Mountainside interprets Berkeley Heights' exception to the ALJ's award of relief pertaining to the 2007-08 school year as a claim for entitlement to the 2006-07 portion of the ALJ's award while rejecting the 2007-08 portion as beyond the scope of present proceedings. While reiterating its belief that the ALJ erred in her specific cash-flow instructions and urging adoption of its own calculations as set forth on exception, Mountainside asserts that Berkeley Heights can in no event "cherry pick that portion of the result that is advantageous to it, while escaping the consequences of that portion arguably favoring Mountainside" – since the ALJ's directives were an "integrated whole" not susceptible to bifurcation. (Petitioner's Reply at 44-45, quotation at 45)

Upon careful review and consideration, the Commissioner adopts the Initial Decision with modification and clarification as set forth below.

Preliminarily, the Commissioner concurs with the ALJ that this matter can be fully and fairly decided on the parties' cross-motions for summary decision together with the record developed at the hearing convened for the purpose of taking expert testimony on the question of proper calculation of tuition credits. While the parties obviously impute very different meanings to many of their past actions and calculations and Berkeley Heights objects to what it perceives as certain questionable inferences on the part of the ALJ, the Commissioner finds that the material facts necessary for disposition of this matter are clear on the record and largely undisputed, and that where a material factual dispute does exist – i.e., the nature of the $49,250 and $400 payments

made by Mountainside in the 2000-01 school year – the existing record was sufficient for the ALJ to have made reasonable findings of fact.

Similarly, with respect to the question of timeliness, the Commissioner likewise agrees with the ALJ that this matter should be decided on its merits; however, she does so for reasons other than those stated in the Initial Decision.

Initially, the Commissioner does not agree that this matter falls within the scope of *Lavin, supra,* so as to render the 90-day rule inapplicable. The provision of *N.J.S.A.* 18A:38-19(a) specifying that tuition to be paid by a sending district shall not exceed the actual cost per pupil does not create an "entitlement" in the sense addressed in *Lavin*, which distinguished between benefits to which an employee was absolutely entitled by statute and those dependent on the contract of employment or services rendered; indeed, extending the Court's holding from the narrow circumstance addressed in *Lavin* to *N.J.S.A.* 18A:38-19(a) – and, by implication, to virtually every statute prescribing non-discretionary parameters for the operation of local district boards of education – would, as Berkeley Heights correctly asserts, render meaningless both the 90-day rule and the carefully crafted regulatory mechanism for orderly reconciliation of tuition costs.[4] [5]

Further, the Commissioner does not agree that there is no single point in time that can be identified as constituting appropriate notice of a cause of action on Mountainside's part. Whatever the parties' differences as to details and intentions, there is no dispute that: 1) during the summer and fall of 2005, Mountainside's business

[4] As further noted by Berkeley Heights, the 90-day rule has, in fact, previously been applied in matters involving payment of tuition.

[5] Similarly disingenuous is Mountainside's contention that, in a dispute of the type herein, each monthly tuition bill constitutes a new cause of action.

administrator raised the issue of credits for the 2001-02 and 2002-03 school years (due in 2004-05 and 2005-06, respectively) with the Berkeley Heights business administrator; 2) Mountainside was credited in November 2005 with $402,500 to be paid over the course of the 2005-06 school year; 3) discussions continued between the parties' respective business administrators, who by then were additionally required to consider the question of credits for 2003-04, to be reflected in the 2006-07 budget following the December 2005 certification of 2003-04 actual tuition rates by the Department of Education; and 4) by the spring of 2006, Mountainside had clearly taken the position that it was cumulatively owed $673,496 and Berkeley Heights was equally clear about its disagreement with this position. As required by *N.J.A.C.* 6A:23-3.1(f)5, the districts' dispute was taken to the county superintendent for mediation, and although efforts were made by county office staff, no mutually acceptable agreement could be reached and the parties resolved to continue in their respective postures.[6]

Thus, as of March 16, 2006 – the date of the meeting at the county office – Mountainside was clearly on notice that Berkeley Heights was firm in its stance that Mountainside was not owed the credits claimed, so that Mountainside could have no reasonable basis to expect that Berkeley Heights would either be paying it additional monies attributable to 2002-03 during the remainder of the 2005-06 school year or

[6] The Commissioner here notes that the parties and the ALJ all infer that the County Superintendent "failed" to render a "decision" resolving the parties' dispute once they could not reach agreement, and that, when the County Superintendent did not make a determination in the matter, the Department of Education's Division of Finance could or should have intervened in some way. There is, however, no provision in rule for "decision" or "determination" by either the County Superintendent or the Department – notwithstanding that a county superintendent may on occasion take a position on a tuition matter in dispute between parties to a sending-receiving relationship, as in *Board of Education of the Borough of Lincoln Park v. Board of Education of the Town of Boonton,* Commissioner of Education Decision No. 246-03, decided May 15, 2003, cited by Mountainside before the ALJ and on exception. What *N.J.A.C.* 6A:23-3.1(f)5 expressly provides for is "mediation" by the County Superintendent, so that there should have been no expectation of a dispositive ruling by the County Superintendent once mediation proved unsuccessful. (*Cf.*, for example, *N.J.A.C.* 6A:17-2.8, requiring County Superintendent or Division of Finance "decisions" and "determinations" on disputes involving homeless students.)

crediting it in 2006-07 with the cumulative monies it believed it was due. At this point, in the Commissioner's view, the parties were undeniably at impasse, and Mountainside – as the aggrieved party with no entitlement to subsequent intervention by the County Superintendent or Department – needed no further "trigger" to file a petition with the Commissioner. Berkeley Heights, in contrast, could not assume that Mountainside would withhold actually payment on its 2006-07 tuition invoices solely because it budgeted for the large cumulative credit it believed itself due; in so doing, Mountainside was merely acting – at its own peril – consistent with its previously stated position, which it could and would (presumably) then seek to vindicate through appeal to the Commissioner. Berkeley Heights was not aggrieved, and had no cause of action ripe for adjudication, until Mountainside actually failed to honor its tuition obligation in the absence of a ruling from the Commissioner entitling it to pay less than the invoiced amount.

However, by failing to pay the invoices issued by Berkeley Heights – thereby unilaterally taking for itself the relief it should have obtained from the Commissioner – Mountainside effectively compelled Berkeley Heights to file a cross-appeal, thus ensuring that it would be able to press its claims in the form of a defense in the event they were found untimely in their own right.[7] While the Commissioner ordinarily would not countenance such a tactic, she cannot overlook the unique posture of this matter – which has brought to light a nearly decade-long history of the parties to a still-extant sending-receiving relationship ignoring regulatory mechanisms for calculation and payment of tuition and credits, the cumulative effects of which, if unattended, will be

[7] The Commissioner here notes that Berkeley Heights did, in fact, raise untimely filing as an affirmative defense in answering Mountainside's petition on August 2, 2006 – as the ALJ herself recites in the procedural history (Initial Decision at 2) – so that the ALJ is incorrect in stating (*Id.* at 20) that the first indication of Berkeley Heights' intention to raise untimely filing as a defense was its December 2006 cross-motion for summary decision.

carried over into the future.[8] Neither can she ignore that both parties are equally to blame for the morass created by their mutual failure to abide by the provisions of a regulatory scheme expressly designed to ensure clarity, accuracy and stability in tuition arrangements between public school districts; indeed, this entire matter is an object lesson in the wisdom of the regulation and pitfalls of tampering with its application. Consequently – although she does not agree with the ALJ that interpretation of the applicable tuition rules serves the general public interest, since the rules are clear on their face and there can be no two opinions as to how they should operate – the Commissioner does believe it necessary to decide this matter in the more specific interest of the citizens of Mountainside and Berkeley Heights, who are entitled to have the tuition arrangements between their respective boards of education brought back into alignment with law designed to ensure fairness to both.

Turning, then, to the merits of the matter, the Commissioner first concurs with the ALJ, for the reasons set forth in the Initial Decision, that: 1) the regulatory provisions at *N.J.A.C.* 6A:23-3.1(f) rather than the parties' contractual terms govern the calculation of tuition credits for the 1997-98 and 1998-99 school years, so that Berkeley Heights cannot claim a right to reimbursement of credits for those years paid over and above contractual amounts; 2) special education costs – for which Berkeley Heights did not claim reimbursement at any time prior to the present litigation or expressly plead in its cross-petition – are not appropriately considered in this matter; and 3) Mountainside's $49,250 payment to Berkeley Heights in 2000-01 was for tuition, while its $400 payment was not.

[8] In this respect, the present matter differs from other matters, as cited by Berkeley Heights, where the 90-day rule was applied to foreclose appeal of a disputed tuition calculation.

The Commissioner further concurs that – in order for the parties to be positioned at the conclusion of proceedings so that past errors are rectified to the extent reasonably and fairly possible at this point, and so that the law can be followed moving forward – it is necessary to analyze and recast the payments and credits between the parties from the outset of their relationship in 1997 through the date of closing of the record, notwithstanding that Mountainside's petition expressly addressed only the 2001-02, 2002-03, and 2003-04 school years and that the parties may have already made an agreement between themselves with respect to the 2007-08 school year.

Finally, the Commissioner finds the ALJ's methodology – as set forth and applied in the Initial Decision at 26-34 – to be well-devised for the purpose at hand, reducing the dispute to abstract formulations that clearly reveal the fallacy of each of the parties' positions on appeal, allow for incorporation of the valid aspects of both positions, and provide a clear, consistent mechanism for calculating the adjustments and realignments necessary to conform the parties' past actions to the framework of law. The Commissioner further concurs that Mountainside should remit to Berkeley Heights the difference between what it should have paid and what it actually paid for the 2006-07 school year, rather than crediting that amount as an underpayment to Berkeley Heights in a subsequent budget; as previously stated, Mountainside acted at its own peril in unilaterally taking for itself relief it should have sought to obtain by order of the Commissioner.

Accordingly, the Initial Decision of the OAL is adopted for the reasons expressed therein, as clarified and modified above.[9] The Mountainside Board of

[9] The Commissioner notes that Mountainside's expert – Melvin L. Wyns – although identified correctly in the body of the Initial Decision, is erroneously listed in the Appendix (at 39) as "David" Wyns.

Education is directed to remit to Berkeley Heights tuition for the 2006-07 school year in the amount necessary to bring its total payments for the year to $2,980,313.90, reflecting the total estimated tuition of $3,216,360 less $236,046.10 in prior year credit.

IT IS SO ORDERED.[10]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 1/17/08

Date of Mailing: 1/17/08

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 09700-06
AGENCY DKT. NO. 243-7/06

BORO OF MOUNTAINSIDE
BOARD OF EDUCATION,
Petitioner,
v.
TOWNSHIP OF BERKELEY HEIGHTS
BOARD OF EDUCATION,
Respondent.

David Rubin, Esq., for petitioner

Vito A. Gagliardi, Jr., Esq., for respondent (Porzio, Bromberg & Newman, attorneys)

Record Closed: June 12, 2007 Decided: July 20, 2007

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

PROCEDURAL HISTORY

Petitioner, Mountainside Board of Education, filed a verified petition on or about July 12, 2006, alleging that the respondent, Berkeley Heights Board of Education, had failed to credit or refund to Mountainside the sum of $673,496, representing the total

overcharges for fiscal years 2001-2002, 2002-2003 and 2003-2004, and demanding payment of same. The respondent filed its answer on August 2, 2006, demanding that the Commissioner of Education dismiss the petition with prejudice and award attorneys' fees and costs of suit. In addition, it raised the affirmative defense that the petitioner's claims were barred by the applicable statutes of limitations. The matter was forwarded for filing at the Office of Administrative Law (OAL) on September 11, 2006. A telephone conference was held on October 13, 2006. At that time it was decided that the parties would file cross-motions for summary decision. The respondent also made application to file a cross-petition out of time. The application was granted and Berkeley Heights filed its cross-petition on November 14, 2006. The petition alleged that, in compliance with its contractual obligation, Berkeley Heights passed its 2006-2007 school budget and informed the petitioner of the estimated per-pupil cost for 2006-2007. It further alleged that it informed Mountainside of the credit that it would receive based upon the actual cost-per-pupil adjustment from prior years. Without the respondent's knowledge, petitioner adopted a school budget for 2006-2007 with a large, unjustifiable credit and decided to pay over $600,000 less than the tuition due to respondent. Berkeley Heights alleged that due to the actions of the petitioner it would experience a shortfall of $643,721 for the 2006-2007 budget year.

Mountainside filed its motion for summary decision on November 28, 2006. Berkeley Heights filed its opposition to the petitioner's motion for summary decision and its notice of cross-motion for summary decision on December 21, 2006. Mountainside filed its brief in opposition to the respondent's cross-motion on January 11, 2007. Berkeley Heights filed its reply brief on January 26, 2007. On January 23, 2007, I sent a letter stating that I was reserving decision on the summary decision motions and was taking testimony on the issue of the proper method of calculating tuition credits under N.J.A.C. 6A:23-3.1(f)(6). The parties requested an opportunity to submit expert reports. These reports were submitted by March 13, 2007, along with a spreadsheet requested by the judge. Expert testimony was presented on April 24, 2007. There remained outstanding the amount that Mountainside actually paid to Berkeley Heights in the 2000-2001 and 2003-2004 school years. Further correspondence ensued between the parties. On May 22, 2007, Berkeley Heights agreed with Mountainside that the $2,850.33 payment by Mountainside was for transportation and not tuition. In the last

correspondence by Berkeley Heights on June 12, 2007, there was still no agreement on the characterization of the $49,250 payment made in the 2000-2001 school year. Therefore, the record was closed on June 12, 2007.

STATEMENT OF THE FACTS

1. Mountainside and Berkeley Heights have a sending-receiving arrangement. Mountainside sends its students in grades nine through twelve to Governor Livingston High School in Berkeley Heights.

2. In 1997 the parties entered into an "Agreement to Establish High School Sending-Receiving Relationship." The Agreement was to remain in full force through June 30, 2007.

3. This agreement was not in the proper form, according to N.J.S.A. 18A:38-19. According to its terms and in contravention of the statute and regulations, the tentative and final tuition for 1997–1999 was to be $12,500 per student per year.

4. During all other time periods covered by the contract the Mountainside Board of Education was to pay tuition to Berkeley Heights for each Mountainside student enrolled in the high school in accordance with N.J.S.A. 18A:38-19 and N.J.A.C. 6:20-3.1.

5. According to the formula outlined in the contract, which followed the terms of the statute and regulation, the parties were to agree on a tentative tuition charge for each year. Mountainside was to notify Berkeley Heights in writing no later than December 15 of each year of the estimated average daily enrollment of pupils expected to be sent to the high school in the next school year. Berkeley Heights was to notify Mountainside of the estimated cost per pupil no later than January 15 of each year, and the parties were to agree in writing on the tentative total tuition to be charged for each school year no later than seven days prior to the date on which the proposed school budget for that year was required to be submitted to the County Superintendent.

6. An upward or downward adjustment of the tuition charge for any given year was to be made in the third year following the determination by the Commissioner of Education of the actual tuition charge multiplied by the actual daily enrollment of Mountainside students.

7. The agreement also contained a formula for calculating a tentative tuition charge for budgetary purposes each year as per the statute and regulation.

8. During the 2005-2006 school year a disagreement arose between Mountainside and Berkeley Heights over the proper method of calculating credits due Mountainside for overcharges in school years 2001-2002, 2002-2003, 2003-2004 and 2004-2005.

9. In July 2005 Roderic McLaughlin became secretary/school business administrator for the Mountainside School District. Upon his arrival he undertook an analysis of Mountainside's sending-receiving payment history and discovered what he considered to be substantial arrearages for school years 2001-2002 and 2002-2003. He reported these calculations to the Berkeley Heights' school business administrator, William Van Tassel, in November 2005.

10. In November 2005 Berkeley Heights gave Mountainside a credit of $402,500 toward overcharges. This amount was paid to Mountainside at the rate of $57,500 per month through June 2006.

11. The two men agreed to continue discussions about a way to resolve the other credit issues, including the 2003-2004 school year credits, which would be certified in December 2005 and reflected in the 2006-2007 budget planning cycle.

12. McLaughlin attempted to have further discussions with Van Tassel over a number of months, but the Berkeley Heights administrator kept telling him that he would have to get back to him.

13. In December 2005 the certified per-pupil cost figures for the 2003-2004 school year were released. It showed that the tentative per-pupil cost exceeded the actual cost per student.

14. In January 2006 Mr. Van Tassel left a voice message for Mr. McLaughlin. The gist of the message was that Berkeley Heights was still working on the credit issue, but had no final proposal. Because of a pending lawsuit involving de-regionalization, a one-shot credit might be arranged. However, Mr. Van Tassel said that if Mountainside had to come up with a figure, it should "put in what we talked about and we'll see where it plays out." Petitioner's Reply Br. at 3.

15. Mr. Van Tassel announced his retirement on short notice and left Berkeley Heights by February 2006.

16. Michael Kistner was appointed as interim secretary/school business administrator for Berkeley Heights in February 2006. During February and early March, Kistner and McLaughlin exchanged e-mails in which McLaughlin explained the basis for his belief that Mountainside was owed additional tuition credits. Kistner questioned the basis for some of McLaughlin's calculations and McLaughlin attempted to explain his position.

17. By February 2006 Mountainside and Berkeley Heights were involved in the budget adoption cycle for the 2006-2007 school year.

18. McLaughlin included in his preliminary budget calculations a $673,496 credit for what he calculated was the overpayment by Mountainside to Berkeley Heights for school years 2002-2003 and 2003-2004 and the remaining credit for 2001-2002.

19. All Type II school districts, which included Mountainside and Berkeley Heights, were required to adopt and submit preliminary budgets to their County

Superintendents by March 16, 2006. The County Superintendent had until March 27, 2006, to approve them.

20. Both school boards' public hearings on their proposed budgets were to be held by March 30, 2006. A formal vote adopting their budgets was to be held no later than March 31, 2006. The annual school election was scheduled for April 18, 2006.

21. According to N.J.A.C. 6A:23-3.1(f)(3), Mountainside and Berkeley Heights were required to enter into a written agreement stipulating the tentative tuition for the 2006-2007 school year at least seven days prior to the deadline for submitting their proposed budgets to the County Superintendent. However, the two districts had been unable to reach a consensus.

22. A meeting was scheduled for March 16, 2006, for Dr. Carmen Centuolo, the Union County superintendent, to mediate the matter.

23. Both districts planned to attend with their superintendents and school business administrators. However, Dr. Centuolo was ill and, instead, Katherine Davenport, the Union County school business administrator, conducted an informal work session with the districts' business administrators.

24. At the meeting, McLaughlin took the position that Mountainside was entitled to a total credit of $673,496 for overpayments. Kistner countered that Mountainside was not entitled to the credits. Ms. Davenport was unable to mediate the problem and no written decision was ever made by her or Dr. Centuolo on the merits.

25. Mr. McLaughlin attempted, after the meeting with Ms. Davenport, to seek assistance from the State Department of Education's Division of Finance in resolving the differences between the two districts. However, he was unable to secure any definitive position on the matter from the State.

26. At the public meeting of the Mountainside Board of Education on March 14, 2006, Mr. McLaughlin made a presentation which included the $673,496 tuition credit adjustment in the 2006-2007 school budget.

27. On March 28, 2006, the Mountainside Board of Education, at a public hearing, voted to approve the 2006-2007 school budget and submit it to the voters. The budget included the credit of $673,496.

28. On April 18, 2006, the residents of Mountainside approved the school budget.

29. Berkeley Heights adopted its proposed school budget for 2006-2007 on March 27, 2006. In its budget there was a tuition credit due to Mountainside of $127,483. Mountainside had a representative on the Berkeley Heights Board of Education present at the meeting.

30. On April 18, 2006, the residents of Berkeley Heights rejected the proposed budget. As a result, the budget was sent to the township governing body for revision.

31. On May 11, 2006, the township council approved a revised budget with $400,618 in reductions.

32. The proper way to calculate the amount of tuition paid and credit given is outlined in Attachments I & 2. According to the analysis, Mountainside should pay Berkeley Heights $2,980,313.90 for the 2006-2007 school year. This is in addition to the $236,046.10 credit that Mountainside should receive. Thus, the total estimated tuition that Mountainside would pay Berkeley Heights for the 2006-2007 school year would be $3,216,360.00. For school year 2007-2008, Mountainside should receive a tuition credit of $263,574.80.

ISSUES

1. Can some or all of the issues in this matter be decided on summary decision?

2. Are some or all of Mountainside's claims for reimbursement barred by the 90-day limitations period?

3. Are some or all of Berkeley Heights' claims for payment barred by the 90-day limitations period?

4. What is the proper method of calculating the credits (if there are any) owed to Mountainside?

5. Can school districts contract a method of calculating payment of tuition by a sending district that differs from the statutory and regulatory formula?

6. Is the issue of special education charges cognizable in this matter?

STANDARD FOR SUMMARY DECISION

The rules governing practice in the Office of Administrative Law provide that a motion for summary decision may be granted if there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. This provision mirrors the language of R. 4:46-2 and the Supreme Court's decision in Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67 (1954). Under N.J.A.C. 1:1-12.5(b), the determination to grant summary decision should be based on the papers presented as well as any affidavits that may have been filed with the application. In order for the adverse, i.e., the non-moving, party to prevail in such an application, responding affidavits must be submitted showing that there is indeed a genuine issue of fact that can only be determined in an evidentiary proceeding. The Court in Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 523 (1995), set the standard to be applied when deciding a motion for summary decision.

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

The questions of fact in this case involve the proper mathematical calculation of tuition credit. Therefore, I took expert testimony on the issue of the proper formula to be followed in determining whether there were tuition credits due from one party to the other. All the other issues of the case involve questions of law and not fact. I therefore **CONCLUDE** that all the issues in the case except for the proper calculation of tuition can be decided on summary decision.

APPLICATION OF N.J.A.C. 6A:3-1.3(i)

Berkeley Heights' Position

Berkeley Heights maintains in its briefs that the petitioner's claims for additional tuition credits for years 2001-2002, 2002-2003 and 2003-2004 are time-barred by the provision of N.J.A.C. 6A:3-1.3(i). That section states:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.

Further, the respondent argued that, according to Kaprow v. Berkeley Township Board of Education, 255 N.J. Super. 76, 88 (App. Div. 1992), aff'd, 131 N.J. 572, 588-89 (1993), unofficial and informal notice is sufficient to trigger the 90-day limitations period. It alleges that Mountainside was aware that it had a claim against Berkeley Heights for credits owed for the 2001-2002 and 2002-2003 school years at some point between July 2005 and November 2005. Berkeley Heights points to the petitioner's brief, in which it stated that Mr. McLaughlin, Mountainside's business administrator, "undertook

an analysis of the sending-receiving payment history with Berkeley Heights and discovered substantial arrearages in reimbursement due Mountainside for tuition overpayments of $411,796.00 in 2001-2002 and $295,848.00 in 2002-2003." Petitioner's Br. at 1. Mountainside should have filed its petition for reimbursement no later than 90 days from the November 2005 date. Instead, it waited to file until July 2006. In addition, Berkeley Heights asserted that it gave Mountainside a credit of $402,500 to resolve overpayments made by Mountainside in prior years. In its brief the petitioner asserted that it was due additional moneys. If that was the case, then it should have brought an action 90 days from the November 2005 date. Instead it waited until July 2006. Again, it was out of time to file. Berkeley Heights also contended that, during the March 16, 2006, meeting at the County Board of Education offices, Berkeley Heights interim board secretary Michael Kistner made Mr. McLaughlin, the Mountainside Board of Education representative, aware that Berkeley Heights did not believe that Mountainside was entitled to the credits it demanded and "the two Districts were left to take whatever action they deemed necessary to protect their respective interests." Petitioner's Br. at 8-9. Under these circumstances the 90-day period began to run from March 16, 2006, and the petitioner was out of time when it filed in July 2006. Further, Berkeley Heights adopted its 2006-2007 proposed school budget on March 27, 2006. Mountainside had a representative on the Berkeley Heights Board of Education who was present during the meeting. Therefore, the petitioner had full knowledge on March 27, 2006, that the adopted budget did not reflect a credit to Mountainside of the $673,496.00 that it claimed was owed to it. Despite this notice, Mountainside did not file its petition until July 12, 2006.

As for relaxing the 90-day rule, the respondent maintained that it has been the practice of New Jersey courts to strictly interpret the limitations period. See Kaprow, supra,131 N.J. 572 (1993); Nissman v. Bd. of Educ. of Long Beach Island, 272 N.J. Super. 373 (App. Div. 1994); Morris-Union Jointure Comm'n v. Bd. of Educ. of S. River, 92 N.J.A.R.2d (EDU) 453. The purpose was to provide finality in education matters and stability for school systems facing budgetary requirements. Contrary to the petitioner's assertions, the "interests of justice" are not served by relaxing the limitations period. Berkeley Heights similarly contended that Mountainside's argument that the statute of limitations should be tolled or relaxed, because there were ongoing

negotiations/conversations between the two districts, is without factual and legal basis. The respondent argued that ongoing conversations do not toll the running of the limitations period, nor do they negate the fact that the petitioner had notice of a cognizable claim as far back as July 2005. Berkeley Heights claimed that it made no representations or engaged in any conduct that was intentionally calculated to mislead the petitioner or lull the petitioner into a false sense of security with respect to its right to file suit. Therefore, it is irrelevant whether ongoing conversations were actually occurring. Respondent's Reply Br. at 8-9.

Finally, Berkeley Heights pointed out that the holding in Lord Sterling Schools v. Board of Education of the Morris School District, Agency Dkt. No. 129/4-02, Comm'r (July 19, 2002) <http://www.nj.gov/education/legal>, stands for the proposition that the limitations period is triggered, at the latest, upon the expiration of the period for collecting amounts due, the end of the second school year following the year for which the actual cost per pupil was certified. Therefore, the statute of limitations for the alleged overcharges for 2001-2002 would have been 90 days after the end of the 2004-2005 school year. The claim was not brought until July 2006. Therefore, it is barred.

Mountainside's Position

Mountainside first argued that the 90-day rule did not apply in this case. Citing Lavin v. Hackensack Board of Education, 90 N.J. 145 (1982), and Board of Education of Alpha v. Alpha Education Association, 188 N.J. 595 (2006), it asserted that the rule is not applicable to matters in which an absolute statutory entitlement is at stake. The absolute statutory entitlement to pay no more than "the actual cost per pupil" as outlined in N.J.S.A. 18A:38-19(a) made the 90-day rule inapplicable.

The petitioner argued that even if it were found that the 90-day rule applied, based on Kaprow, the party invoking this affirmative defense must pinpoint an "objective event" constituting a violation of Mountainside's rights coupled with meaningful notice to Mountainside that this "event" occurred. Mountainside claimed that an "objective event" was difficult to find in a situation such as this, where the parties had a longstanding relationship and were constantly reconciling conflicting positions. "It is only when the

other has taken concrete action infringing the other's legal rights that [the] 90-day period should commence running." Petitioner's Reply Br. at 15. Mountainside pointed out that, as a matter of law, any reimbursement for tuition overpayments for school years 2002-2003 and 2003-2004 was due by June 30, 2006, and June 30, 2007, respectively. Mountainside's petition was filed within the 90-day timeline for these two school years. As far as the 2001-2002 tuition reimbursement, Mountainside argued that Berkeley Heights waived its affirmative defense of the statute of limitations by agreeing to repay the bulk of amount due, i.e., $402,000, during the 2005-2006 school year.

Mountainside asserted that the meeting at the Union County Board of Education's office on March 17, 2006, did not represent the type of notice that would start the 90-day limitations period. The County Superintendent was not present at that meeting, so no formal decision was rendered by the County Board of Education. The outcome of the meeting was that each Board of Education presented its position, with no resolution. Mountainside asserted that, if the State Department of Education had issued a ruling on the merits of the disputed tuition prior to the adoption of the Mountainside or Berkeley Heights budget, that would have constituted an adverse administrative determination and the 90-day period would have begun to run. However, no such ruling was ever issued. As for Berkeley Heights' argument that the limitations period began to run when Berkeley Heights adopted the budget in the presence of Mountainside's sending-receiving representative, Mary Beth Schaumberg, Mountainside pointed out that the budget presentation at that meeting did not explicitly break out the tuition credits being given to Mountainside. More importantly, Ms. Schaumberg was aware that the Mountainside Board was already on notice that Berkeley Heights disagreed with its position and the State Department of Education had declined to take a stand on the merits of the issue and the matter would have to be settled after the school board election. Further, Mountainside pointed out that the school budgets were tentative, since they were subject to the outcome of the election. Mountainside's budget passed on April 18, but Berkeley Heights' budget was defeated. The revised budget was not adopted until May 11, 2006. Since Mountainside's petition was filed on July 12, 2006, it was within the 90-day limit. Mountainside also argued that Berkeley Heights' position that the adoption of its budget initiated Mountainside's 90-day limitations period was also flawed, because it presumed that no further changes could be made after the

adoption. Mountainside asserted that a budget is a working document and is subject to change even after adoption. It pointed out that Berkeley Heights agreed in November 2005 to pay Mountainside $402,500 in credits that had never been included in Berkeley Heights' 2005-2006 adopted budget. The adoption of the Board's budget was "nothing more than a reservation of rights to position the parties for whatever negotiation or litigation might ensue by the following school year, when an actual breach of the other's rights was threatened to occur." Petitioner's Reply Br. at 20.

Mountainside also argued that, if the adopting of the budgets were considered anticipatory repudiation of its intention to perform its legal obligations during the 2006-2007 school year, the limitations period did not commence running until an actual breach occurred, unless the aggrieved party affirmatively elected to treat the repudiation as a breach. Franconia Assoc., Inc. v. United States, 536 U.S. 129, 144, 122 S. Ct. 1993, 2002, 153 L. Ed. 2d 132, 147 (2002). Since the actual breach could not occur until the first monthly invoice was dishonored in the fall of 2006, Mountainside's petition was filed in a timely fashion in July 2006.

Further, Mountainside analogized this case to Alpha, supra, 188 N.J. 595. In that case the New Jersey Supreme Court found a continuing and separate cause of action each time the school district failed to provide contractual health coverage benefits. Thus, Mountainside argued that each monthly tuition invoice from Berkeley Heights during the 2006-2007 year that failed to credit Mountainside with the reimbursement that it claimed was due could be deemed a continuing and separate cause of action arising from a non-discretionary statutory mandate of N.J.S.A. 18A:38-19(a), implemented through N.J.A.C. 6A:23-3.1.

In addition, Mountainside argued that even if the 90-day rule applied, N.J.A.C. 6A:3-1.16 provides that procedural rules

> may be relaxed or dispensed with by the Commissioner, in the Commissioner's discretion, in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice.

While the 90-day rule is rarely waived, it can be under certain circumstances where it would be inappropriate or injustice would occur. Mountainside cited Brown v. Board of Education of the Sussex Vocational School, A-4854-83T7 (App. Div. 1985) (quoted in W.V. ex rel C.V. v. Board of Education of Montville, EDU 5402-05, Initial Decision (January 6, 2006), adopted, Comm'r (February 21, 2006) <http://lawlibrary.rutgers.edu/oal/search.html>)), where the Appellate Division held that there is justification to waive the rule "where a petitioner was reasonably led to believe that he could continue to informally seek relief and not be concerned about the time limitations for filing his formal petition." Mountainside also asserted that the Commissioner had relaxed the rule where enforcement would have allowed a school district to evade its clear legal obligation to pay tuition to a county vocational school on behalf of a resident student. See Bd. of Educ. of the Gloucester County Inst. of Tech. v. Bd. of Educ. of the Lenape Reg'l High Sch. Dist., EDU 10120-98, Initial Decision (October 4, 1999), aff'd as modified, Comm'r (December 16, 1999), remanded, St. Bd. (June 7, 2000) <http://lawlibrary.rutgers.edu/oal/search.html> (where another party to the same dispute has filed a petition of its own implicating the same issue). Mountainside emphasized that where the trigger date for the running of the limitations period is unclear or ambiguous, the State Board has applied the clarifications prospectively. The petitioner also argued that Mountainside reasonably could have believed that in the absence of a ruling by the County Superintendent, the limitations period for filing its petition would have commenced no earlier than June 30, 2006. In addition, since the proper method for calculating tuition credits is an important issue for many local boards, it could be considered an important public interest that required adjudication or clarification. Therefore, the 90-day rule could be waived.

Finally, Mountainside invoked the "square-corners doctrine," which holds that government agencies and officials must "turn square corners" in their dealings with others. They cannot use the statute of limitations defense where their negotiations or informal course of dealings with the other party implied that immediate resort to litigation is unnecessary. Petitioner's Reply Br. at 27. Mountainside pointed out that Mr. Van Tassel of Berkeley Heights and Mr. McLaughlin had established a dialogue trying to resolve the arrearage problem. Van Tassel's voice message alluded to the parties coming up with a "one-shot" credit to bring the parties current during the 2006-2007

school year. After Van Tassel retired, the discussions continue between Mr. Kistner and Mr. McLaughlin in February and March 2006. When no agreement was reached by the budget deadline and the Department of Education declined to rule on the matter, the districts put differing credit amounts in their budgets. However, neither side gave the other an indication that this signaled the end of negotiations and the commencement of the limitations period. As Mountainside pointed out, Berkeley Heights did not institute an action based on the differing budget amounts until November 2006, well after the time that the two budgets had been struck. The claim for the first time in the respondent's brief that the trigger date was the date the budget was introduced or passed was the kind of inequitable result that the "square-corners doctrine" was designed to prevent.

Mountainside also pointed out that one of the purposes of the 90-day rule was to allow a district to arrange its affairs without worrying about future legal challenges. If the Board of Education's passage of the proposed budget was the trigger date, then Mountainside's petition should have been filed by mid-June. However, by that date Berkeley Heights had already adopted its revised budget and the tax rate for the 2006-2007 school year had been struck. Thus, Berkeley Heights had suffered no delay by Mountainside's filing its petition on July 12, 2006.

ANALYSIS

APPLICATION OF 90-DAY RULE TO MOUNTAINSIDE

The first matter to be decided is whether the 90-day rule applies in this instance. N.J.S.A. 18A:38-19(a) states that

> the board of education of the receiving district shall determine a tuition rate to be paid by the board of education of the sending district to an amount not in excess of the actual cost per pupil as determined under rules prescribed by the commissioner.

N.J.A.C. 6A:23-3.1, which was promulgated to accomplish this purpose, also speaks in the imperative. It states, in pertinent part:

> If the Commissioner later determines that the tentative tuition charge established by written contractual agreement . . . was greater than the actual cost per student during the school year . . . the receiving district board of education shall return to the sending district board of education in the third school year following the contract year the amount by which the tentative charge exceeded the actual charge as determined above.
>
> [N.J.A.C. 6A:23-3.1(f)(6).]

As the petitioner pointed out, the New Jersey Supreme Court in Lavin, supra, and Alpha, supra, ruled that the 90-day rule is not applicable to matters in which an absolute statutory entitlement is at stake. Where the regulation talks in terms of the receiving board of education being underpaid by the sending district, it speaks in the permissive. N.J.A.C. 6A:23-3.1(f)(7) states:

> If the Commissioner later determines that the tentative charge . . . was less than the actual cost per student . . . the receiving district board of education **may** charge the sending district board of education all or part of the amount owed by the sending district board of education, to be paid during the third school year following the school year for which the tentative charge was paid.
>
> [Emphasis added.]

Thus, it would appear that, based on the statutory language, the sending district has an absolute statutory right to reimbursement.

Aside from this determination, there is the issue of whether Berkeley Heights waived its defense of the 90-day rule when it paid $402,000 during the 2005-2006 school year. The parties acknowledged that if the 90-day rule applied, then the limitations period would have run for the 2001-2002 tuition credit. According to the statute, any credit for overpayment should have been paid by June 2005. However,

Berkeley Heights did not acknowledge that a credit was due until November 2005 and repayment was not begun until December 2005. In his certification, Mr. McLaughlin claimed that the $402,000 payment was specifically for tuition credits for the 2001-2002 school year. Mr. Van Tassel certified that the money was a recognition of all prior credits due Mountainside. While it is likely that some of the $402,000 payment was a credit for 2001-2002, it is not necessary to determine if all of the payment was attributable to 2001-2002 in order to decide the waiver issue. What is clear is that both sides acknowledged that at least part of the payment was for 2001-2002. Acknowledgement of a debt and partial payment can waive the statute of limitations. See Burlington County Country Club v. Midlantic Nat'l Bank S., 223 N.J. Super. 227, 235-36 (Ch. Div. 1987), which involved payment to some of the bondholders on a debt owed to all of the bondholders. In this case, there was partial payment plus an acknowledgement by Van Tassel that further payment was subject to negotiations. Thus, I **CONCLUDE** that the acknowledgement and payment of the $402,000 credit waived the limitations argument as to the 2001-2002 school year.

The issue still remains as to the balance of the 2002-2003 and 2003-2004 school years. Berkeley Heights has claimed that there were several triggering dates when Mountainside knew that Berkeley Heights was disputing its rights to credits and it should have filed its petition. The first was when Mr. McLaughlin became business manager and began a comprehensive review of the tuition credit situation in November 2005 and found substantial overpayments. Mountainside should have filed its petition 90 days from that date. The problem with this argument is twofold. First, it is clear that the parties were engaged in a continuing discussion and negotiation regarding the amount of tuition credit due to Mountainside. As the petitioner pointed out, the parties were involved in a long-term sending-receiving relationship. (That relationship has recently been renewed for an additional ten-year period.) There were constant negotiations back and forth regarding tuition reimbursement and other issues that came up between them. While Berkeley Heights argued that the 90-day rule must be strictly interpreted and not waived unless there was proof that Berkeley Heights misrepresented or engaged in conduct that was intentionally calculated to mislead the petitioner, Mountainside pointed out that there was a case that held that there was justification to waive the 90-day rule without showing misrepresentation. DeMaio v. New Providence

Bd. of Educ., 96 N.J.A.R.2d (EDU), 449 453, allowed for waiving of the time limitation when the party reasonably believed that it could informally seek relief without risking the running of the statute of limitations. Based on the course of conduct between Mountainside and Berkeley Heights, there was no indication at the time that Mr. McLaughlin's review of the tuition credits or Berkeley Heights' payment of $402,000 was the end of the discussion between the parties, including the issue of the balance of the 2001-2002 tuition credit. Therefore, there was no triggering event that would have caused Mountainside to be on notice that the 90-day period was beginning to run. Mr. Van Tassel's voice message to Mr. McLaughlin in January 2006 echoes the same attitude between the parties, i.e., that there was no solution regarding the tuition credit, but they were still working on the issue. If necessary, Mountainside should come up with a figure for budget purposes and they would deal with it later. Further, the issue of the proper method for calculating tuition credits is an important and recurring issue for boards of education. This type of case involving an important public interest is the kind of matter that would justify waiving the 90-day limitations period.

The next date that Berkeley Heights claims was a triggering event was the meeting at the County Board of Education. It is clear that at that meeting there was a discussion between the two business managers and they disagreed about the calculation of the tuition credit. However, as Mountainside pointed out, there was no decision by the County Superintendent as to which calculation was correct, so the parties were left in the same position they were in prior to the meeting. Since there was no adverse administrative determination, Mountainside reasonably could have believed that the issue was still open to further negotiations, especially since there was a new interim business manager who would have to be brought "up to speed" on the tuition issue. The next trigger date proposed by Berkeley Heights was the date of the school board approval of the budget. While at first blush it might seem that this is a trigger date, there are certain problems with this premise. Berkeley Heights pointed out that there was a member of the Mountainside Board of Education, Ms. Schaumberg, on the Berkeley Heights board and she was aware of the adoption of a budget that did not call for the tuition credit that Mountainside was alleging was due. While it is not entirely clear whether Ms. Schaumberg knew the exact amount that Berkeley Heights was putting in its budget for tuition credits, it is fairly certain that she knew that Berkeley

Heights disagreed with Mountainside on the credit due to the petitioner. Therefore, the adoption of the budget should be the trigger date. However, there are two problems with this argument. First, the fact that Berkeley Heights adopted a budget did not mean that negotiations were necessarily over. As Mountainside pointed out, Berkeley Heights had paid $402,000 for prior tuition credits and this was not a line item expense in their 2005-2006 budget. The fact that a budget was adopted did not mean that Berkeley Heights could not adjust the tuition credit during the year. In addition, Berkeley Heights' budget was not passed by the taxpayers and the revised budget was not voted on by the town council until May 11, 2006. Therefore, the final budget did not come into existence until that date. It could have been revised at any time prior to that date. Therefore, if there was a triggering event, it did not occur until after the May date. The filing of the petition with the Department of Education on July 12, 2006, was within the 90-day period.

Second, according to N.J.A.C. 6A:23-3.1(f)(6), the receiving district was to return the excess tuition charge to the sending district in the third school year following the contract year in which the credit was incurred. Therefore, Berkeley Heights could make payments up through June 30, 2006, for credits for the 2002-2003 school year. See Lord Sterling, supra, Agency Dkt. No. 129/4-02, Comm'r (July 19, 2002) <http://www.nj.gov/education/legal>. The filing of the petition on July 12, 2006, was thus within the 90-day time period. As for the 2003-2004 tuition credit, it was not due to be paid until the 2006-2007 school year. The petition was certainly filed prior to that 90-day time limit. If the adoption of the 2006-2007 budget by Berkeley Heights and Mountainside is considered an anticipatory breach, Berkeley Heights' position is still unpersuasive. Mountainside had the right to elect whether to consider the adoption of the budget as a breach of the agreement on tuition credits or wait until June 30, 2006, the last date for payment of the credit from the 2002-2003 school year. By filing in July 2006, the petition was filed in time.

Finally, in the interests of justice, it is clear that the 90-day limitations period should not be invoked. Government agencies have an obligation to "turn square corners." See W.V. Pangborne & Co. v. New Jersey Dep't of Transp., 116 N.J. 543, 554 (1989); Griggs v. Bd. of Educ. of Magnolia, EDU 6404-02, Initial Decision

(December 27, 2004), adopted, Comm'r (February 10, 2005) <http://lawlibrary.rutgers.edu/oal/search.html>. This would apply not only to dealings with the public, but also to dealings with other government entities. Up until the time that Berkeley Heights filed its cross-motion for summary decision there was no indication that the respondent would be raising the defense of the 90-day limitations period. If the respondent believed that this was an issue in the case, it certainly had the opportunity to advise the petitioner prior to the cross-motion. One of the purposes of having the limitations period is to allow the school district the opportunity to plan for its fiscal obligations. If the adoption of the 2006-2007 budget by Mountainside on March 17 was the trigger date, then it is unclear how the filing of the petition on July 12 rather than on June 17 would have affected Berkeley Heights' fiscal position for the 2006-2007 school year. Therefore, I **CONCLUDE** that, in the interests of justice and based on the reasoning outlined above, the 90-day limitations period does not apply.

APPLICATION OF 90-DAY RULE TO BERKELEY HEIGHTS

Mountainside argued that if the 90-day rule were to apply to Mountainside, then it should also apply to Berkeley Heights. Berkeley Heights had argued that at the March 16, 2006, meeting Mountainside was made aware that Berkeley Heights disagreed with the petitioner's calculations about the credit due. Mountainside pointed out that at the same meeting Berkeley Heights was made aware that Mountainside had adopted different tuition figures and was planning to make them part of its budget. Therefore, Berkeley Heights should have filed its petition for reimbursement of underpayment by Mountainside by June 16, 2006. Instead, Berkeley Heights did not file its petition until November 2006. Under Berkeley Heights' theory, it was equally barred from recovery. Mountainside also pointed out that even if there was a factual question as to whether Berkeley Heights received notice of Mountainside's position at the March 16, 2006, meeting, it received written notice no later than June 7, 2006, when the County Superintendent faxed over Mountainside's budget showing the disputed credits deducted from what Mountainside would have planned to pay Berkeley Heights in the coming school year. Therefore, on this theory as well, Berkeley Heights was late in filing its petition in November 2006. Mountainside also argued that if its petition was deemed untimely under an anticipatory repudiation analysis, then Berkeley Heights'

cross-petition must also be deemed untimely, since Berkeley Heights was as much on notice of Mountainside's intentions as Mountainside was of Berkeley Heights'.

Having found that the 90-day rule does not apply to bar Mountainside's claim, I likewise **CONCLUDE** that the rule does not bar any claim that Berkeley Heights has for underpayment of tuition by Mountainside.

1997-1998 & 1998-1999 SCHOOL YEAR CREDITS

In its reply brief Berkeley Heights argued that Mountainside was given credits for overcharges in tuition for 1997-1998 and 1998-1999 despite clear contract language relieving Berkeley Heights from any obligation to do so. Berkeley Heights points to paragraph 5, section c, of the existing agreement dealing with tuition for those years. It states:

> Notwithstanding the provisions of subparagraphs (a) and (b)[1] above, the tuition charge for the 1997-98 and 1998-99 school years shall be twelve thousand five hundred dollars ($12,500.00) per student. In 1997-98 this amount shall be multiplied by 197 Mountainside students, for a total tuition charge of two million four hundred and sixty two thousand five hundred dollars ($2,462,500.00). For 1998-99 the total tuition charge shall be determined by multiplying the per-pupil amount of $12,500.00 by the number of Mountainside students enrolled at the High School on January 15, 1998.
>
> [Respondent's Reply Br. at 11.]

While Berkeley Heights argued that it was under no legal obligation to give a credit, it acknowledged that, based on the lower per-pupil tuition cost of $10,770 certified by the State, it gave petitioner a credit of $337,350, which was deducted from moneys owed in the 2001-2002 school year. It then went on to argue that if I find that the statute of limitations is not applicable, Berkeley Heights is owed a refund credit in the amount of $337,350.

[1] Subparagraphs (a) and (b) of the agreement refer to the calculation of tentative tuition charges and resultant adjustments based on the actual cost per pupil as certified by the Commissioner of Education in any given school year.

There are a number of problems with this argument. First, Berkeley Heights was granted leave to file a cross-petition of appeal. Nowhere in the cross-petition did Berkeley Heights mention the 1997–1999 credit or anything relating to the issue of the contract versus the statutory calculation of tuition credits. Second, Berkeley Heights admitted that it gave credits to Mountainside for overpayments of tuition for those years. In effect, Berkeley Heights acknowledged that the statute and regulations, rather than the contract terms, should determine the actual tuition charge that Mountainside was obligated to pay. It was only later on in the cross-motion for summary decision that Berkeley Heights asserted that the contract terms should be enforced and no credit was due for 1997–99. During cross-examination, Mr. Thomas, Berkeley Height's expert, refused to characterize these prior payments as credits and claimed that he was not sure whether they were given or what they represented. He did admit, however, that if I found that the regulation was applicable, that the amount of the credit calculated by Mountainside was correct. Mr. Thomas' testimony on this point does not square with the prior conduct of the parties. Having given the credit required under the regulation, Berkeley Heights cannot assert now that it should not have given the credit.

Finally, Berkeley Heights' argument that the contract terms, rather than the statutory and regulatory formula, should prevail, is contrary to case law. The Supreme Court in State of New Jersey v. State Supervisory Employees Association, 78 N.J. 54 (1978), a matter involving collective negotiations agreements between the State and union locals, found that parties cannot enter into binding agreements concerning matters that are the subject of legislation. In Girard Trust Co. v. Schmitz, 129 N.J. Eq. 444 (1941), a matter involving the terms of a will, the court held that a transaction would be void if it was against public policy. Public policy is determined by the constitution, statutes or judicial decisions of the state. In this case, the State has determined that school districts must follow a certain formula in determining tuition calculations. As Mountainside's expert Melvin Wyns pointed out in his testimony, it seems clear from the terms of the statute and regulation that the State did not want a sending district to pay more than the actual (certified) tuition cost per student.[2] That is why there was a

[2] Mr. Wyns wrote the original regulation on this issue.

formula to credit any overpayment. The language of N.J.A.C. 6A:23-3.1(f)(6) is mandatory. It states:

> . . . the receiving district board of education shall return to the sending district board of education in the third school year following the contract year the amount by which the tentative charge exceeded the actual charge as determined above.

The issue of the mandatory terms of this regulation was discussed in Board of Education of Spotswood v. Board of Education of Milltown, EDU 197-98, Initial Decision (March 5, 1999), aff'd, Comm'r (June 7, 1999) <http://lawlibrary.rutgers.edu/oal/search.html>. In that matter a question arose regarding certain components of the tuition charge. However, the Commissioner made it clear that the payment to the sending district by the receiving district of overcharges based on the tentative versus the certified tuition amounts was mandatory. If the parties could contract to pay a set amount that was in excess of the actual cost (which was the case in 1997-1998 and 1998-1999), then they would be circumventing the intent and terms of the statute. Therefore, the parties are not free to determine another method of calculation. (Mr. Wyns' testimony that the contract terms are ambiguous and may only relate to determination of the tentative tuition rather than the actual tuition amount is not persuasive. The contract speaks clearly about the $12,500 charge per student for 1997-1998 and 1998-1999 being considered the actual cost per-pupil despite any determination by the Commissioner of Education to the contrary.)

Therefore, I **CONCLUDE** that the regulation fixing the formula for determining credit to be given to the sending district governs rather than the terms of the contract. Berkeley Heights cannot recoup the credit for tuition overpayment by Mountainside for the 1997-1998 and 1998-1999 school years.

SPECIAL EDUCATION TUITION CHARGES

In its reply brief, the respondent raised for the first time the issue of tuition credits for special education students. Berkeley Heights alleges that since the inception of the

sending-receiving agreement, Mountainside has not been billed for special education costs related to the education of its students. The Berkeley Heights' expert estimated that $277,915 was due to Berkeley Heights for providing resource-room services for Mountainside students for the period 2000–2006. The expert claimed that this was a conservative estimate, which did not take into account other special services offered to these special education students. Berkeley Heights asserted that if I found that the 90-day limitations period did not apply, then it had the right to claim reimbursement for these expenses. The respondent, neither in its answer nor in its cross-petition, ever claimed a right to reimbursement for special education costs. (Berkeley Heights claims that its general prayer for reimbursement should be interpreted to include special education costs, even though they were not specifically mentioned. I do not find this argument to be persuasive.) At this point, if the respondent claims that it is due moneys for special education, then it must file a separate action to recover these costs. They are not part of this matter. It should also be noted that, while Mountainside has claimed, over the course of many years, that it is due tuition reimbursement, Berkeley Heights has never sought special education tuition reimbursement prior to its filing the brief in this action. Therefore, there may be a separate 90-day limitations issue that I decline to rule on in the present controversy. Further, the respondent faces the additional burden that was addressed in Spotswood, supra, EDU 197-98, Initial Decision (March 5, 1999), aff'd, Comm'r (June 7, 1999) <http://lawlibrary.rutgers.edu/oal/search.html>, which is that, while the receiving district is obligated to reimburse the sending district for overcharges, it is not required to ask for reimbursement for undercharges.

CALCULATION OF THE CREDITS BETWEEN THE DISTRICTS

Mountainside presented the expert testimony of Melvin Wyns, and Berkeley Heights called Wayne Thomas as its expert. After reviewing the testimony and the reports, it is clear that both districts failed to follow the dictates of the statute and regulations. In Mountainside's case, it failed to pay the amount invoiced, which should have been the estimated cost per pupil (ECP) multiplied by the estimated average daily enrollment (EADE), minus the credit from three years prior. Instead it paid another amount, which appears to have been adjusted based on the number of students attending Berkeley Heights during a given month. This is not a correct application of the

statute. Mountainside should have paid based on the EADE, then once the certified cost per pupil and the certified average daily enrollment was determined, an adjustment of the amount owed by Mountainside would be calculated. This would have been credited three years hence. Mountainside should not have deviated from this formula.

As will be illustrated more fully below, Berkeley Heights deviated from the statutory formula in such a manner that it failed to give Mountainside the proper credit for overpayments of tuition in prior years. By using a formula that was not provided by the statute, Berkeley Heights shortchanged Mountainside on the credit that it was supposed to receive in the third year for overpayments made three years prior. Therefore, in order to determine whether one district owes the other district money, it is necessary to completely rework the figures and fit them into the legislative scheme. I will do so in the calculations and attachments below.

Before I begin the calculations, there are two issues that must be resolved. During the initial submissions period, there was a question regarding a $2,850.33 payment made by Mountainside to Berkeley Heights in 2003-2004. This question has been resolved, since both parties now agree that this payment was for transportation costs and not tuition. The second discrepancy regards payments of $49,250 and $400 made in the 2000-2001 school year. Mountainside submitted a voucher countersigned by Berkeley Heights on July 31, 2000, reflecting a payment of $49,650 toward the "97/98 Tuition Agreement" and an activity register showing a payment made to Berkeley Heights during the 2000-2001 school year, allocating that payment to account number 11-000-100-561-000-02 "TUITION/REG," which was the account for regular education tuition. The activity register also showed a payment of $400, which was designated as "Supp & Mater." Berkeley Heights argued that while it did not send an invoice to Mountainside that specifically related to the $49,250, it did receive the payment. However, it claimed that the countersigned voucher was not dispositive proof that the $49,250 was a tuition payment. On Berkeley Heights' side it was recognized as "miscellaneous income," whereas other payments made for tuition were allocated as such by Berkeley Heights.

The account that Berkeley Heights choose to allocate the payment to is not dispositive of the designation that the payment should receive in this matter. Mountainside presented a voucher countersigned by Berkeley Heights that clearly designates the $49,250 payment as part of the "97/98 Tuition Agreement." This is sufficient proof that the payment was for tuition and that both parties acknowledged it as such. Therefore, it will be considered as a tuition payment. The $400 payment has no voucher attached and the activity register does not characterize it as a tuition payment. Therefore, I **CONCLUDE** that the $400 payment was not for tuition, but the $49,250 was for that purpose. The figures in the tables attached reflect these designations.

OVERALL ASSESSMENT

The case between Mountainside and Berkeley Heights is covered by statute. The statute clearly identifies how the estimated tuition is to be calculated, and how the credit for each year is to be determined based on the data certified by the Department of Education (DOE). It is clear from the data provided by both districts that the statute was not followed by either school district.

There are four issues that skew the mathematics and are the contributing factors to the districts' reaching different conclusions about who owes whom money and the amount owed. The factors are a Payment Issue, Computation of Credit Issues, an Overapplication of Credit Issue, and an Underapplication of Credit Issue. Each of these issues will be addressed below.

The only way to resolve these issues was to obtain the records indicating how much Mountainside paid Berkeley Heights each year from the start of this sending/receiving relationship and the certified tuition as calculated each year from the data provided by the DOE. It was then necessary to recalculate the credits each year starting with school year 1997-1998 using the methodology defined in the statute. The results of these calculations are shown in Attachments 1 and 2 below.

SUMMARY OF THE STATUTE

The statute requires that prior to the start of a school year the districts enter into a contract that identifies the estimated cost per pupil (ECP) and the estimated average daily enrollment (EADE). From these numbers the districts can compute a tentative tuition (TT) as follows:

(1) $TT = ECP \times EADE$

The statute also requires that the sending school district pay the receiving school district the tentative tuition less any prior year credit in ten equal payments. The statute defines prior year credit as the credit from three years earlier (CR_{-3}).

The total amount that the receiving school district should invoice the sending school district (AI) is as follows:

(2) $AI = TT - CR_{-3}$

Later, when the DOE determines the certified cost per pupil (CCP) and the certified average daily enrollment (CADE), the certified tuition (CT) is calculated as follows:

(3) $CT = CCP \times CADE$

The credit (CR) for that school year is then determined as follows:

(4) $CR = TT - CT$

If the credit is positive, then the receiving school district must reimburse the sending school district no later than the end of the third school year following this contract year. The reimbursement can be sent via check or applied as a credit for that later school year. If the credit is negative, then the receiving school district can take one of three actions:

a. Bill the sending school district for the entire amount owed.

b. Bill the sending school district none of the amount owed.

c. Bill the sending school district for part of the amount owed.

The billing, if any, is to occur in the third year following the contract year in which the credit was negative.

ISSUES THAT SKEW THE MATHEMATICAL CALCULATIONS

1. Payment Issue

Mountainside did not pay Berkeley Heights the amount invoiced, which skews the calculations. The amount that Mountainside should have paid (AP) should have been the amount invoiced (AI). In that case:

(5) $AP = AI$

Substituting this equivalent into equation (2) yields:

(6) $AP = TT - CR_{-3}$

By rearranging the terms, the equation reads:

(7) $TT = AP + CR_{-3}$. The tentative tuition equals the amount paid plus the credit.

Since Mountainside did not pay the amount invoiced, the tentative tuition cannot be the amount as determined by equation (1), but rather the amount as determined by equation (7). In other words, the tentative tuition for any given year is actually the amount paid (AP) by Mountainside to Berkeley Heights plus the credit that Mountainside should have received for that year.

In the attached charts, equation (7) was used to determine the tentative tuition for each year.

2. Computation of Credit Issues

Both Mountainside and Berkeley Heights computed the credit improperly.

Berkeley Heights' Computation

Berkeley Heights calculated the credit using the following equation, instead of using equation (4):

(8) CRBH = AP - CT. Credit as calculated by Berkeley Heights (CRBH) is the amount paid (AP) by Mountainside minus the certified tuition. Let us look at why this is mathematically incorrect.

Substituting equation (7) into equation (4) we get:

(9) $CR = AP + CR_{-3} - CT$

Comparing equation (9) with equation (8) we see that the difference is the term CR_{-3}, which means that the Berkeley Heights calculation never gave Mountainside the credit due to Mountainside from a previous school year. The impact of this error is discussed in the section entitled "Underapplication of Credit Issue."

Mountainside's Computation

Mountainside computed the credit as follows:

(10) CRM = (ECP - CCP) x CADE. The credit as calculated by Mountainside (CRM) is the estimated cost per pupil (ECP) minus the certified cost per pupil (CCP),

times the certified average daily enrollment (CADE). Let us look at why this is mathematically incorrect.

Substituting equations (1) and (3) into (4) we get:

(11) CR = (ECP x EADE) - (CCP x CADE)

Expanding equation (10) we get:

(12) CRM = (ECP x CADE) - (CCP x CADE). The second terms in equations (11) and (12) are identical, but the first terms are different. The only way that they can be identical is if the CADE is absolutely identical to the EADE. This is a highly unlikely case.

However, even if it turned out to be true in a particular year, note that the first term is the tentative tuition as calculated in accordance with the statute as stated in equation (1). We have previously ascertained that since Mountainside did not pay the amount invoiced, equation (1) cannot be used to determine the tentative tuition; equation (7) must be used. Equation (7) is based on the amount that Mountainside actually paid Berkeley Heights in any given year. Therefore Mountainside cannot use its method in determining the credit owed to Mountainside. Even if CADE = EADE, Mountainside is basing the tentative tuition on the amount as calculated by the statute, then paying Berkeley Heights less than this amount, and yet Mountainside is calculating the credit as if it had paid the correct amount.

Rolling Credit

One-way to keep track of the credit owed to (or due from) the sending school district is to compute a rolling credit (RCR). This can be accomplished as follows:

(13) $RCR_0 = RCR_{-1} - CR_{-3} + CR_0$. The rolling credit for the current year (RCR_0) is the rolling credit from the previous year (RCR_{-1}) minus the credit given to the sending

district, which is the credit as calculated from three years earlier (CR_{-3}) plus the credit due for the current school year (CR_0).

3. Overapplication of Credit

For school year 2005-2006 Berkeley Heights realized that it owed Mountainside a credit, and it gave Mountainside a credit of $402,500. We will see when we discuss the attached charts that the amount given was more credit than Mountainside should have received, if the statute was followed correctly. The amount of excess credit is defined as the delta credit (ΔCR).

Equation (9) explains how the credit for any given year should be calculated. Recall that equation 9 is as follows:

$$(9) \quad CR = AP + CR_{-3} - CT$$

If the credit given to the sending school district is not CR_{-3}, but rather $CR_{-3} + \Delta CR$, then equation (9) becomes,

$$(14) \quad CR = AP + (CR_{-3} + \Delta CR) - CT$$

Comparing equation (14) with equation (9) shows that the credit for the school year in question will actually be increased by ΔCR, which compounds the problem. Not only is the sending school district receiving more credit than it deserves for the current school year, but it will be receiving an excess credit in three years when this erroneous credit for the current year is applied.

The method of correcting an overapplication of credit (ΔCR) is not addressed in the statute, so good accounting practice should prevail. Good accounting practice dictates that once the mistake is found it should be rectified as soon as possible. The easiest way to rectify the situation is to underapply the credit due to the sending school

district the next school year by the amount that was overapplied in the school year in question. This is what was done in Attachment 2 of the attached charts.

4. Underapplication of Credit

If there is an underapplication of credit, the following occurs. Equation (14) still applies, but now ΔCR is a negative number. In this case, not only is the sending school district receiving less credit than it deserves for the current school year, but it will be receiving less credit in three years when this erroneous credit for the current year is applied. Basically, this is what has been happening every year since these two school districts entered into the sending-receiving relationship.

The only way to rectify the situation is to go back to the very beginning of the relationship and recalculate the credits based on the information provided, and agreed upon, by both districts. The attached charts accomplish this task.

EXPLANATION OF ATTACHED CHARTS

Attachment 1

Attachment 1 recalculates the transactions by year, starting with the first year of the agreement (1997-1998), in accordance with the statute, using the amounts agreed upon by both school districts. There is still a discrepancy in the amount paid for school year 2000-2001. Based on the evidence provided by Mountainside, the amount used in the attachment is $49,250 more than what Berkeley Heights claimed that it received. The other discrepancy of $400 was not substantiated by Mountainside and therefore the Berkeley Heights numbers are being used.

Equation (7) was used to determine the tentative tuition and equation (4) was used to determine the credit for each school year. The credit was applied in accordance with the statute, in the third school year following the year it was calculated.

A rolling credit is also shown at the bottom of the Attachment 1 chart. Note that the rolling credit for the current school year (2006-2007) is $263,574.80.

Attachment 2

Attachment 2 recalculates the transactions as done in Attachment 1 through school year 2004-2005. However, in school year 2005-2006 the credit given is $402,500 instead of $291,158 as shown in Attachment 1. The $402,500 is the amount of credit that both school districts agree was given that year. The difference between $402,500 and $291,158 is $111,342. This is the overapplied credit (ΔCR) discussed above.

In school year 2006-2007 Mountainside is given a credit of only $236.046.10 instead of $347,388.10 as shown in Attachment 1. The difference is an underapplication of credit of $111,342, which is the ΔCR from the previous school year. Note that the rolling credit for the current school year (2006-2007) is $263,574.80, which is the same as in Attachment 1, proving that this method of correcting for a ΔCR is correct.

Another point borne out by both Attachment 1 and Attachment 2 is that Mountainside is behind in its payments for the current school year. Mountainside has paid, including credits received, $1,720,588.90 through February against an estimated tuition of $3,216,360.00. Since Mountainside is to receive a credit of $236,046.10, the amount that should be invoiced by Berkeley Heights and paid by Mountainside is $2,980,313.90 for this school year. Therefore, at the end of the current school year Mountainside should have paid $2,980,313.90.

THE WAY AHEAD

The districts should follow the statute and use the DOE-mandated contract to determine the tentative tuition (TT). For school year 2007-2008 Mountainside should receive a credit of $263,574.80. Once the TT is agreed upon and the credit applied, then the amount invoiced should be determined by equation (2) above. Mountainside

should pay one-tenth of this amount each month from September 2007 through June 2008 without making any adjustments.

When the DOE determines the certified tuition, then the credit (CR) should be determined using equation (4).

Note that according to the data provided, the certified tuition for school year 2005-2006 has not yet been released. Therefore the credit for this school year cannot yet be calculated. However, once the certified tuition is released and the credit determined, then this credit should be given to Mountainside in school year 2008-2009.

The process explained in this section, which is in accordance with the statute, should be followed for all subsequent school years as long as this sending-receiving relationship remains in force. When it ends, Berkeley Heights will send checks to Mountainside, no later than the end of the third school year following the year that the credit was earned, for any credits that Mountainside is owed from the last two years of the relationship.

CONCLUSION AND ORDER

Based on the briefs and certifications submitted and the testimony presented, I **CONCLUDE** and **ORDER** as follows:

1. The issue of the 90-day rule can be determined on summary decision.

2. Mountainside's claim for reimbursement of tuition credit for 2001–2006 is not barred by the 90-day rule.

3. Berkeley Heights' claim for underpayment of tuition is not barred by the 90-day rule.

4. The proper method of calculating tuition credit is that which was outlined in the regulation.

5. School districts must follow the method of calculation for determining tuition credit based on the statute and regulations promulgated thereunder. They are not free to agree to a formula that contradicts the provisions of the statute and regulations.

6. Following the proper formula, Mountainside, in order to be current, should pay Berkeley Heights $2,980,313.90 for the 2006-2007 school year. In addition, Mountainside should receive a credit of $236,046.10, which would bring the total estimated tuition for the 2006-2007 school year to $3,216,360.00.

7. The issue of tuition credits for special education students is not encompassed in this petition and will not be considered in this action.

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

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

7/20/07
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Date Received at Agency: 7/20/07

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUL 23 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

id

Attachment 1

Applying the credits in accordance with the statute and computing the rolling credit accordingly.

School year	1997-1998	1998-1999	1999-2000	2000-2001	2001-2002	2002-2003	2003-2004	2004-2005	2005-2006	2006-2007
Total Paid	$2,451,861.00	$2,459,236.00	$2,586,875.00	$2,456,190.00	$2,361,400.00	$2,615,727.20	$2,885,683.50	$2,903,795.00	$2,739,481.00	$1,533,792.80
Credit received				$184,725.00	$325,699.00	$315,052.40	$290,852.60	$402,385.80	$291,158.00	$347,388.10
Tuition paid for current year	$2,451,861.00	$2,459,236.00	$2,586,875.00	$2,640,915.00	$2,687,099.00	$2,930,779.60	$3,176,536.10	$3,306,180.80	$3,030,639.00	$1,881,180.90
State Certified cost per student	$11,520.00	$10,770.00	$10,938.00	$11,342.00	$10,597.00	$11,242.00	$11,060.00	$11,613.00		
Actual average daily enrollment	196.8	198.1	207.7	207.2	215.6	234.8	255.8	262.0		
Certified Tuition	$2,267,136.00	$2,133,537.00	$2,271,822.60	$2,350,062.40	$2,284,713.20	$2,639,621.60	$2,829,148.00	$3,042,606.00		
Overpaid	$184,725.00	$325,699.00	$315,052.40	$290,852.60	$402,385.80	$291,158.00	$347,388.10	$263,574.80		
rolling credit	$184,725.00	$510,424.00	$825,476.40	$931,604.00	$1,008,290.80	$984,396.40	$1,040,931.90	$902,120.90	$610,962.90	$263,574.80

Attachment 2

Applying the credits in accordance with the statute but recognizing the overapplication of credit in 2005-2006 and applying the correction of this overapplication in 2006-2007.

School year	1997-1998	1998-1999	1999-2000	2000-2001	2001-2002	2002-2003	2003-2004	2004-2005	2005-2006	2006-2007
Total Paid	$2,451,861.00	$2,459,236.00	$2,586,875.00	$2,456,190.00	$2,361,400.00	$2,615,727.20	$2,885,683.50	$2,903,795.00	$2,739,481.00	1,533,793
Credit received				$184,725.00	$325,699.00	$315,052.40	$290,852.60	$402,385.80	$402,500.00	$236,046.10
Tuition paid for current year	$2,451,861.00	$2,459,236.00	$2,586,875.00	$2,640,915.00	$2,687,099.00	$2,930,779.60	$3,176,536.10	$3,306,180.80	$3,141,981.00	$1,769,838.90
State Certified cost per student	$11,520.00	$10,770.00	$10,938.00	$11,342.00	$10,597.00	$11,242.00	$11,060.00	$11,613.00		
Actual average daily enrollment	196.80	198.10	207.70	207.20	215.60	234.80	255.80	262.00		
Certified Tuition	$2,267,136.00	$2,133,537.00	$2,271,822.60	$2,350,062.40	$2,284,713.20	$2,639,621.60	$2,829,148.00	$3,042,606.00		
Overpaid	$184,725.00	$325,699.00	$315,052.40	$290,852.60	$402,385.80	$291,158.00	$347,388.10	$263,574.80		
rolling credit	$184,725.00	$510,424.00	$825,476.40	$931,604.00	$1,008,290.80	$984,396.40	$1,040,931.90	$902,120.90	$499,620.90	$263,574.80

APPENDIX

Exhibits

For Petitioner:

P-1 Report of David Wyns with Curriculum Vitae
P-2 Original Spreadsheet
P-3 Spreadsheet Revised, April 23, 2007
P-4 Mountainside Board of Education Report of Activity

For Respondent:

R-1 Report of Educational Executives
R-2 Curriculum Vitae –Wayne W. Thomas
R-3 Curriculum Vitae – Dr. Novembre

23-08

#23-08

C.I.S. on behalf of minor children, A.P.S. and A.S.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner filed a *pro se* residency appeal on behalf of her children in June 2007. The respondent filed an answer and counterclaim for tuition. Petitioner received appropriate notice of a December 2007 hearing, but failed to appear and provided no explanation for her nonappearance.

Having received no explanation from the petitioner for her non-appearance, the ALJ recommended dismissal of the case and returned the file to the Commissioner. The file included respondent's letter conveying its willingness to withdraw its counterclaim.

The Commissioner adopted the Initial Decision – finding that this matter is no longer a contested case and recommending dismissal of the petition – as the final decision in this case.

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

January 18, 2008

OAL DKT. NO. EDU 4823-07
AGENCY DKT. NO. 152-6/07

C.I.S. on behalf of minor children, A.P.S. and A.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. In the Initial Decision the Administrative Law Judge (ALJ) advises that the petitioner failed to appear at the hearing scheduled in this case, notwithstanding the two notices that had been sent to her at the address listed in her petition. Having received no explanation from the petitioner for the non-appearance, the ALJ recommends dismissal of the case and has returned the file to the Commissioner pursuant to *N.J.A.C.* 1:1-14.4 – along with copies of the notifications that were sent to the parties by the OAL concerning the December 4, 2007, hearing date.

No exceptions have been filed by petitioner, and the respondent has conveyed in writing its willingness to withdraw its counterclaim. The Commissioner consequently adopts the Initial Decision – finding that this matter is no longer a contested case and recommending dismissal of the petition with prejudice – as the final decision in this case.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 1/18/08
Date of Mailing: 1/18/08

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 4823-07

AGENCY DKT. NO. 152-6/07

C.I.S., on behalf of minor children, A.P.S. and A.S.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY,

Respondent.

C.I.S., on behalf of minor children, **A.P.S.** and **A.S.**, pro se

John E. Croot, Esq., for respondent (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: December 5, 2007 Decided: December 5, 2007

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

Petitioner filed a pro se residency appeal, dated June 3, 2007. On June 25, 2007, respondent filed an Answer and Counterclaim for tuition. By letter dated September 7, 2007, respondent advised me that it was dismissing its counterclaim and also confirming that it consented to the dismissal of petitioner's appeal. Thereafter,

petitioner was advised that, if she wanted to withdraw her appeal, she needed to so advise me in writing. Petitioner never filed a letter withdrawing her appeal.

A hearing was scheduled for December 4, 2007. Petitioner did not appear at the hearing and provided no explanation for the nonappearance. Respondent continues to rely on its September 7, 2007, letter withdrawing its Counterclaim.

ORDER

Petitioner's appeal is hereby dismissed for her failure to appear at the December 4, 2007 hearing. Respondent's counterclaim is, likewise, dismissed by its request that its counterclaim be withdrawn. It is so **ORDERED**.

Based on the foregoing, it is my conclusion that petitioner no longer wishes to proceed and it is **ORDERED** that this Petition be **DISMISSED.**

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

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

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

December 5, 2007
DATE

DOUGLAS H. HURD, ALJ

Date Received at Agency: 12/5/07

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DEC 10 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

/cs

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6121-07
AGENCY DKT. NO. 172-6/07

MAUREEN PRICE,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, BURLINGTON COUNTY,
Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Fagella,Nowak, Kleinbaum & Friedman, attorneys)

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

Record Closed: November 20, 2007 Decided: December 7, 2007

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner filed a petition alleging that she was improperly riffed in violation of her tenure and seniority rights. The matter was transmitted to the Office of Administrative

DOCUMENTS CONSIDERED

Respondent's Notice of Motion with supporting documentation, October 22, 2007

Petitioner's Opposition to Motion, November 20, 2007

2-6-08

C.H., ON BEHALF OF MINOR GRANDCHILDREN, B.M., Z.M. and G.P.,

PETITIONER,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner sought emergent relief, appealing respondent's decision to disenroll her minor grandchildren, B.M., Z.M. and G.P., as of May 1, 2007. Petitioner acknowledged that – because of financial hardship – her family had relocated three blocks from their former residence in Bloomfield to an apartment in East Orange during January 2007, but requested that respondent allow the children – who were deeply affected by a recent family loss as well as the ensuing move – to finish the year in Bloomfield schools, where they had always attended, without payment of tuition.

The ALJ – treating the matter as a residency dispute, as the Board had done at both the local level and OAL hearing – found that: it was unnecessary to hear petitioner's application for emergent relief, since the children would remain in school during the pendency of the appeal by operation of *N.J.S.A.* 18A:38-1; the children were not entitled to a free public education in Bloomfield schools as of the date of their move in January 2007; respondent was entitled to disenroll petitioner's grandchildren due to their change in domicile; tuition can be waived in a disputed residency matter when particular circumstances so warrant; and the Board's refusal to waive tuition in this case was not sufficiently justified. The ALJ affirmed the disenrollment of petitioner's grandchildren but dismissed the Board's tuition reimbursement claim.

The Commissioner modified the Initial Decision, noting that the matter was *not* a residency dispute – since petitioner never claimed her grandchildren were legally entitled to free education once they had moved from the district – but rather an appeal of the Board's discretionary determination not to permit them to attend for the rest of the year as tuition-free nonresident students. Because the children's ineligible attendance continued for the duration of proceedings at the local level and before the Commissioner by virtue of the Board's actions – not those of petitioner – the Commissioner concurred with the ALJ that tuition should not be assessed.

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

January 23, 2008

26-08

OAL DKT. NO. EDU 5181-07
AGENCY DKT. NO. 119-4/07

C.H., ON BEHALF OF MINOR GRANDCHILDREN, B.M., Z.M. and G.P.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have exceptions filed by the respondent Board of Education (Board) pursuant to *N.J.A.C.* 1:1-18.4. The petitioner did not reply to the Board's exceptions.

On exception, the Board first objects to the Initial Decision on grounds that the Administrative Law Judge (ALJ) lacked authority to waive tuition for petitioner's grandchildren's period of ineligible attendance in the district. According to the Board, *N.J.S.A.* 18A:38-3(a) – the statute permitting local district boards of education to admit nonresident students in their discretion, erroneously cited by the ALJ – does not apply in this matter, whereas the statute that actually controls – *N.J.S.A.* 18A:38-1(b)2 – clearly "mandates the imposition of tuition against the parent or guardian whose child attends a school district in which the child does not reside." The Board argues that "[no] case has held to the contrary," and that the Legislature could not have reasonably intended for school boards to have "a mandatory right to tuition unless and until a student requests a

'waiver' pursuant to N.J.S.A. 18A:38-3(a)" as was effectively held by the ALJ. Thus, the Board proffers, upon its discovery that C.H.'s grandchildren were unlawfully attending school in the district, the children "came within the auspices of *N.J.S.A.* 18A:38-1(b)2, and, therefore, must, by the express provisions of said statute, reimburse the Board for tuition." Once tuition was reimbursed and the children began attending their "proper school," the Board concludes, C.H. could then petition the Board for the children to "attend the Bloomfield School District under the terms and conditions deemed appropriate by the Board." (Board's Exceptions at 2-4, quotations at 3 and 4-5)

The Board next asserts that – even if C.H. was, *arguendo*, eligible for a waiver of tuition – the ALJ erred in holding the Board's "denial" of such waiver to be arbitrary, capricious and unreasonable; according to the Board, C.H. never made that claim herself and "it is a long held maxim of law that a party which fails to raise a defense waives their right to pursue that defense at a later date." (Board's Exceptions at 5) Moreover, even assuming a claim of arbitrariness was appropriately considered, the Board continues, the ALJ erred by relieving C.H. of any burden of proof and instead placing the burden on the Board – without testimony on this point – to show that its actions were not unreasonable. (*Id.* at 5-6)

Finally, the Board contends that – contrary to the finding of the ALJ – the petitioner did not come to this matter with "clean hands," and, consequently, cannot be awarded equitable relief. The Board explains:

> Despite admitting that her grandchildren did not reside in Bloomfield, petitioner compelled C.H. (*sic*) to attend Bloomfield schools for a period of at least three (3) months (January 2007 to March 2007). Then, after being caught illegally attending Bloomfield schools, Petitioner challenged the Board's decision to disenroll C.H. (*sic*) without legal foundation to mount a challenge. In other words, Petitioner, admitting that C.H. (*sic*)

> lived in East Orange, brought a challenge to the Board's ruling knowing that C.H. (*sic*) improperly attended Bloomfield schools," thus forcing the Board and the State to "expend money hearing a meritless claim."
> (Board's Exceptions at 6-7, quotation at 7)

Upon review, the Commissioner concurs with the ALJ that – as of their move from the district in January 2007 – C.H.'s grandchildren were no longer entitled to a free public education in the Bloomfield school district pursuant to *N.J.S.A.* 18A:38-1, but also that C.H. should not be assessed tuition for the time of the children's ineligible attendance. In so doing, however, she clarifies the ALJ's reasoning as follows.

Initially, the Commissioner concurs with the ALJ that assessment of tuition can, indeed, be waived in a disputed residency matter, and that the Board errs in arguing to the contrary. Over and above the earlier cases cited as examples by the ALJ (Initial Decision at 6), the Commissioner additionally notes that applicable rule adopted in November 2001 expressly provides that nothing in the chapter shall "preclude an equitable determination, by the district board of education or the Commissioner, that, when the particular circumstances of a matter so warrant, tuition shall not be assessed for all or part of any period of a student's ineligible attendance in the school district." (*N.J.A.C.* 6A:22-6.3(b); see also predecessor rule *N.J.A.C.* 6A:28-2.10(d)) Thus, there can be no question that the ALJ had the authority, based on specific facts found, to waive any tuition found to be due pursuant to *N.J.S.A.* 18A:38-1.

However, as implicitly recognized by the ALJ – notwithstanding that the Initial Decision's analysis is couched in terms of "waiver" of tuition pursuant to *N.J.S.A.* 18A:38-1 as consequence of the Board's persistent posture in this matter – C.H.'s true claim is not one of entitlement by residency, but rather of unreasonable exercise by the Board of its discretionary authority to permit her grandchildren to attend

during the spring 2007 term as tuition-free nonresidents. Indeed, once the question of her family's residency was raised and C.H. acknowledged that they no longer lived within the district and did not claim to meet alternate statutory criteria so as to be entitled to free education pursuant to *N.J.S.A.* 18A:38-1, the question of the children's subsequent attendance in Bloomfield should not have been treated as a residency dispute, either at the local district level or at the subsequent OAL hearing.

Although the record does not reveal how the district administration came to be aware in February 2007 that C.H. was no longer living in Bloomfield, there is nothing to indicate that at any time – either at the local district level or before the Commissioner or the ALJ – C.H. disputed or attempted to conceal that she had moved from Bloomfield during the preceding month (January 2007), when – due to family exigency – she rented a smaller home located three doors away but just over the municipal border in East Orange. To the contrary, once she was notified of the district's findings, C.H.'s quest to keep the children enrolled in Bloomfield for the remainder of the year was at all times based on a plea – in the interest of the children's well-being – for the Board to consider them as tuition-free nonresident students (*N.J.S.A.* 18A:38-3 and *N.J.A.C.* 6A:22-2.2), rather than on any claim of entitlement based on purported residency in the district.

From the outset, however, the Board proceeded as though the matter were a residency dispute arising under *N.J.S.A.* 18A:38-1 and its implementing rules, engaging in protracted investigative and removal proceedings and staying disenrollment of the children throughout – even though C.H. readily acknowledged that the family no longer lived in Bloomfield. When the Board ultimately (on April 10, 2007) heard and denied

her request for the children to be considered tuition-free nonresidents and remain in the district with approximately six weeks remaining in the school year – notwithstanding that the April 11, 2007 letter informing her of the children's impending disenrollment provided procedural information specific to claims arising under *N.J.S.A.* 18A:38-1 – C.H. filed with the Commissioner *not* a residency appeal disputing the Board's finding of ineligibility, but a petition *appealing the Board's discretionary determination not to consider the children as tuition-free nonresidents.* She further filed an application for emergent relief so that the children would not be disenrolled on May 1, 2007 (the date set by the Board), since appeals under *N.J.S.A.* 18A:38-3 – unlike timely appeals filed pursuant to claims of domicile or residency under *N.J.S.A.* 18A:38-1 – carry with them no entitlement by operation of law to continue attending school while an appeal is pending.

Consistent with the statutory framework and C.H.'s clear representations, the Department of Education in turn did not transmit this matter to the OAL as a "residency" appeal, but rather as a petition and application for emergent relief with the instruction that the petitioner was seeking an immediate order permitting the named children to "continue attending Board's schools through the end of the [2006-07] school year, notwithstanding having moved from the district." At the OAL, however, the Board first advised the ALJ that a hearing on C.H.'s emergent application was unnecessary because the children would remain in school by operation of law until the matter was decided on the merits, then proceeded to litigate its case – as it continues to do before the Commissioner – substantially as though C.H. had challenged the Board's determination of ineligibility and invoked the protections of *N.J.S.A.* 18A:38-1, rather than conceding such ineligibility and appealing from the Board's discretionary denial of her request that

the children be permitted to attend for the term as tuition-free nonresidents in light of the family's unfortunate personal and financial situation.[1]

Consequently, it was due entirely to the actions of the Board and its agents that C.H.'s grandchildren continued to attend school in Bloomfield – and thus to incur potential liability for tuition – from the time their residency came into question through the end of the school year. Had the Board acted decisively subsequent to February 23, 2007 – the date of investigative referral from which the Board's own calculation of tuition is reckoned,[2] and within a month of the family's move from the district – and not advised the ALJ on appeal that the Board was proceeding pursuant to *N.J.S.A.* 18A:38-1 and keeping the children enrolled pending final decision, C.H.'s emergent appeal of the Board's denial of her request for tuition-free nonresident status could have been promptly heard and decided in accordance with applicable standards of law; then, only if the stringent criteria of *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) and *N.J.A.C.* 6A:3-1.6(b) were met would the Commissioner have ordered the Board to permit the children to remain in the district pending final determination rather than directing C.H. to enroll them forthwith in the district (East Orange) of their legal entitlement, where – due to the timing of events – they likely would have finished the

[1] That the Board understood the petitioner's position at her hearing before the Board – but misconstrued her position on appeal – is evident from the Board's own recitation of events:

> The Petitioner requested the Board to exercise its discretion to permit her grandchildren to attend the District schools free of charge from January through June 2007. *N.J.S.A.* 18A:38-3(a) recognizes the right of the Board to do so. The Board, after hearing from the Petitioner, denied her request. Rather than withdraw her grandchildren from the District schools at the time of the denial, which occurred on or about April 11, 2007, the Petitioner filed the instant appeal and, pursuant to *N.J.S.A.* 18A:38-1, her grandchildren attended the District schools for the balance of the 2006-07 school year. (Post-hearing Summation at 3)

[2] See Certification of Dr. Nicolette Salerno at 1.

school year had emergent relief not been granted.[3] Moreover, had the Board not insisted on characterizing this matter as a residency dispute, proceedings on appeal would have focused – as they should have – on the reasonableness of the Board's discretionary determination to deny C.H.'s grandchildren tuition-free nonresident status, and the record would not be devoid as it is of argument and evidence – from either party, apart from brief comments from the Board in its post-hearing summation (at 3) – specifically directed to this question. Under such circumstances, the Commissioner simply cannot find assessment of tuition against C.H. to be a just result, notwithstanding that her grandchildren did, in fact, attend Bloomfield public schools for 78 school days after they had moved from the district.

Accordingly, as clarified and amplified above, the Initial Decision of the OAL – finding that C.H. is not responsible for payment of tuition to the Bloomfield Board of Education for the period from February 23, 2007 to the end of the 2006-07 school year – is adopted as the final decision in this matter.

IT IS SO ORDERED.[4]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 1/22/08

Date of Mailing: 1/23/08

[3] Particularly under circumstances where the family had already been subjected to major emotional and physical upheaval, the Commissioner finds absurd the Board's stance on exception, *supra*, that C.H. should have withdrawn the children from the Bloomfield schools – the only schools they have ever attended – on her own volition upon discovery of their ineligibility in February or March, enrolled them in East Orange, and then, after paying tuition to Bloomfield for the time of their ineligible attendance, petitioned the Board for permission to have them return to Bloomfield to finish whatever was left of the school year. (The record does not indicate where the children will be attending school during the 2007-08 school year – only that they are being returned to their parents, whose district of domicile is not identified.)

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 05181-07
AGENCY DKT. NO. 119-4/07

C. H. O/B/O MINOR GRANDCHILDREN,

Petitioner,

v.

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

Respondent.

C.H., pro se

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

Record Closed: September 11, 2007 Decided: October 19, 2007

BEFORE **JAMES A. GERAGHTY**, ALJ:

BACKGROUND

Petitioner, C.H. on behalf of her minor grandchildren B.M., Z.M., and G.P., contests respondent Bloomfield Board of Education's disenrollment of her grandchildren from the Bloomfield public schools due to their having relocated from Bloomfield to the

City of East Orange during January 2007, the beginning of the second semester of the 2006-2007 school year. Specifically, by letter dated March 20, 2007, the school administration advised C.H. that her grandchildren would be disenrolled due to their no longer being domiciled within the Township of Bloomfield. The Board of Education held a hearing after which they voted to disenroll three of her grandchildren effective May 1, 2007. However, the Board decided not to disenroll a fourth grandchild but to grant him the "senior privilege" to complete senior year at Bloomfield High School tuition free. Petitioner appealed to the Commissioner of the Board of Education by letter dated April 27, 2007. The matter was transmitted to the Office of Administrative Law ("OAL") on May 3, 2007 as a request for emergency relief. On May 16, 2007, respondent filed an Answer and Counterclaim for tuition reimbursement of $11,455.86.

A hearing was scheduled for May 15, 2007. By letter of May 11, 2007, counsel for respondent requested an adjournment and averred that the matter was no longer emergent since the appeal stayed the disenrollment and that the involved students continued to attend the Bloomfield Public Schools. N.J.S.A. 18A:38-1. The tribunal granted the request and rescheduled the hearing for May 24, 2007. Respondent's counsel requested another adjournment due to a scheduling conflict. The tribunal granted the request but scheduled a telephone conference during which the tribunal accepted a proposal that the matter proceed on stipulated facts, written argument, and oral argument by conference call on August 21, 2007.

Under cover of a letter dated August 1, 2007, respondent submitted stipulated facts and a Certification by Dr. Nicolette Salerno, Bloomfield Public Schools Manager of Grants, Admissions and Residency, explaining the tuition reimbursement calculations for petitioner's grandchildren. (Joint Exhibit 1 and Exhibit R-1). At oral argument the tribunal learned that petitioner had applied to the school board for a tuition waiver based on hardship but that her request had been denied.

As invited by the tribunal, petitioner made a post-hearing submission received on September 10, 2007, while respondent likewise made a post-hearing submission September 11, 2007. The record closed that day.

STATEMENT OF THE ISSUES

The issues are whether: (1) respondent's decision to disenroll petitioner's grandchildren B.M., Z.M. and G.P. due to a domicile change is sustainable, (2) respondent properly denied petitioner's hardship-based tuition waiver request, and, if so, (3) respondent has sustained its burden of establishing its tuition reimbursement counterclaim.

FINDINGS OF FACT

Based on the stipulated facts, the uncontradicted Certification of respondent's Grant Manager, and petitioner's uncontradicted testimony and written submission, I **FIND:**

C.H. and her husband lived at 457 Abington Avenue, Bloomfield, New Jersey, for over ten years until 2007. During that time the couple made mortgage and tax payments for their residence. Also, C.H. obtained legal custody of her grandchildren as their parents became incapable of caring for them as evidenced by Superior Court orders. (Appended to the Facts Stipulation.) However, the children always have attended the Bloomfield Schools.

In July 2006, petitioner's husband passed away from chronic liver disease complicated by hepatitis B and C. By the end of his lengthy illness, the family's funds had been depleted. Petitioner had no income until the Social Security Administration paid her husband's benefits after three years of appeals. Meanwhile, petitioner was unable to make mortgage payments. She and her husband declared bankruptcy and lost their Bloomfield home in foreclosure. Thereafter, the family rented a home at 151 Leslie Street, Bloomfield until petitioner's husband's death on July 16, 2006. Thereafter, she rented a smaller less expensive home three doors away at 110 Leslie Street which is over the Township border in East Orange, New Jersey. When petitioner's son graduated from high school, the family lost his aid to dependent children benefits. Petitioner claims her monthly expenses are $3,100 for her and her four grandchildren

while the family's monthly income is $3,255. With excess monthly income of $155 petitioner requested the School Board to waive the $11,455.86 tuition reimbursement claim because of the devastating financial hardship her family has experienced.

Petitioner has not challenged the accuracy of the tuition assessment calculated by the School District.

The School District has not explained to the tribunal why it denied petitioner's request for a tuition waiver.

Under the totality of the circumstances, I **FIND** that: (1) C.H. and her grandchildren were not domiciled within the Bloomfield School District from January 2007, (2) the amount of the tuition reimbursement due from petitioner to the school board, if not waived, is $11,455.86, and (3) the School Board's denial of petitioner's tuition waiver application was an unreasonable failure to exercise its discretionary powers, contrary to principles of equity and justice.

LEGAL AUTHORITY

Persons from the age of five through twenty years old domiciled within a school district are entitled to a free education. N.J.S.A. 18A:38-1. A domiciliary lives with a parent or legal guardian whose permanent home is located within the school district. N.J.A.C. 6A:22-3.1(a)(1). As to non-residents:

> Any person not resident in a school district, if eligible except for residence, may be admitted to the schools of the district with the consent of the board of education upon such terms, and with or without payment of tuition, as the board may prescribe.

N.J.S.A. 18A:38-3a.

Otherwise, if the parent or guardian of a child attending school in the district is not domiciled within the district, the superintendent or administrative principal may apply to the board of education for the child's removal. N.J.S.A. 18A:38-1b.(2). No child shall

be removed from school during the twenty-one day period during which the parent or guardian may contest the board's decision or during the pendency of the proceedings before the commissioner. Ibid.

School board decisions are presumed correct and unassailable unless shown to be arbitrary, capricious, or unreasonable. Thomas v. Board of Education, Township of Morris, 89 N.J. Super. 327 (App. Div. 1965), aff'd, 46 N.J. 581 (1966); Parsippany-Troy Hills Education Assoc. v. Board of Education, 188 N.J. Super. 161 (App. Div. 1983). The courts have refined the standard explaining that a board's discretionary decision will not be overturned unless "patently arbitrary, without rational basis or induced by improper motives." Kopera v. West Orange Board of Education, 60 N.J. Super. 288 (App. Div. 1960).

As to agency action generally, the Supreme Court has explained that a reviewing tribunal inquires whether the agency action violates express or implied legislative polices, whether there was substantial evidence to support the findings upon which the agency acted, and whether the agency clearly erred as its conclusion could not reasonably have been based upon the relevant factors. In the Matter of Tammy Herrmann, 192 N.J. 19 (2007). As to the policy inquiry, the Supreme Court has stated:

> Any administrative agency in determining how best to effectuate public policy is also limited by applying principles of fundamental fairness. We have in the past applied such principles of fundamental fairness beyond those required by the Constitution, to administrative agency actions. See In re Arndt, 67 N.J. 432 (1975); Monks v. New Jersey State Parole Bd., 58 N.J. 238 (1971). "When specific parties are particularly affected by a proposed rule, fair play and administrative due process dictate that an agency must conscientiously concern itself with and make reasonable efforts to accommodate the rights and interests of the affected individual and genuinely account for the individualized effect of its proposed action." Balley Mfg. Corp. v. New Jersey Casino Control Comm'n, supra, 85 N.J. 25, 345 (1981) (Handler J, concurring).
>
> "[T]heir are no simple answers as to what constitutes fundamental fairness" and "[e]ach case must be considered and evaluated on its own merits." In re Kallen, supra, 92 N.J. 14, 27 (1983). The determination of whether agencies have observed principles of basic fairness therefore requires "an examination of the facts in each case, giving weight to the effect of the decision on the agency's public policy." Id. at 26

State of New Jersey Dept. of Environmental Protection v. Stavola, 103 N.J. 425 note 2 (1986).

Although the statute requires school boards to disenroll students not domiciled within their districts and to recoup retroactive tuition, the obligation may be obviated on equitable principles. Akbar Zadran v. Board of Education Township of Belleville, State Board (April 1, 1998) www.state.nj.us/education/legal/sboe/index.html. (Tuition waiver supported by principles of fundamental fairness and equity); M.F. and P.J.F. o/b/o minor children v. Bd. of Educ. Township of Hope, EDU 7367-99, Initial Decision (June 14, 2000) modified, Comm'r. (July 31, 2000) <http//lawlibrary.rutgers.edu/oal/search.html> (domicile on Township Boarder, tuition waiver predicated upon equity, petitioner's lack of intent to defraud and honest belief in entitlement); H.M. and L.M. v. Township of Freehold, 97 N.J.A.R. 2d (EDU) 418 (1990) (equity and considerable passage of time); and R.D. o/b/o Minor Children v. Board of Education Fort Lee, EDU 7327-00, Initial Decision (February 1, 2001) modified, Comm'r. (April 2, 2001) <http//lawlibrary.rutgers.edu/oal/search.html> (tuition recovery limited to period following school board decision).

In this case, C.H. acted in good faith and petitioned with clean hands. Based on the precedent involving families living on the border between two school districts, , it would be fair and equitable for petitioner to be relieved of tuition to the date of the School Board's decision to disenroll, that is, April 10, 2007. However, the tribunal considers the Board's denial of the tuition waiver application to have been without a rational basis contrary to implied legislative policies and, therefore, unreasonable. Moreover, there is a dearth of evidence on the record to support the Board's decision. The legislation does not delineate the factors upon which school boards should rely in exercising their discretionary authority to waive tuition. Without more, the tribunal may assume that the legislature intended school boards to waive in appropriate circumstances. More to the point, the legislature must have intended that in domicile cases involving tuition reimbursement there ought to be some circumstances which warrant waiver. Although the tribunal is not prepared to conclude that extreme financial hardship per se justifies a waiver, suffice it to say that on the facts of this case, a discretionary decision to waive would be fairly compelling.

Petitioner and her grandchildren have recently experienced personal calamities resulting from the death of the husband/grandfather, bankruptcy, and foreclosure on the family's Bloomfield residence. Thus, the family was forced to move after the foreclosure. Although they rented a home in Bloomfield until after petitioner's husband's death, the family traded down, as it were, by renting a smaller house three doors away. It is these baleful events whose tragic consequences have left petitioner and her grandchildren in the vulnerable circumstances in which they now find themselves. Petitioner paid real estate taxes to Bloomfield for over ten years thereby financially supporting education in that municipality. The tribunal finds it fundamentally unfair and unjust, principles of equity notwithstanding, for the Board to refuse to waive tuition for one semester despite petitioner's wretched circumstances. It is difficult for the tribunal to imagine a case more compelling in which to grant a tuition waiver.

The School Board adduced no evidence or rationale at the OAL to justify the wavier denial. If the School Board's decision were rational or soundly based on public policy, the tribunal could evaluate it. However, the absence of any such evidence indicates that the Board gave no consideration to the interests of the affected individuals or the individualized effect of its actions. Bally Mfg. Corp., supra. Therefore the decision had no rational basis, was patently arbitrary, and finds no support in the record.

CONCLUSIONS

Based on the foregoing uncontradicted facts and legal authority, I **CONCLUDE** that respondent rightfully disenrolled petitioner's three grandchildren at the conclusion of the 2006-2007 school year due to their change in domicile, but further **CONCLUDE** that the School Board's denial of petitioner's tuition reimbursement waiver application was not sufficiently grounded by evidence on the record, unreasonable, fundamentally unfair, and inequitable.

DISPOSITION AND ORDER

Based on the foregoing findings of fact and conclusions of law, I **DECIDE** this matter in part in favor of respondent, **AFFIRM** the disenrollment of petitioner's grandchildren at the conclusion of the 2006-2007 school year, **DENY** the petition insofar as it challenges the disenrollment, but **GRANT** petitioner's challenge to respondent's tuition reimbursement claim, and **DISMISS** that claim accordingly.

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

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

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

10/19/2007
DATE

James A. Geraghty
JAMES A. GERAGHTY, ALJ

Date Received at Agency:

10/19/07

Mailed to Parties:

OCT 22 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

pb

APPENDIX

For Petitioner:

August 10, 2007 post-hearing submission

For Respondent:

September 6, 2007 post-argument submission
August 1, 2007 Stipulation of Facts and Certification regarding tuition calculation

#27-08

27-08

OAL DKT. NO. EDU 12105-04
AGENCY DKT. NO. 419-11/04

ROBERT L. WILLIAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the executed "Stipulation of Settlement" (Settlement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner approves the terms of the settlement with one comment.

Section 5 of the Settlement recites that respondent will pay petitioner $3000 within thirty days following the execution of the Settlement and the approval of same by "formal action of the Board." Section 6 obligates petitioner to withdraw his petition of appeal with prejudice when petitioner's counsel "receives notice and documentation that the Board has approved the terms and conditions of [the] settlement."

Thus, these provisions anticipated that certain conduct would occur on a date that ultimately fell before the Settlement was considered by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves same.

Accordingly, the Commissioner adopts the Initial Decision as the final decision in this case, providing that the parties have already implemented the settlement terms, or have agreed upon a mutually satisfactory alternate date for effectuation of same.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/23/08

Date of Mailing: 1/24/08

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 12105-04

AGENCY DKT. NO. 419/1104

ROBERT L. WILLIAMS,

Petitioner,

v.

TOWNSHIP OF WILLINGBORO BOARD OF EDUCATION, BURLINGTON COUNTY,

Respondent.

Kathleen Naprstek Cerisano, Esq., for appellant (Zazzali, Fagella, Nowak, Kleinbaum and Friedman, attorneys)

Paul C. Kalac, Esq., for respondent (Parker McCay, attorneys)

Record Closed: December 3, 2007 Decided: December 10, 2007

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

This matter concerns a Petition of Appeal filed with the Commissioner of Education by Robert L. Williams regarding a claim of entitlement to a position awarded

to another employee by the respondent Board of Education of the Township of Willingboro. The Commissioner of Education transmitted the matter to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and prepared a Stipulation of Settlement, which is attached and fully incorporated herein.

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

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

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

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

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

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

December 10, 2007
DATE

JEFF S. MASIN, ALJ

Date Received at Agency:

Mailed to Parties:

DEC 13 2007

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

mjm
Attachment

30-08

OAL DKT. NO. EDU 12278-06
AGENCY DKT. NO. 449-12/06

IN THE MATTER OF THE TENURE	:	
HEARING OF ROBERT J. TETI,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF WILLINGBORO, BURLINGTON COUNTY.	:	

The record of this matter, the parties' Joint Request for Approval of Settlement And Withdrawal of Tenure Charges, and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon such review, the Commissioner concurs with the ALJ that the proposed settlement is consistent with established standards governing settlement of tenure matters. *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846.

Accordingly, the settlement is hereby approved and the tenure matter dismissed, subject to compliance with the terms of the settlement. A copy of this decision shall be forwarded to the State Board of Examiners.

IT IS SO ORDERED.

Lucille T Davy

COMMISSIONER OF EDUCATION

Date of Decision: 1/24/08

Date of Mailing: 1/25/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 12278-06

AGENCY DKT. NO. 449-12/06

IN THE MATTER OF THE TENURE HEARING OF ROBERT J. TETI, SCHOOL DISTRICT OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY.

Michael E. Sullivan, Esq., for the petitioner, School District of Willingboro (Parker, McCay & Criscuolo, attorneys)

Michael C. Damm, Esq., for the respondent, Robert J. Teti (Selikoff & Cohen, attorneys)

Record Closed: December 10, 2007 Decided: December 10, 2007

BEFORE **SOLOMON A. METZGER**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on December 27, 2007, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

12/10/07
DATE

SOLOMON A. METZGER, ALJ

Date Received at Agency:

DEC 14 2007
DATE

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

/cad

RECEIVED
2007 DEC 10 A 11: 12
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

IN THE MATTER OF THE TENURE HEARING OF ROBERT J. TETI, WILLINGBORO TOWNSHIP BOARD OF EDUCATION, BURLINGTON COUNTY.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDUTH 12278-2006S
AGENCY REF. NO. 499 -12/06

JOINT REQUEST FOR APPROVAL OF SETTLEMENT AND WITHDRAWAL OF TENURE CHARGES

INTRODUCTION

Counsel for the Petitioner, Willingboro Township Board of Education (the "Petitioner" or "Board") and Counsel for its tenured employee, Respondent, Robert J. Teti, (the "Respondent") join in moving before this Honorable Court for an Order declaring that the Settlement Agreement between the parties attached hereto (the "Settlement Agreement") meets the requirements of *N.J.A.C.* 1:1-19.1 and *N.J.A.C.* 6A:3-5.6(a) and recommending that the Settlement Agreement be approved by the Commissioner of Education (the "Commissioner") on the condition that the Commissioner approves without modification the Settlement Agreement and ordering that the Settlement Agreement be implemented and that the tenure charges filed by the Board be withdrawn and this matter dismissed with prejudice.

PROCEDURAL STATEMENT

This matter arises out of tenure charges certified by the Board on November 20, 2006 to the Commissioner of Education against Respondent, Robert J. Teti, a tenured math

teacher alleging the inappropriate use of the Internet by viewing alleged child pornography on his own personal computer unconnected with his school-related duties and responsibilities. The charges were based on information initially obtained from law enforcement. Mr. Teti filed an Answer on December 20, 2006 setting forth in detail his denial of the allegations. The tenure charges were transmitted to the Office of Administrative Law as a contested case and the matter was assigned to the Honorable Solomon A. Metzger, ALJ.

The parties have now reached a settlement which is conditioned on the approval of the Commissioner of Education that the tenure charges be withdrawn. The parties agree that upon the Commissioner's approval of the attached Settlement Agreement without modification, the tenure charges against Mr. Teti shall be withdrawn and dismissed with prejudice subject to implementation of the Settlement Agreement. Should the Commissioner fail to approve the Settlement Agreement without modification, the parties agree to make every effort to reform the Settlement Agreement to meet any objections thereto or otherwise abide by the directives of the Commissioner, subject to each party's right to reject any such modified Settlement Agreement and proceed with the tenure proceedings.

JUSTIFICATION FOR WITHDRAWAL OF TENURE CHARGES

The Board originally instituted tenure charges against Mr. Teti, based on information obtained from law enforcement concerning alleged child pornography allegedly found on a personal computer which Mr. Teti, in August of 2005 brought to a computer facility for repair. Mr. Teti was never criminally prosecuted on the allegations. At no time were the allegations connected with Mr. Teti's school activities with the Board. Mr. Teti's performance with the Board as a teacher is not at issue.

The Board, through counsel, has now had an opportunity to fully investigate and assess the allegations, review discovery and confer with witnesses during the discovery phase of the case in preparation for hearing. The Board and Mr. Teti have conducted a detailed and full independent investigation of the allegations, and have exchanged relevant information and documentation. Subsequent to the charges being filed, counsel for Mr. Teti brought to the attention of the Board the report of a qualified expert in the field of computer programs, internet computer use and child pornography, Dr. Rebecca Mercury, Ph.D. which contradicted the allegations. The expert qualifications of Dr. Mercury are set forth in her attached curriculum vitae (Exhibit "1"). Dr. Mercury conducted an independent investigation which included her actual review of the computer evidence and concluded in her forensic report issued August 10, 2007 attached as Exhibit "2" that the evidence "overwhelmingly corroborates Mr. Teti's [statements to law enforcement personnel] that he was unaware of and did not participate in any acquisition, viewing or file sharing of any of the alleged child pornography" (Exhibit "2" pg. 7) . In this regard, Dr. Mercury in her report not only cited to the fact that the computer and other evidence established that numerous individuals other than Mr. Teti had access to the computer and disc drive in question both before and after they had been brought in for servicing, but that there was evidence that the computer involved was "hijacked," i.e. invaded by an insidious virus program known as a "webbot," which was known to be operating during the exact same time period in August 2005 when Mr. Teti's computer was brought in for servicing and involved the placement of child pornography on the user's computer without the user's knowledge. In this regard, Dr. Mercury discovered evidence of the presence of the "webbot" based on certain computer log entries which she found and described in detail in her forensic report of August 10,

2007 (Exhibit "2"). Dr. Mercury further found that the existence of this insidious program was corroborated by the problems Mr. Teti reported having with the computer, and the reason why it was initially brought in for servicing. Dr. Mercury, in her forensic report presented further information with respect to the existence and operation of the "webbot" virus program during the specific time period in question by citing several news articles and programs devoted to the subject and persons who had been accused similar to Mr. Teti, but ultimately cleared (see exhibits annexed to Dr. Mercury's forensic report, Exhibit "2a-f").

The Prosecutor's Office did not prosecute the charges against Mr. Teti. Instead, Mr. Teti was offered pretrial intervention, which he accepted and completed, resulting in an order of the Superior Court dated June 1, 2007 (Exhibit "3," attached) dismissing the allegations in their entirety.

Based upon a full investigation of the evidence that might be presented at a tenure hearing as set forth ante; the lack of any evidence that students received, reviewed or were exposed to any of the materials referenced in the tenure charges or in this Settlement Agreement; that Mr. Teti's alleged actions did not harm or threaten to harm any students at any time; Mr. Teti's tenured service to the District; that Mr. Teti was suspended without pay for 120 days; the uncertainty of the result that might be obtained and costs of proceeding with the litigation the Board has determined to resolve this dispute in a manner it believes to be consistent with the public interest; and,

WHEREAS in recognition of all of the above, the Board has reached an informed determination that the public interest will be served by this negotiated agreement; and,

WHEREAS the agreement between the Board and Mr. Teti is based upon the understanding of all these facts and both the Board and Mr. Teti are satisfied with the resolution of this matter, consider it closed, and believe that it fulfills the public interest.

CONCLUSION

The parties have been fully informed of their respective rights in connection with these proceedings, including those standards for approval of the Settlement Agreement by the Commissioner pursuant to *N.J.A.C.* 6A:3-5.6(a). The parties are satisfied with the Settlement Agreement and believe that it fulfills the public interest with respect to these matters. For the reasons outlined above, and for good cause shown, this tribunal should conclude that the Settlement Agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and *N.J.A.C.* 6A:3-5.6(a), recommend that the Settlement Agreement be adopted without modification by the Commissioner of Education, order that the Settlement Agreement be implemented on condition that it is so approved, and thereafter upon such approval dismiss with prejudice the tenure charges.

Respectfully submitted,

SELIKOFF & COHEN, P.A.
Attorneys for Robert J. Teti

BY: _____
MICHAEL C. DAMM
DATED: 10-12-07

PARKER McCAY PA
Attorneys for Willingboro Twp. Board of Education

BY: _____
JOAN KANE JOSEPHSON
DATED: 10-15-07

SETTLEMENT AGREEMENT REGARDING ACTION PENDING BEFORE THE COMMISSIONER OF EDUCATION

This Settlement Agreement is entered into by and between the Willingboro Township Board of Education ("Board") and its tenured employee Robert J. Teti ("Teti").

WHEREAS, Mr. Teti has been continuously employed by the Board as a math teacher since in or about September of 1998; and,

WHEREAS, on November 20, 2006 the Board certified tenure charges against Mr. Teti to the Commissioner of Education under the Tenure Employees Hearing Law, which charges were captioned:

IN THE MATTER OF THE TENURE HEARING
OF ROBERT J. TETI, WILLINGBORO
TOWNSHIP BOARD OF EDUCATION
OAL DKT. NO. EDUTH 12278-2006S
AGENCY REF. NO. 499 -12/06

WHEREAS Mr. Teti filed an Answer contesting the tenure charges; and,

WHEREAS, the aforesaid tenure charges were assigned for hearing before the Honorable Solomon A. Metzger, ALJ; and,

WHEREAS, in consideration of the mutual promises contained herein, the parties intend to resolve all matters in dispute involving Mr. Teti and the allegations which are the subject of the tenure charges, or which otherwise may be raised by them, in the context of this tenure proceeding;

NOW THEREFORE, the matter in dispute having been amicably adjusted by and between the parties and based on the foregoing having fulfilled the public interest, it is hereby stipulated and agreed as follows:

1. It is agreed that Mr. Teti shall retire from his employment with the Board effective May 1, 2008.

2. The Parties will seek the Commissioner's approval of this Settlement Agreement, and if the Commissioner approves the Settlement Agreement without modification, ask the Commissioner to allow the tenure charges against Mr. Teti to be withdrawn and dismissed with prejudice subject to implementation of the Settlement Agreement. The terms of a Joint Request for Approval of Settlement and Withdrawal of Tenure Charges submitted to the Commissioner are incorporated herein by reference.

3. Should the Commissioner fail to approve the Settlement Agreement without modification, the parties agree to make every reasonable effort to reform their Settlement Agreement to meet her objections.

4. Should the Commissioner fail to approve the Settlement Agreement and it cannot be reformed to meet her objections and/or the matter is referred to hearing, the parties agree that they will not assert in any judicial or administrative proceeding that any statements made by them or their attorneys herein are admissions, admissions against interest or competent evidence of any fact.

5. Mr. Teti and the Board understand and agree that as a contested case which has been brought to the Office of Administrative Law, the settlement documents herein become part of the public record in this matter.

6. Mr. Teti agrees that he has been fairly and adequately represented and advised at all stages of these proceedings, that he is fully satisfied with the services of counsel and that he is voluntarily and without coercion with a full understanding of his rights and the ramifications of this Settlement Agreement entering into it on his own accord. Mr. Teti fully understands that this Settlement Agreement is subject to the approval of the Commissioner of Education.

SELIKOFF & COHEN, P.A.

Attorneys for Robert J. Teti

BY: _____
MICHAEL C. DAMM

DATED: 10-11-07

BY: _____
ROBERT J. TETI

DATED: 10-11-07

WILLINGBORO TWP. BOARD OF EDUCATION

BY: Theresa Rita Owens
THERESA RITA OWENS
PRESIDENT

DATED:

BY: Kelvin F. Smith
KELVIN SMITH
BUSINESS ADMINISTRATOR
AND BOARD SECRETARY

DATED:

Rebecca Mercuri, Ph.D.
P.O. Box 1166
Philadelphia, PA 19105
609/587-1886 and 215/327-7105
www.notablesoftware.com
mercuri@acm.org

Background:

Expert witness on computer and engineering matters including investigative casework, written briefs, and courtroom testimony, as well as presentations at municipal, county, state and federal hearings. Focus on microprocessor-based, real-time, interactive, computer systems; computer security and risks; digital multimedia; election law. Tasks have involved defense, plaintiff, and court support in civil, criminal and municipal cases, patent reviews, claim evaluations, and security assessments. Excellent written and verbal communication skills. Fluency in reading and analysis of software code and circuit diagrams. Superb media relations and strong ability to sway public opinion.

Experience:

Twenty-five years of employment includes more than ten years in industry positions as a programmer, systems analyst and software engineer, and over ten years of college and university professorships and research fellowships in computer science, computer engineering, and business information systems. Court-related work dates from 1998.

Degrees:

Ph.D., Computer and Information Science, University of Pennsylvania, School of Engineering and Applied Science, 2001.
Dissertation: "*Electronic Vote Tabulation: Checks & Balances.*"
Master of Science in Engineering, University of Pennsylvania, 1990.
Master of Science in Computer Science, Drexel University, Department of Mathematics and Computer Science, 1989. G.P.A. 4.00.
Master's Thesis: "*Parallel Processing in a Simulated RISC Environment.*"
Bachelor of Science in Computer Science, Pennsylvania State University, 1979.
Bachelor of Music in Classical Guitar, Philadelphia College of the Performing Arts (now the University of the Arts), 1977.

Expertise:

Programming Languages: C, C++, Java, HTML/JavaScript, Pascal, FORTRAN, BASIC, various assembly languages (680x0, 80x86, Z-80, 6502).
Operating Systems: UNIX, Windows, PC/MS-DOS, MacOS, CP/M, VMS.
Hardware: Macintosh, IBM PC family, Silicon Graphics, Connection Machine, Palm, Sun Workstations, Apple II family, Z-80 family, VAX 11/780, DEC-20, IBM 360/370.

Exhibit 1

Job History:

Industry –

- Notable Software, Inc., Lawrenceville, NJ and Philadelphia, PA.
  April 1985 - present: *Senior Systems Analyst, Forensic Computing Expert.*
- Communications of the Association for Computing Machinery, NY, NY.
  October 2002 - present: *Contributing Editor* and *Columnist.*
- AT&T Bell Laboratories, Holmdel, NJ.
  June 1993 - October 1993: *Visiting Member of Technical Staff.*
- David Sarnoff Research Center, Princeton, NJ.
  June 1980 - April 1985: *Associate Member of Technical Staff.*

Academia –

- Harvard University, Cambridge, MA. Research fellow, John F. Kennedy School of Government, Belfer Center for Science and International Affairs, 2003-4; Fellow, Radcliffe Institute for Advanced Study 2004-5.
- Bryn Mawr College, Bryn Mawr, PA 1999-2003.
  Assistant Professor of Computer Science.
- The College of New Jersey, Trenton, NJ 1998-1999. Assistant Professor of Computer Science and Computer Engineering.
- Contract workshop/seminars for the David Sarnoff Research Center, the United States Army, the Philadelphia Stock Exchange, and the Federal Aviation Administration.

Expert Witness Work:

- NJ Office of the Public Defender –forensic investigations and data collection for various cases involving murder, child endangerment and child pornography.
- NJ Office of Attorney Ethics – data collection to support funds misuse case.
- Product liability lawsuits – data reconstruction and loss mitigation.
- Expert opinion for patent disputes, civil computer-related matters, electronic balloting and vote tabulation systems, and election recounts.

Professional Affiliations:

Institute of Electrical and Electronics Engineers, Senior Member
  Executive Board of Princeton Central Jersey Section
  P1583 working group on Voting Systems Standards
  Computer Society Chair, Princeton Professional Chapter
Association of Computing Machinery, Member
  Co-founder Princeton Professional Chapter
  Contributing Editor, "Communications"
Audio Engineering Society, Member
  Executive Board of Philadelphia Chapter.

Career Highlights:

- Expert witness and forensic investigations have included customary as well as high-profile cases. Ability to negotiate well with law enforcement and court agency personnel as well as technical staff has contributed positively to discovery efforts. Have played key roles in logistics and brief preparation. Many matters reached out-of-court settlements as a result of my analysis of findings.

- Internationally recognized as a leading expert in the area of electronic balloting and vote tabulation. Have had direct influence in election litigation efforts, introduction of key wording into legislation and initiatives at state and federal levels, and construction and adoption of new voting technologies and methods.

- Software Quality Assurance reviews have included verification and validation of program code as well as in-depth analysis and input on System Requirements Documents, System Design Documents, System Test Documents, black/white-box testing, standards compliance, reliability and risks assessments.

- Scientific public policy advocacy has invited presentation of opinion to the U.S. House of Representatives Science Committee, Federal Election Commission, U.S. Department of Justice, U.S. General Accounting Office, U.S. Commission on Civil Rights, National Institute of Standards and Technologies, U.K. Cabinet, and various State Legislative Committees.

- Frequently quoted by major news agencies in television, radio and print media, such as CNN, NBC Nightline, FOX News, National Public Radio, USA Today, New York Times, The Economist, Wall Street Journal, and the Associated Press.

Court Testimony:

- Superior Court Law Division, Mercer County, Docket No. MER-L-2691-04, Civil Action. Assemblyman Reed Gusciora et. als. vs. James E. McGreevey, Governor of the State of New Jersey (in his official capacity) and Peter C. Harvey, Attorney General of the State of New Jersey (in his official capacity). October 2004 – present. Provided extensive written and oral/courtroom testimony pertaining to paper ballot retrofits on electronic voting equipment. Only plaintiff witness explicitly cited in Appellate Division's remanding decision (Docket No. A-2842-04T1).

- Affidavit submitted in support of Detroit Michigan's Mayoral candidate Freeman Hendrix's request to conduct a full manual recount of the general election ballots, December 2005. Request was granted largely on the basis of this expert testimony.

- Superior Court of New Jersey, Chancery Division: Middlesex County, General Equity Part, Docket No. C-291-02. Balaji Chennawar v. Rajneesh Gupta, et als. Performed directed review of computer materials related to civil action in business dispute, provided written report and oral testimony. August-October 2003. Court appointed expert.

Court Testimony (continued):

- Florida 15th Circuit Court Case No. CA-02-3667-AE. Emil P. Danciu v. Theresa LePore in her Official Capacity as Palm Beach County Supervisor of Elections, Boca Raton City Canvassing Board, Palm Beach County Canvassing Board, Susan Haynie, and Bill Hager. August 2002. Expert for plaintiff.

- "*Declaration of Rebecca T. Mercuri in Support of Plaintiff's Opposition to Defendant's Motion for Summary Judgment*," sworn affidavit regarding the unconstitutional nature of self-auditing touch-screen voting machines, presented to the United States District Court for the Central District of California, Case No. CV 01-11159 SVW(RZx) in the case of Susan Marie Weber vs. Bill Jones, California Secretary of State, and Mischelle Townsend, Riverside Country Registrar of Voters.

- "*Declaration of Rebecca T. Mercuri*," sworn affidavit requested by the Democratic Recount Committee regarding the necessity of a hand recount in the disputed Florida precincts for the November 2000 Presidential election. The testimony was presented as part of the defense brief (Appendix of Appellee-Intervenor Florida Democratic Party in Siegel, No. 00-15981-C (CA11)), in the 11th Circuit Court of Appeals, Atlanta, November 17, 2000, and referenced in the United States Supreme Court "Brief in opposition for respondents Gore et al. in Nos. 00-836 and 00-837."

Public Testimony, Comment and Briefings:

- "Electronic Voting Machines: Verification, Security and Paper Trails," written submission entered into the record of the U.S. Congressional Committee on House Administration's September 28, 2006 hearing, October 4, 2006.

- "*Comments on Draft of Subtitle V, Part 6209, VSS NY State*," written comment to New York State Board of Elections and Concerned NY Citizens, February 22, 2006.

- "*Problems with the Unilect Patriot Electronic Voting System*," written submission, Election Assessment Hearing on 2004 Presidential Election Processes, Houston, TX, June 29, 2005.

- Public Comment, Election Assistance Commission Hearing on Consideration of Proposed Voluntary Voting System Guidelines, New York, NY, June 30, 2005.

- Presentation on Auditability and Standards for Electronic Voting and Tabulation Equipment, Joint Select Committee on Electronic Voting Systems, North Carolina State Legislature, Raleigh, NC, January 7, 2005.

- Presentation on NY Help America Vote Act Implementation, New York State Board of Elections HAVA Public Hearing, New York City, July 10, 2003.

Public Testimony, Comment and Briefings (continued):

- Written testimony to the General Assembly of Virginia on six House Bills related to election technology. February 4, 2004.

- Testimony to the Government Administration and Elections Committee of the Connecticut General Assembly on HB388: "An Act Promoting Voting System Accuracy, Integrity and Security Through Voter-Verified Permanent Records or Hard Copies," Hartford, CT, February 27, 2004.

- Testimony on accuracy, integrity and security of computer-assisted elections, Democratic Policy Committee and State Government Committee of the Commonwealth of Pennsylvania, House of Representatives, Philadelphia, PA, March 10, 2004.

- Briefing to the U.S. Commission on Civil Rights on the civil rights implications of election reform efforts, Washington DC, April 9, 2004. Public testimony broadcast by C-SPAN (archived as ID: 181317 "2004 Elections and Civil Rights").

- Written testimony, with members of the National Committee for Voting Integrity, to the U.S. Election Assistance Commission, Public Hearing on "Use, Security and Reliability of Electronic Voting Systems," May 5, 2004.

- "*Response to Formal Request for Comment by the CESG (UK) on Internet Voting*," a written statement and meeting note transcript provided to the UK Cabinet Office as part of the Consultation on e-Democracy, October, 2002.

- "*The FEC Proposed Voting Systems Standard Update*," a detailed comment submitted to the Federal Election Commission on September 10, 2001 in accordance with Federal Register FEC Notice 2001-9, Vol. 66, No. 132.

- "*Full Committee Hearing on Improving Voting Technology: The Role of Standards -- Testimony by Rebecca Mercuri, Ph.D.*," presented to the U.S. House of Representatives Committee on Science Subcommittee on Environment, Technology, & Standards, Rayburn House Office Building, May 22, 2001.

Publications:

Writings are in various general categories as indicated below.
Notations: [R] refereed/reviewed, [I] invited.

Computer Security:

"*Challenges in Forensic Computing*," Security Watch, Communications of the ACM, Vol. 48, No. 12, December 2005. [I]

"*Trusting in Transparency*," Security Watch, Communications of the ACM, Vol. 48, No. 5, May 2005. [I]

"*The HIPAA-potamous in Health Care Data Security*," Security Watch, Communications of the Association for Computing Machinery, Volume 47, No. 7, July 2004. [I]

"*Superscaled Security*," Security Watch, Communications of the Association for Computing Machinery, Volume 47, No. 3, March 2004. [I]

"*Standards Insecurity*," Security Watch, Communications of the Association for Computing Machinery, Volume 46, No. 12, December 2003. [I]

"*Security by Obscurity*," with Peter G. Neumann, Inside Risks, Communications of the Association for Computing Machinery, Volume 46, No. 11, November 2003. [I]

"*Analyzing Security Costs*," Security Watch, Communications of the Association for Computing Machinery, Volume 46, No. 6, June 2003. [I]

"*On Auditing Audit Trails*," Security Watch, Communications of the Association for Computing Machinery, Vol. 46, No. 1, January 2003. [I]

"*Computer Security: Quality rather than Quantity*," Security Watch, Communications of the Association for Computing Machinery, Volume 45, No. 10, October 2002. [I]

"*Uncommon Criteria*," Inside Risks, Communications of the Association for Computing Machinery, Volume 45, No. 1, January 2002. [R]

"*System Integrity Revisited*," with Peter G. Neumann, Inside Risks, Communications of the Association for Computing Machinery, Volume 44, No. 1, January 2001. Reprinted in the CPSR Newsletter, Winter 2001, Volume 19, No. 1. [I]

"*Physical Verifiability of Computer Systems*," 5th International Computer Virus and Security Conference, March, 1992. [R]

Electronic Voting:

"COTS and Other Electronic Voting Backdoors," with Vincent J. Lipsio, Beth Feehan, Communications of the Association for Computing Machinery, Volume 49, Number 11, November 2006.

"Voting System Guidelines Comments," submitted in the formal call for written comments to the U.S. Election Assistance Commission, September 30, 2005.

Publications (continued):

Electronic Voting (continued):

"*Lack of Security Assurances and Auditability Requirements in the IEEE P1583 Draft 5.3.2 Voting System Standards*," Memorandum to the Election Assistance Commission, December 20, 2004.

"*The Code of Elections*," with L. Jean Camp, Communications of the Association for Computing Machinery, Vol. 47, No. 10, October 2004.

"*Poll Tax*," Editorial Note, CIO Insight, October 1, 2004. [I]

"*Florida 2002: Sluggish Systems, Vanishing Votes*," Inside Risks, Communications of the Association for Computing Machinery, Volume 45, No. 11, November 2002. [I]

"*Verification for Electronic Balloting Systems*," with Peter G. Neumann, Chapter 3, Secure Electronic Voting, Dimitris Gritzalis, ed., Advances in Information Security, Volume 7, Kluwer Academic Publishers, Boston, November 2002. ISBN 1-4020-7301-1

"*A Better Ballot Box?*," IEEE Spectrum, Vol. 39, No. 10, October 2002. [R]

"*Florida Primary 2002: Back to the Future*," The Risks Digest, ACM Committee on Computers and Public Policy, Volume 22, Issue 24, September 11, 2002.

"*Explanation of Voter-Verified Ballot Systems*," ACM Software Engineering Notes (SIGSOFT), Volume 27, Number 5, September, 2002. Also published in The Risks Digest, ACM Committee on Computers and Public Policy, Volume 22, Issue 17, July 24, 2002.

"*Humanizing Voting Interfaces*," Usability Professionals Association Conference, Orlando, FL, July 11, 2002. [I]

"*Internet and Electronic Voting*," with Peter Neumann, Lauren Weinstein, The Risks Digest, ACM Committee on Computers and Public Policy, Volume 21, Issue 14, December 12, 2000. Reprinted in ACM's Software Engineering Notes (SIGSOFT), Volume 26, No. 3, March 2001.

"*Voting Automation (Early and Often)*," Inside Risks, Communications of the Association for Computing Machinery, Vol. 43, No. 11, Nov., 2000. [R]

"*Corrupted Polling*," Inside Risks, Communications of the Association for Computing Machinery, Volume 36, No. 11, November, 1993. [R]

"*Threats to Suffrage Security*," 16th National Computer Security Conference, September, 1993. [R]

"*The Business of Elections*," 3rd Conference on Computers, Freedom and Privacy, March, 1993. [R]

"*Voting-Machine Risks*," Inside Risks, Communications of the Association for Computing Machinery, Volume 35, No. 11, November, 1992. [R]

Publications (continued):

Education:

"*Identifying and Correcting Java Programming Errors for Introductory Computer Science Students*," with Maria Hristova, Ananya Misra, Megan Rutter, Technical Symposium on Computer Science Education, ACM SIGCSE, 2003. [R]

"*Computer Camp -- For Girls Only!* ", ACM SIGGRAPH '99, Electronic Schoolhouse, August 1999. [R]

"*In Search of Academic Integrity*," Inside Risks, Communications of the Association for Computing Machinery, Volume 40, No. 5, May 1998. [R]

"*Using HTML and JavaScript in Introductory Programming Courses*," with Nira Herrmann, Jeffrey Popyack, 29th SIGCSE Technical Symposium on Computer Science Education, February, 1998. [R]

"*Introduction to Programming for Inexperienced Students*," with Nira Herrmann, Jeffrey Popyack, Syllabus '97 Workshop, October 1997. [R]

"*The Yamaha DX-7 Synthesizer - A New Tool for Teachers*," with Dennis Righter, IEEE Proceedings of the 5th Symposium on Small Computers in the Arts, 1985. [R] Reviewed in "Report on the 5th Annual Symposium on Small Computers in the Arts," Jim McConkey, Computer Music Journal, Volume 10, No. 2, Summer, 1986.

"*Instruction of Introductory Concepts in Computer Programming*," short report presented by Rebecca Mercuri, ACM SIGCSE, 1984.[R]

Virtual Environments & Arts Therapy:

"*Virtual Arts Therapies*," with Sr. JeanAnthony Gileno, 9th World Congress Music Therapy, American Music Therapy Association, November 1999. [R]

"*Virtual Arts Therapies*," (sketch), with Ranjit Bhatnagar, ACM SIGGRAPH '97, Visual Proceedings, August, 1997. [R]

"*The Technology of Cyberspace Music Therapy*," first Conference on Cyberspace in Music Therapy, MedArt International, February 1992.

"*The Counter-Therapeutic Aspects of Cyberspace*," first Conference on Cyberspace in Music Therapy, MedArt International, February 1992.

"*The Reality of Virtual Environments*," University of Pennsylvania Technical Report, MS-CIS-92-10, Graphics Lab 49, February 1992.

Publications (continued):

Multimedia & Digital Audio:

"*The Many Colors of Multimedia Security*," Security Watch, Communications of the ACM, Vol. 47, No. 12, December 2004.

"*Providing Assurances in a Multimedia Interactive Environment*," with Dorée Duncan Seligmann, John T. Edmark, ACM SIGCHI '95, May, 1995.

"*Digital Audio Applications of Massively Parallel Architectures*," with Michael Keith, Robert Kline, 87th Convention of the Audio Engineerin Society, October, 1989. [R]

"*An Illustrated History of Computer Music*," RCA Engineer, July/August, 1982. Producer of accompanying soundsheet containing musical examples.

"*Computer-Interactive Modifications for the RCA VideoDisc Player*," RCA Technical Report, PRRL-82-TR-099, June 1982.

"*MANUSCRIPT: Music Notation for the Apple II*," IEEE Proceedings of the Symposium on Small Computers in the Arts, November, 1981. Reviewed in "Report on the Symposium on Small Computers in the Arts", Jim McConkey, Computer Music Journal, Volume 6, No. 2, Summer 1982.

"*Music Editors for Small Computers*," Creative Computing, February, 1981.

Conference Presentations:

"*Transparency and Trust in Electronic Voting*," Panelist, Voting Technology: Current Assessment and Future Prospects, A Post-2004 Election Update, AAAS Annual Meeting, Washington, DC, February 18, 2005.

"*New Standards for Elections: A forum on technical and non-technical requirements for voting systems*," co-organizer and panelist, Radcliffe Institute for Advanced Study, Harvard University, Cambridge, MA, February 12, 2005.

"*Electronic Voting Issues*," panelist, Committee on Communications & Information Policy, IEEE-USA, Washington, D.C., February 7, 2005.

"*A Framework for Understanding Electronic Voting*," panelist, National Association of Science, Washington, D.C, December 9, 2004.

"*Do the 'Ayes' Have it? Vote Counting Technology, Election Integrity, and Democracy*," Third Annual Distinguished Authors Panel, New York County Lawyers' Association, Cyberspace Law Committee, New York City, NY, September 29, 2004.

"*Managing Election Data: The California Recall*," Keynote Address, Black Hat, Las Vegas, NV, July 29, 2004.

Conference Presentations (continued):

"*Voting, Vote Capture and Vote Counting*," Symposium, John F. Kennedy School of Government, Harvard University, June 1, 2004. Co-organizer and "Technologies of Voting" panelist.

"*Why Tech Is Back...and Where Was It Anyway?*" panelist, Yale CEO Leadership Summit, "Rediscovering Greatness: The Secrets of Successful Transformation," The Chief Executive Leadership Institute, Yale School of Management, New Haven, CT, May 28, 2004.

"*E-voting in an Untrustworthy World*," DIMACS Workshop on Electronic Voting – Theory and Practice, National Science Foundation Science and Technology Center for Discrete Mathematics & Theoretical Computer Science, Rutgers University, Piscataway, NJ, May 26, 2004.

"*The California Recall – What the Election Data Really Showed*," 30th Asilomar Microcomputer Workshop, Monterey, CA, April 28, 2004.

"*What the Vendors Don't Want You to Know About Election Technology*," 67th Annual Conference, New Jersey Association of Election Officials, Atlantic City, NJ, March 24, 2004.

"*'Don't Ask Don't Tell' Voting System Standards*," National Institute of Standards and Technology Symposium on Building Trust and Confidence in Voting Systems, Gaithersburg, MD, December 10, 2003. NIST video.

"*Equal Opportunity Disenfranchisement: Who Gets to Count Your Vote?*" panelist, Richard Tapia Celebration of Diversity in Computing, Atlanta, GA, October 18, 2003.

"Voting Machines: A Threat to Democracy?" forum, Philadelphia, PA, September 7, 2003. Videocast by Drexel University Television.

"*DRE Security*" and "*Disabled Voting Accessibility*," panelist and member of steering committee, US-ACM Workshop on Voter Verified Election Systems, Denver, CO, July 28-29, 2003.

A Debate on Computerized Voting: A New Solution for a New Generation of Voters, Invited Panelist at National Press Club session sponsored by George Washington University's Democracy Online Project, January 2001.

Computers and Elections: Risks, Reliability, and Reform, Guest Panelist, "Communications Unleashed" Conference by Computer Professionals for Social Responsibility, October 1996.

Security and Auditability of Electronic Vote Tabulation Systems, Session Chair, 16th National Computer Security Conference, September, 1993.

Electronic Voting -- Threats to Democracy, Session Chair, 3rd Conference on Computers, Freedom and Privacy, March 1993.

Invited Lectures (2003-2006):

"*A Better Ballot Box*"

- Department of Computer Science Colloquium, North Carolina State University, Raleigh, NC, November 13, 2003.
- Duke University, guest lecture, CPS 182s – Technical and Social Analysis of the Internet, Durham, NC, November 14, 2003.

"*Computers, Public Policy and You*"

- Math Options, Pennsylvania State University, Abington, PA, October 24, 2003.
- Villanova University, guest lecture, CSC 2500 – A Survey of Information Science, Villanova, PA, March 11, 2004.
- 29th Trenton Computer Festival, Keynote Address, New Jersey Convention Center, Raritan Center, Edison NJ, May 1, 2004.

"*Challenges in Computer Forensics*"

- Department of Computing Sciences Colloquium, Villanova University, April 24, 2006.

"*E-voting (For Better or Worse)*"

- Harvard Club, New York City, NY, Nov. 16, 2004.

"*E-voting: Perils and Promises*"

- Electronic Voting in Massachusetts: Problems and Prospects conference, Suffolk University Law School, Boston, MA, February 28, 2004.
- Examining Voting Systems, 2004 Center for Education and Research in Information Assurance and Security, Expert Security Seminar Series -- Filtering Out the Noise, Indianapolis, IN, April 22, 2004
- Voting in an e-Democracy, Symposium sponsored by the Yale University Faculty of Engineering and the Yale Office of New Haven and State Affairs, New Haven, CT, April 2, 2004.
- Haverford League of Women Voters, Haverford, PA, May 25, 2004.
- Keynote, II Votobit, Leon, Spain, October 7, 2004.
- Princeton University School of Engineering, Princeton, NJ, October 14, 2004.
- West Chester University, West Chester, PA, October 21, 2004.
- W.M. Keck Foundation, Interdisciplinary Science Lecture, Lewis & Clark College, Portland, OR, October 25, 2004.

"*E-voting in an Untrustworthy World*"

- Computer Science & Engineering Department Seminar Series, Lehigh University, November 10, 2005.
- University of South Florida, Tampa, FL, September 20, 2004.
- Technology and Society Forum Series, New Jersey Institute of Technology, New Brunswick, NJ, September 23, 2004.
- Providence Section of the IEEE, Seekonk, MA, September 28, 2004.
- Distinguished Lecture, Arizona Center for Information Science and Technology, University of Arizona, Tucson, AZ, Dec. 8, 2004.
- Delaware Valley Mensa, Conshohocken, PA, January 9, 2005.

Invited Lectures (continued):

"The Electronic Voting Enigma – Hard Problems in Computer Science"

- Williams College, Class of 1960's Scholar's Colloquium, Computer Science Department, Williamstown, MA, November 21, 2003.
- Connecticut-Trinity-Wesleyan Computer Science Consortium, Spring 2004 Joint Colloquium Series, Hartford, CT, April 21, 2004.
- Center for Education and Research in Information Assurance and Security, Purdue University, West Lafayette, IN, April 23, 2004.
- Department of Mathematical & Natural Sciences, Lewis & Clark College, Portland, OR, Oct. 26, 2004.

"Why Computers Can't Count Votes"

- John F. Kennedy School of Government, Harvard University, guest lecture, STP-308 – Technology and Power: Technical Design and Human Values, Cambridge, MA, September 25, 2003.
- Class of 1960's Scholar's Talk, Williams College, Williamstown, MA, November 20, 2003.
- Trinity College, Computer Science Department, and the Public Policy and Law Program, Hartford, CT, April 20, 2004.

"Transparency and Trust in Computational Systems"

- Radcliffe Institute for Advanced Study, Cambridge, MA, November 29, 2004.
- Marshall D. Abrams Invited Essay, 20th Annual Computer Security Applications Conference, Tucson, AZ, December 9, 2004.

"Pushing Forward: Voting System Standards"

- Co-organizer and Panelist, "New Standards for Elections: A forum on technical and non-technical requirements for voting systems," Radcliffe Institute for Advanced Study, Harvard University, Cambridge, MA, February 12, 2005.
- Panelist, "The Machinery of Electronic Voting," 31st Asilomar Microcomputer Workshop, Asilomar, CA, April 20, 2005.

"Any Sound You Can Imagine – RCA's Electronic Music Synthesizer and the Beginning of Binary Sequencing,"

- Co-organizer and panelist, Princeton ACM/IEEE-CS, Philadelphia AES, Delaware Valley Acoustical Society of America, Sarnoff Center, Princeton, NJ, April 20, 2005.

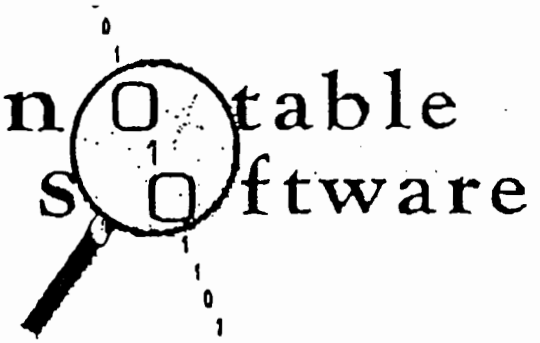
"History and Architecture of the RCA Synthesizer,"

- electro-music 2005, Cheltenham, PA, June 5, 2005.

"A Brief History of Multiphonic Recording and Playback,"

- electro-music 2006, Cheltenham, PA, June 6, 2006.

Forensic Investigation Report
Robert Teti / Willingboro Board of Ed.
Conducted by Rebecca Mercuri, Ph.D.
Notable Software, Inc.
August 10, 2007



Review

On January 30, 2007 I was given an opportunity to review a CD-ROM at the Gloucester County Prosecutor's Office, Justice Complex, Hunter & Euclid Streets, Woodbury, NJ. This review took approximately 4 hours. I was accompanied by Attorney Steven Cohen and Attorney Michael Damm who were present for the first 2 hours of the review, and Robert Teti who was present for the entire review. The review was facilitated by Detective Laporta of the Gloucester County Prosecutor's Office, who was present for the entire review. As we were not provided with a printed or electronic copy of the materials (excluding any possible contraband) that were reviewed, as per Attorney Michael Damm's request of February 9, 2007, this report consists of a synopsis of information that I transcribed by hand during the review, plus my analysis of the reviewed materials.

Counsel for Robert Teti provided me with additional written documentation pertaining to this matter. A list of the materials that I reviewed is attached to the end of this report.

Observations

The CD-ROM review consisted of an examination of a single derivative evidence CD containing report materials that we were informed had been prepared by forensic examiner Carlos Hernandez of the New Jersey Regional Computer Forensic Lab (NJRCFL). Data on the CD indicated that the report materials were generated on May 16, 2006 at 2:04:23 PM.

Attorneys Cohen and Damm requested that Detective Laporta provide us with a demonstration of the materials that was, to the best of his ability, identical to the one he provided to Lorene W. Moore (of the Willingboro School District) and Attorney Joan K. Josephson on October 11, 2006. Detective Laporta explained that he had verbally provided Ms. Moore and Ms. Josephson with a general explanation of the materials that were on the derivative evidence CD, but that Ms. Moore and Ms. Josephson perused the materials themselves, using the Forensic Tool Kit (FTK) software that was running on the laboratory's computer (a Windows-based PC). Detective Laporta then provided a general overview of the files and data on the CD and allowed us to self-direct our own examination of these materials.

Detective Laporta remarked that Ms. Moore and Ms. Josephson asked him a lot of questions during their review, and we asked him if he could recall some examples of the types of questions and answers that had occurred during their session. In response, he showed us some images that were on the CD and then explained that he had told Ms. Moore and Ms.

Exhibit 2

Josephson that these were pictures of "a pre-pubescent child engaged in a sexually explicit position." He also told us that he had explained to them that some of the data was obtained using recovery software that provided information from the Internet cache, indicating web sites that he alleged had been browsed and programs that had been executed prior to the impounding of the computer. We then began examining the materials on the derivative evidence CD ourselves, via a menu of selections provided by the FTK software.

The Case Information data indicated that FTK Version 1.61a, build 06.03.13 had been used to prepare this CD. The case number was recorded as 2005-002. Carlos Hernandez was listed as the forensic examiner, along with Investigative Detective William Manstein of the Deptford Township Police Department.

The File Overview data that was provided on the derivative evidence CD indicated that the NJRCFL had listed the total number of file items in the original data set as 223,995, with 4 flagged thumbnail images and 55,055 other thumbnails. The NJRCFL had also listed 755 bookmarked items,10 encrypted files, 439 files from email, 11,867 deleted files, 73,960 duplicate files, 19,114 documents, 55,059 graphics, 137 email messages, 5,328 executable files, 8,815 archives, 2,213 folders, 54,625 units of slack/free space, 2,832 files of other known types, and 75,697 files of unknown type.

The Evidence List for the CD indicated that there were three derivative evidence files contained on it. These were as follows:
1) 007865_ddimage\Part_1\NoName-FAT32, created 5/1/06 at 10:35:19AM
2) 007865_ddimage\Part_5\system_SAV-FAT32, created 5/3/06 at 6:09:54AM
3) 007865_ddimage\UnpartSpace, created 5/3/2006 at 8:22:14AM

There were numerous Registry Viewer Reports on the CD, whose contents we reviewed, including: LastVisitedMRU which appeared to consist of a list of the programs that were last executed on the computer prior to its impounding; OpenSaveMRU which appeared to consist of a list of the paths and files that were last opened or saved on the computer prior to impounding; RecentDocs which appeared to consist of a list of documents and image files that may have been recently accessed; RunMRU which appeared to include the name, type and data names of the most recently run files; and MediaPlayer (2 copies) which appeared to contain a list of paths and names of files that had been run on Windows MediaPlayer.

Under the Selected Bookmarks section, there was information pertaining to BAG files (AOL buddy list file information and lists of screen names), Index.DAT (Internet Explorer cookie index, cache index, and browsing history), Images (around 500 images that the NJRCFL had selected as possibly containing child pornography), Lolita (any files containing the word "Lolita"), and Netscape-Mozilla history (files with browser history).

There were 4 files of AOL IM Users that appeared to contain data pertaining to the users of the AOL Instant Messenger program on the impounded computer. These were as follows: honey6684, prof8384, jorge0082, christina2984. The RecentIMScreenNames data appeared to contain the names of other users who may have exchanged instant messages with these users. There was 1 name in the christina2984 list, 16 names in the honey6684 list, 17 names in the jorge0082 list, and 13 names in the prof8384 list.

There was a file tree containing the path names (directory and subdirectory lists) of files that we were able to peruse using the Microsoft Access software that was on the laboratory computer. We observed that this did not constitute a comprehensive list of the files, since we were unable to locate many of the file names and paths that were referenced in the other report materials. Even some of the file names and paths that would have been derived from data recovery techniques applied to the original drive, appeared to be missing.

Discussion

The derivative evidence CD that we reviewed appeared to be the one referenced in the police reports as being comprised of a copy of some of the materials obtained from a copy of the original impounded computer hard drive. The NJRCFL and the Prosecutor's Office, though, did not provide any evidence or data that could be used to corroborate their claim that the partial copy of the copy of the original drive actually represents a true and correct copy. Neither we, nor apparently the Willingboro School District, were provided with any way to validate the authenticity of any of the information listed on the derivative evidence CD, nor was there any information provided as to why certain items had been bookmarked or flagged, etc.

The usual method for confirming the authenticity of data copies typically involves the computation of hash numbers (a mathematically generated string of digits that uniquely identifies a file or set of digital materials). Although hash numbers were provided for the image files, there were no companion hash numbers for the original data materials that could be used to authenticate either the first copy or the second derivative copy of the files. Without this information, the data on the CD that we reviewed is not authenticatible. This lack of authenticity proof for the derivative data is further compounded by the fact that the originally impounded materials were, in all likelihood, contaminated by the various repair and data recovery processes performed on it by the Best Buy staff. There are also strong chain-of-custody issues, pertaining to the computer and its data, that further compromise its use as evidence.

The materials available for perusal on the derivative evidence CD comprise only a very small portion (possibly less than 1%) of the 200,000+ files that were apparently contained on the original impounded evidence drive. The set of files that were available for perusal thus omits some 99% of the available forensic evidence in this case. As this limited set of materials was generated by the Prosecution's investigative team, it provides only a narrow and potentially biased view of the computer's contents. Evidence that could have corroborated claims of innocence made by Mr. Teti were not available for perusal. For example, the trip photos that Mr. Teti claimed were deleted from his computer by the Best Buy technical staff were not provided, nor was the image (copy of the original drive made by the NJRCFL) provided whereby we could have conducted our own recovery effort in order to confirm Mr. Teti's assertions that material on his hard drive had indeed been damaged, augmented, and/or modified by the Best Buy staff. The fact that the file tree provided on the CD was incomplete also strongly compromises the use of the materials that were available for review at the Prosecutor's office as evidence.

Similarly, the 500+ image files on the CD comprised only around 1% of the 55,000+ images on the original impounded drive. Although the set of image files that we were

provided for review were repeatedly characterized as "child pornography" by Detective Laporta, it was clear that at least a third of these images did not actually involve sexual poses, and hence would have probably been excluded as evidence. A further substantial number of the image files were actually only thumbnails (pictures with very low-resolution data) that also might not have been deemed evidence of child pornography.

For the rest of the images in the set provided, there was no data in any of the reports that indicated whether or not these files had ever been identified as actual child pornography by the National Center for Missing and Exploited Children (NCMEC). NCMEC is the forensic clearinghouse for such imagery – their laboratory provides a service to law enforcement that matches forensic images with files they have in a database of known child pornography. This is important because the United States Supreme Court has ruled that image files that appear to depict children engaged in sexual acts can only be deemed child pornography if an actual child has been identified as being involved. Computer-generated graphics or depictions that are derived through altered image data, such as can be produced by combining images that were taken separately (such as an image of an adult that is digitally superimposed with an image of a child) are not admissible as child pornography evidence. There appears to have been no attempt made to identify whether any of the images provided on the examination CD actually constituted child pornography, as per the Supreme Court ruling. Upon inquiry, Detective Laporta indicated to us that the images of children on the CD had not been filtered to exclude any that would not be accepted as child pornography evidence in court.

There was certainly sufficient evidence in the material that was reviewed, as well as in the police reports, to corroborate the fact that Mr. Teti was only one of numerous users of the computer prior to its impounding. Of the material available on the CD for review, neither the FTK software nor Detective Laporta provided any differentiation as to who of these many users (including the repair staff at Best Buy) was responsible for the existence of any of the files or file data (such as the materials containing names of recently accessed files or websites). Certain of the materials on the CD were identified with fabricated file names, indicating that they may have been recovered by the NJRCFL from the deleted or slack areas of the hard drive. These recovered files should have been excluded as evidence in this civil matter since their origin cannot at all be ascertained to have been attributed specifically to Mr. Teti or any of the particular computer users.

The NJRCFL Examination Report, written by Carlos Hernandez, dated May 18, 2006, and attached as document 21 in the Statement of Evidence in Support of Charges of Unbecoming Conduct from the Willingboro Township Board of Education, lists the Compaq Presario computer's serial number as 2H13JD4KC26R. Although this serial number does match the serial number provided on the receipts for the computer that Mr. Teti purchased from Best Buy back on April 13, 2001, and it also matches the computer serial number on the Best Buy Service Order of August 17, 2005, there is no indication in either the sales receipts, the repair receipts, or the NJRCFL Examination Report as to whether the impounded hard drive (Seagate ST340823A with serial number SEF089SH) was indeed the hard drive that originally came with the computer when it was purchased, or if it was the hard drive inside of the computer when Mr. Teti brought it into the Best Buy for repairs.

Furthermore, the Best Buy repair center specifically imposes a waiver of any responsibility for maintaining the integrity of the contents of the hard drive during repairs, as per their Service Order Disclaimer #10 as follows:

> "I, THE UNDERSIGNED AGREE THAT PRIOR TO DELIVERING MY PRODUCT TO BEST BUY FOR REPAIRS OR SERVICING IT IS MY RESPONSIBILITY: (1) TO BACKUP THE DATA, SOFTWARE, INFORMATION OR OTHER FILES STORED ON MY PRODUCT; AND (2) TO REMOVE ALL VIDEOTAPES, COMPACT DISCS, CASSETTES, DVDS, FILM OR OTHER MEDIA FROM MY PRODUCT. FURTHER, I AGREE THAT WHETHER OR NOT I REQUEST BEST BUY TO BACKUP ANY DATA, SOFTWARE, INFORMATION AND/OR FILES, IN NO EVENT SHALL BEST BUY AND/OR ITS THIRD PARTY SERVICE PROVIDER BE LIABLE UNDER ANY CIRCUMSTANCES FOR ANY LOSS, ALTERATION OR CORRUPTION OF ANY DATA, SOFTWARE, INFORMATION, FILES, OR LOSS OF ANY OTHER MEDIA FROM MY PRODUCT."

This wording in this Service Order has strong implications in this case. By virtue of Best Buy specifically disclaiming any responsibility against "loss, alteration or corruption" of data, information or files, they are explicitly notifying the customer of the possibility that such could occur. Best Buy's waiver of liability includes actions that may have resulted in inadvertent or deliberate placement of the materials that were subsequently considered as evidence by the NJRCFL. Anyone who had authorized or unauthorized access to Mr. Teti's computer while it was at the Best Buy for repairs could have caused such "loss, alteration or corruption" to occur. Some examples of actions with potentially deleterious effects that may have been performed could have included: 1) substitution of the original hard drive with a used hard drive that had not been completely erased of data before reloading files from Mr. Teti's original drive; 2) access to the Internet from Best Buy using Mr. Teti's computer; and/or 3) operations performed by the Best Buy staff in conducting the repairs and restoration of benign image files that had been requested by Mr. Teti. It is important to note that such "alteration or corruption" of data can also extend to damage to dates and time-stamps on the files as well as the contents of cache logs (such as those containing the "visited" or "run" lists), thus rendering this information unreliable. The disclaimer also waives any liability due to the performance of the repair service that may have involved the eradication of evidence materials that could have been used to exonerate Mr. Teti from the alleged charges, so it needs to be kept in mind that this also may have occurred.

An important observation from the NJRCFL Examination Report was stated as follows:

> "Reviewed emails and found no emails in which child pornography was attached or distributed. Found the software program "Limewire," which is a file sharing program. There was no data recovered indicating that this program was used to share child pornography."

The claim in Ms. Moore's Memorandum of October 11, 2006 that "there were several child pornography Web sites visited by Robert Teti" followed by a list of Web site names, is not in any way corroborated by the material on the CD that we reviewed, nor is it corroborated by any information provided by the NJRCFL report. In particular, there is absolutely no evidence that indicates that Mr. Teti ever visited any of the websites listed

in Ms. Moore's Memorandum. Nor is there any evidence that indicates that Mr. Teti was even aware of the existence of these websites, nor that he was aware of nor participated in the existence or acquisition of any of the alleged child pornography or files containing the world "Lolita" on his computer's hard drive, prior to its impounding. There is certainly no indication that Mr. Teti was involved with file sharing, as was originally alleged, since no evidence on the CD indicates that his user name was affiliated with this activity. This was specifically disclaimed by the NJRCFL Examination Report. There is absolutely no evidence that indicates that any users of the computer participated in file sharing of any alleged child pornography.

What I did find in the materials on the CD, though, was considerable evidence that Mr. Teti's computer was hijacked by a "webbot" that could have been operating prior to the time that he initially dropped his computer off for repairs, during the time it was being repaired, and/or also during the brief interval when the computer was first returned to him and before he brought it back in again to have his lost travel photos recovered.

A "webbot" is a nefarious program that has been invisibly attached to an otherwise normal webpage, such that when someone views it, a rogue program is unknowingly inserted into the user's computer. These "webbots" can be fairly commonplace, for example, earlier this year, one was discovered on the official Webpage of the Super Bowl. Such programs will not necessarily be detected initially by virus software, and even when they are removed, they may leave "backdoors" in place on the formerly infected computer in order to facilitate subsequent invasions. As it happens, there was a particularly insidious set of these rogue programs operating during the August 2005 timeframe, precisely when Mr. Teti brought his computer to the Best Buy for service. These were in a family of "viruses" that are now referred to as CWS (an ironic acronym for "Cool Web Search"). In fact, Mr. Teti's request that additional memory be added to his computer, as a reaction to his observation that the computer appeared to be running slower than usual, was a common symptom of a CWS-style infection [Exhibit A]. The fact that Mr. Teti's family trip photos were deleted may have been another symptom.

Another, and extremely important observation about certain types of CWS infection during that period of time, was that it typically caused downloads of large quantities of data, especially when the computer was not being used, and it also was known to cause computers to involuntarily and discretely access hard core pornography websites. Reports involving pornography downloaded by CWS infected computers were logged by spyware information centers [Exhibit B]. Not merely coincidentally, on August 17, 2005, the exact day that Mr. Teti returned his computer to Best Buy, New York's well-known PC Radio Show devoted nearly all of its hour-long program to a discussion about CWS and other spyware [Exhibit C], given by Alex Eckelberry, the President of Sunbelt Software, an anti-virus firm. He revealed that such hijacked computers were rapidly downloading data from all over the world. Viruses that specifically download child pornography files can continue to circulate and infect computers on the Internet for years. Some of the earlier ones had been featured in articles published by The Register [Exhibits D and E], and the New York Times [Exhibit F], among others. Numerous individuals who had their lives ruined by such nefarious viral code (software) infection have been subsequently vindicated and all charges dropped.

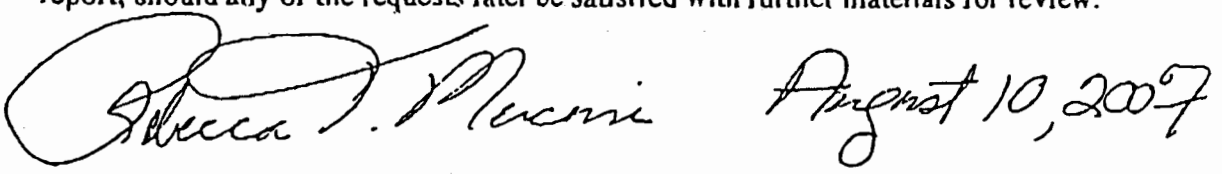
Among the further evidence that Mr. Teti's computer was attacked by CWS or a similar rogue program, is the existence of numerous log entries that involve a file described as a GIF of 1x1 pixels. This description comprises a single dot on the computer screen, of the sort that often is used to conceal a "webbot." Other data on the CD that showed indications of involuntary remote downloads include numerous instances of access dates and times that appear to be inconsistent with the routine use of Mr. Teti's computer. It is certainly possible that the CWS or rogue program, or further evidence of it, still exists in the larger set of data that we were not provided with an opportunity to review.

Given the proliferation of information about the CWS attack during the August 2005 timeframe, it would seem that part of the routine and customary forensic investigation performed by the NJRCFL, as well as by the repair staff at Best Buy, would have included a scan of the computer's hard drive in order to ascertain whether or not such a rogue program existed and was operating in Mr. Teti's computer. Certainly it is possible that the initial repair and the subsequent recovery effort may have obliterated the instance of the actual nefarious code itself, but the trail of evidence (including that which was observable even in the partial data contained on the review CD) should have led the investigators to seek other causes for the existence of the alleged child pornography that had been discovered. There is no evidence in any of the reports affiliated with this case that indicates that due diligence was observed in any of these regards. Certainly such a rogue program might not have been detectable during the early stages of the investigation, but there is high probability that it (or evidence of it) should have been detectable in May of 2006 when the NJRCFL was preparing their forensic report and creating the derivative evidence CD. That the NJRCFL did not scan for CWS or rogue code specifically known to download hard core and child pornography, at that later time, is exceedingly remiss in their handling of this matter.

It is my conclusion, therefore, that the evidence presented on the CD that was reviewed at the County Prosecutor's Office overwhelmingly corroborates Mr. Teti's claims that he was unaware of and did not participate in any acquisition, viewing or file sharing of any of the alleged child pornography found on his hard drive, prior to the time of its impounding.

Additional Remarks

It should be noted that I provided considerable input to Mr. Teti's legal team regarding numerous of the specific interrogatory requests pertaining to the computer-related evidence and derivative reports. To date, most of these Requests for Production have gone unanswered. Since these materials are integral to further corroboration of the claims and discussion made herein, I would like to reserve the ability to submit an amended report, should any of the requests later be satisfied with further materials for review.



August 10, 2007

Printed Materials Pe. ..ining to Teti Matter that were Reviewed by Rebecca Mercuri

Copies of receipts from purchase of Compaq computer, monitor, and printer from Best Buy, Deptford, NJ, April 13, 2001.

Statement of Charges of Unbecoming Conduct by Lorene W. Moore of the Willingboro Township Board of Education against Robert J. Teti, October 18, 2006.

Statement of Evidence in Support of Charges of Unbecoming Conduct by Lorene W. Moore, with set of attached documentation, October 18, 2006.

Resolution of the Willingboro Township Board of Education, Certificate of Determination and Proof of Service, November 20, 2006.

Answer by Attorney Michael C. Damm to the Commissioner of Education of the State of New Jersey, with answer to Tenure Charges against Robert J. Teti, including Exhibit A attachment, filed December 20, 2006.

Interrogatories from Attorney Joan Kane Josephson for the Willingboro Township Board of Education to Robert J. Teti, December 29, 2006.

Robert J. Teti's answers to Willingboro Township Board of Education interrogatories, including attachments (pages R1-R44), sent on February 5, 2007

Interrogatories from Robert J. Teti to the Willingboro Township Board of Education, sent on January 17, 2007.

Lorene W. Moore answers to Teti interrogatories, sent on March 2, 2007.

Supplemental answers by Attorney Joan Kane Josephson for the Willingboro Township Board of Education to Teti interrogatories, June 22, 2007.

Letter from Attorney Michael C. Damm to Joseph A. Brook, Assistant Prosecutor, Gloucester County, February 9, 2007.

Pretrial Intervention Order of Dismissal, Superior Court of New Jersey, Gloucester County, June 1, 2007.

List of Referenced Exhibits

Exhibit A: "Welcome to the CoolWebSearch Chronicles," September 20, 2005.

Exhibit B: "The spyware/kiddie porn/spam zombie connection," Sunbelt Software Blog, August 29, 2005.

Exhibit C: The Personal Computer Radio Show, WBAI-FM 99.5, New York City, August 17, 2005.

Exhibit D: "Suspected paedophile cleared by computer forensics," John Leyden, The Register, October 28, 2003.

Exhibit E: "Child porn case highlights browser hijack risks," John Leyden, The Register, May 13, 2004.

Exhibit F: "Acquitted Man Says Virus Put Pornography on Computer," John Schwartz, New York Times, August 11, 2003.

Exhibit A

TREND MICRO

Welcome to the CoolWebSearch Chronicles

The CoolWebSearch Chronicles

The CoolWebSearch Chronicles detail the variants of the browser hijacker known as CoolWebSearch (CWS). CoolWebSearch is known to be one of the most difficult spyware infections to detect and remove.

CoolWebSearch has evolved as a series of 'variants', each somewhat different than its predecessors, with the later variants significantly more complex to detect and remove. It is believed that the reason why new variants of CoolWebSearch are regularly released is to avoid or defeat attempts to remove it from a computer which it has infected. CWS is a robust infection that exhibits robust intelligence, technical prowess and a determination to survive removal attempts. CWS wants to live.

The difficulty of removing CWS from a user's system is significant. In the early variants, CWS was slightly tricky to remove, but it could be done, carefully, by a knowledgeable Windows user. However, CWS has stepped up the battle and recent variants are virtually impossible to remove manually. Some CWS variants even use methods of hiding and running themselves that had never been used before in any other spyware strains.

The chronological order in which the CWS variants appeared is detailed here, along with the approximate dates when they appeared online. However, since the programmers of CWS have released over two dozen versions of their hijacker in such a short time, and are crunching out new ones practically every week, this document might be out of date at times.

Trend Micro's **CWShredder** tool to remove CoolWebSearch is updated regularly when new variants emerge.

Document last updated: September 20, 2005

CoolWebSearch variants

1. **CWS.Datanotary**
2. **CWS.Bootconf**
3. **CWS.Oslogo**
32. **CWS.Winres**
33. **CWS.Xmlmimefilter**
34. **CWS.Aboutblank**

4. **CWS.Msspi**
5. **CWS.Vrape**
6. **CWS.Oemsyspnp**
7. **CWS.Svchost32**
8. **CWS.Dnsrelay**
9. **CWS.Msinfo**
10. **CWS.Ctfmon32**
11. **CWS.Tapicfg**
12. **CWS.Svcinit**
13. **CWS.Msoffice**
14. **CWS.Dreplace**
15. **CWS.Mupdate**
16. **CWS.Addclass**
17. **CWS.Googlems**
18. **CWS.Xplugin**
19. **CWS.Alfasearch**
20. **CWS.Loadbat**
21. **CWS.Msconfd**
22. **CWS.Therealsearch**
23. **CWS.Control**
24. **CWS.Olehelp**
25. **CWS.Smartsearch**
26. **CWS.Yexe**
27. **CWS.Gonnasearch**
28. **CWS.Smartfinder**
29. **CWS.Winproc32**
30. **CWS.Msconfig**
31. **CWS.Xxxvideo**
35. **CWS.Systeminit**
36. **CWS.Sounddrv**
37. **CWS.Searchx**
38. **CWS.Realyellowpage**
39. **CWS.SysTime**
40. **CWS.HomeSearch**
41. **CWS.Look2Me**
42. **CWS.MSFind**
43. **CWS.Cassandra**
44. **CWS.SnugWeb**
45. **CWS.CoolSearchA**
46. **CWS.EZSearch**
47. **CWS.FindOnline**
48. **CWS.CraftSearch**
49. **CWS.LookFor**

Affiliate variants:

- **CWS.Aff.iedll**
- **CWS.Aff.Winshow**
- **CWS.Aff.Madfinder**
- **CWS.Aff.Tooncomics**

More info on CWS

How do I get rid of this?

How did it get onto my system?

How do I prevent it from happening again?

CWS.Datanotary

Variant 1: CWS.Datanotary

Approx date first sighted: May 27, 2003
Symptoms: Massive IE slowdown, especially when typing text into forms
Cleverness: 9/10
Manual removal difficulty: Very easy, if you know where to look

The first variant of CoolWebSearch wasn't even identified as such. There only were several threads of users experiencing enormous slowdowns in IE when typin messages into text boxes. Delays of over a minute before the typed text appeared were reported. Also some redirections to www.datanotary.com were reported.

The solution to this problem took a while to surface, but after a few weeks (which is pretty long) someone reported the problem going away when going

into IE Options, Accessability and disabling the 'Use My Stylesheet' option. After that, the fake stylesheet file could be deleted.

The hijack installed a stylesheet that used a flaw in Internet Explorer and allowed a .css stylesheet file to execute Javascript code. The code in the file was encrypted, and spawned a popup off-screen that did the redirecting. However, this file was called on almost every action taken in IE, slowing it down - this was the most obvious when typing text.

CWS.Bootconf
Variant 2: CWS.Bootconf Approx date first sighted: July 6, 2003 Symptoms: Massive IE slowdown, illegible URLs ie IE Options, redirections when mistyping URLs, startpage & search page changed on reboot Cleverness: 8/10 Manual removal difficulty: Involves some Registry editing The second variant seemed like the first one in only one way: it used the exact same .css stylesheet file. But it took the hijack one step further by not only changing the IE startpage and search pages, but changing them to illegible hexcode garbage. Only when this code was decyphered it became clear that CoolWebSearch was behind this all. It almost seemed as if they let Datanotary take the stylesheet exploit hijack for a test ride, before using it themselves. The hijack further involved redirecting the default 'server not found' page to the CoolWebSearch portal homepage by editing the Hosts file, and reloading the entire hijack when the machine was rebooted using a bootconf.exe file that was started with Windows. We also started to see some pages which seemed affiliates of CWS since almost all their links led to www.coolwebsearch.com.

CWS.Oslogo
Variant 3: CWS.OSLogo.bmp Approx date first sighted: July 10, 2003 Symptoms: Massive IE slowdowns Cleverness: 2/10 Manual removal difficulty: Involves some Registry editing The filename of the user stylesheet changed into one that didn't even look like a stylesheet on the outside, but got accepted by IE anyway. Two domains were added to the Trusted Zone to ensure CWS could do its dirty work and install any updates if they ever became available. But most of all, IE start and search pages started getting changed to several dozen different sites that were all affiliated to CWS. There didn't seem to be an end to the flow of different domains users were hijacked to.

CWS.Msspi
Variant 4: CWS.Msspi

Approx date first sighted: July 28, 2003
Symptoms: Popups with 'enhanced results' when doing searches on Google, Yahoo and Altavista
Cleverness: 9/10
Manual removal difficulty: Impossible, I kid you not
At about this time, the variant appeared that was the hardest to remove. Users started reporting that when they went to Google, Yahoo or Altavista to search for something, popups appeared that (most of the time) advertised bogus 'enhanced results'. This was the one and only symptom.

After looking over the log, it was quickly concluded the msspi.dll file was to blame. One expert took the file apart and found several key URLs that were monitored, and when he changed them to bogus URLs the popups were gone.

However, the file hooked into the Winsock LSP chain, which lies very deep into the bowels of Windows and is one of the hardest parts of Windows to manipulate. Only a very small selection of spyware used this method of infection, and incorrect removal left a computer with a broken Internet connection that could not be fixed even by reinstalling Windows.

Luckily there were one or two tools that could fix a broken Internet connection due to this problem. **LSPFix** was the one used most since it allowed direct editing of the LSP chain.

CWs.Vrape

Variant 5: CWS.Vrape

Approx date first sighted: July 20, 2003
Symptoms: Redirections to vrape.hardloved.com on virtually anything done in IE, as well as redirections to adult sites, dialers, etc
Cleverness: 5/10
Manual removal difficulty: Involves lots of Registry editing
Perhaps the most widely spread variant of CoolWebSearch, this one was a nightmare for the average user. It combined several hijacking methods, along with random redirections to porn pages, portals and even adult dialers.

The hijack covered most of IE, and a user was left to sit helplessly and watch as almost his every move was redirected to vrape.hardloved.com. One strange thing about this hijack though, is that it operated alone: it didn't use any affiliates and even redirected other adult sites to its own site. It has only been connected with CWS since it appeared together with it in a few logs.

The only good thing about this variant is that the domain hardloved.com has been offline for more than half a week at the time of writing. It is unknown whether this is because of the sheer amount of users being routed to their site, DoS attacks by irate users, account termination because of violation of their host's user agreement, or something else.

CWS.Oemsyspnp

Variant 6: CWS.Oemsyspnp

Approx date first sighted: July 29, 2003
Symptoms: Start page/search pages changed to allhyperlinks.com, activexupdate.com in the IE Trusted Zone, reloading of the hijack on some

reboots.
Cleverness: 10/10
Manual removal difficulty: Involves a bit of Registry editing
This variant was spotted nearly by sheer luck, since it used the same Registry value as the second variant (Bootconf) 'SysPnp'. This was a very clever hijack that disguised itself as a driver update. When the computer was started, there was a 1 in 5 chance the hijack was re-installed and changed the IE start page and search pages to allhyperlinks.com.

However, once the hijack was identified, it was easy to stop: only the autostarting oemsyspnp.inf file had to be disabled using MSConfig, and then it could be safely deleted.

CWS.Oemsyspnp.2: A mutation of this variant exists that uses the filename keymgr3.inf, and the Registry value keymgrldr instead.

CWS.Oemsyspnp.3: A mutation of this variant exists that uses the filename drvupd.inf, and the Regustry value drvupd instead. It hijacks to searchforge.com.

CWS.Svchost32

Variant 7: CWS.Svchost32

Approx date first sighted: August 3, 2003
Symptoms: Redirections to slawsearch.com when accessing Google, searching on Yahoo or mistyping an URL
Cleverness: 10/10
Manual removal difficulty: Involves a process killer
This variant of CWS was focused on only evading existing detection tools. What was visible in a HijackThis log wasn't nearly all of it. The hijack installed dozens of redirections from international Google domains, MSN and Yahoo search engines to a webserver running at the user's own machine. The webserver even had the seemingly unsuspicious filename of 'svchost32.exe' to look like the Windows system file 'svchost.exe'. Anytime a user accessed Google, searched with Yahoo or mistyped an URL, he was redirected to slawsearch.com.

Fixing this hijack involved using a process killer to stop the webserver process, and editing the Hosts file to remove the Google/Yahoo/MSN redirections.

CWS.Dnsrelay

Variant 8: CWS.DNSRelay

Approx date first sighted: August 7, 2003
Symptoms: Redirections to allhyperlinks.com when omitting 'www' from an URL typed in IE
Cleverness: 8/10
Manual removal difficulty: Involves lots of Registry editing
A very clever hijack that uses a method never used before by any other hijacker, this variant monitored all URLs entered into the IE Address bar, and redirected any URLs starting without 'www' to allhyperlinks.com. The hijack isn't very widespread, and is also pretty hard to spot. Luckily, fixing it requires only deleting one Registry value and one file.

CWS.Dnsrelay.2: A mutation of this variant exists which uses the filename

ASTCTL32.OCX instead.

CWS.Dnsrelay.3: A mutation of this variant exists which uses the filename mswsc10.dll instead, which is located in C:\Program Files\Common Files\Web Folders. It hijacks IE to payfortraffic.net. It also adds a custom stylesheet (like **CWS.Bootconf**) located at C:\Program Files\Internet Explorer\Readme.txt. (This file is not present on uninfected systems.) It uses a Registry value named nvstart to re-register the main mswsc10.dll file on startup.

CWS.Dnsrelay.4: A mutation of this variant exists that is like CWS.Dnsrelay.3, but uses the filename mswsc20.dll instead, located at the same place. It hijacks IE to gofreegalleries.com, adds the same custom stylesheet, and uses the hosts file to hijack numerous sites to allhyperlinks.com.

CWS.Msinfo

Variant 9: CWS.Msinfo

Approx date first sighted: August 22, 2003
Symptoms: Redirection to Global-Finder.com, hijack reappearing when rebooting, possible errors about a missing file 'msinfo.exe'.
Cleverness: 6/10
Manual removal difficulty: Involves lots of Registry editing and some .ini file editing
This variant, using a file called 'msinfo.exe' to reinstall the hijack on a reboot, appears to have several versions. The first one seemed to malfunction often, as seen in the 'first sighted' link where the file wasn't actually installed, but the reference to it was. The second version probably fixed this a few days later, since people started surfacing that had been hijacked by this thing. Lastly, the third version appeared together with a slightly mutated variant #2 (bootconf.exe).

The MSINFO.EXE is installed in a Windows folder where also the legitimate MSINFO32.EXE file resides. It is ran from win.ini, a method rarely used by programs nowadays. It sets nearly all Start and Search pages from IE to URLs at out.true-counter.com, and reinstates these whenever the system is restarted. Fixing this variant involves resetting all the Registry values changed for IE, editing the autorun values in win.ini and the Registry, and deleting the two files.

CWS.Ctfmon32

Variant 10: CWS.Ctfmon32

Approx date first sighted: September 22, 2003
Symptoms: Start page and Search pages changed to www.slawsearch.com, 'Customize Search Assistant' closing after opening it, hijack coming back after a reboot.
Cleverness: 3/10
Manual removal difficulty: Involves some Registry editing
This variant surfaced after a quiet time. CWShredder could fix it, but it would return after rebooting the computer. Apart from the new filename 'CTFMON32.EXE' (note that 'CTFMON.EXE' is the real Windows system file) it worked pretty much the same way as CWS.Bootconf: the file loads at startup, resetting homepages and search pages, and then closes. Deleting the file and changing everything back to normal fixes it.

CWS.Tapicfg

Variant 11: CWS.Tapicfg

Approx date first sighted: September 21, 2003
Symptoms: Slow scrolling in IE, redirections to luckysearch.net, hijack returning on reboot, info32.exe errors.
Cleverness: 8/10
Manual removal difficulty: Involves quite some Registry editing, win.ini editing and hosts file editing. The style sheet files are marked read-only, system and hidden.
This hijack consists of only one file, that duplicates itself in two places (info32.exe and tapicfg.exe) and acts different depending on its filename. It drops two style sheets on the system, hijacks to acc.count-all.com which redirects to luckysearch.net, and reinstalls the hijack on each reboot. The hosts file redirection also hijacks any mistyped domains to luckysearch.net.
Though a file determining its actions depending on the filename is very bad programming, it surprised me somewhat because it works so well.

CWS.Tapicfg.2: A mutation of this variant exists that uses the filename soundmx.exe, and hijacks IE to globe-finder through a redirection page at in.webcounter.cc. Possibly the same file is loaded as fntldr.exe from WIN.INI. A hosts file redirection of auto.search.msn.com to globe-finder is installed. Two custom stylesheets named tips.ini and hh.htt are installed.

CWS.Svcinit

Variant 12: CWS.Svcinit

Approx date first sighted: September 10, 2003
Symptoms: Homepage changed to xwebsearch.biz and 'http:///', hijack returning on reboot or even sooner.
Cleverness: 9/10
Manual removal difficulty: Involves lots of Registry editing, ini file editing and a process killer.
This variant was somewhat surprising, because fixing all the items in HijackThis didn't remove it completely - it came back after a reboot (on Windows 2000 and XP). Only after a user had posted a StartupList log it became clear that this hijacker used another additional method of running at boot, besides the two visible in the HijackThis log. Terminating the running process, and deleting the three autorun values fixed it. Also, mssys.exe is possibly involved in this hijack.

CWS.Svcinit.2: A mutation of this variant exists, which uses the filename svcpack.exe instead. It hijacks to http:/// (sic) and uses the same autostarting methods as the first version. Possibly it also drops the file SVCHOST.OLD for unknown purposes.

CWS.Svcinit.3: Possibly, a mutation of this variant exists, which hijacks to xwebsearch.biz and http:/// (sic), as well as installing a hosts file redirection of several dialer sites to searchmeup.com.

CWS.Svcinit.4: A mutation of this variant exists, that hijacks IE to sex.free4porno.net, and adds porn bookmarks to the IE Favorites and on the desktop. It reinstalls from a file c:\windows\svchost.exe (not a valid Windows system file, which is in the system32 folder), running at startup using the name Online Service. It also uses the trojan file msin32.dll for unknown

reasons.

CWS.Msoffice
Variant 13: CWS.Msoffice Approx date first sighted: October 12, 2003 Symptoms: Homepage changed to searchdot.net, hijack coming back after a reboot, slow scrolling and text typing in IE. Cleverness: 7/10 Manual removal difficulty: Involves some Registry editing, and using a command prompt to delete the files. This variant uses a .hta script file to reinstall the hijack on a reboot. The msoffice.hta file is hard to find because the Fonts folder is a special folder for Windows, setup to hide all files in it that are not font files. Thus, a command prompt is needed to be able to see and delete the file. Deleting the file and resetting the IE home and search pages fixes the hijack. CWS.Msoffice.:2 A mutation of this variant exists that hijacks IE to sexpatriot.net and royalsearch.net, installs a hosts file hijack of two porn sites to 64.246.33.179, and reinstalls through a file named fonts.hta using the name AdobeFonts. CWS.Msoffice.:3 A mutation of this variant exists that hijacks IE to supersearch.com and hugesearch.net, and reinstalls through a file named fonts.hta using the name TrueFonts. It also changes the DefaultPrefix and WWW Prefix to redirect all URLs through hugesearch.net.

CWS.Dreplace
Variant 14: Dreplace Approx date first sighted: October 12, 2003 Symptoms: Redirections to xwebsearch.biz and 213.159.117.233, hijack returning on reboot Cleverness: 3/10 , 10/10 on second version Manual removal difficulty: Involves some Registry editing This variant installs a BHO with unknown purpose, though it's probable the BHO is there to ensure xwebsearch.biz is set as your homepage on reboot. It redirects the Verisign Sitefinder, so all mistyped domains are redirected to 213.159.117.233. CWS.Dreplace.2: There is a second version of this variant that used the most dastardly trick I have ever seen in a piece of malware. It changed the dreplace.dll so fixing it with either HijackThis or CWShredder will cause your entire system to fail on Windows 98, 98SE and ME! The hijack is the same as the first version for almost all other aspects, and both HijackThis and CWShredder have been updated to circumvent the problem.

CWS.Mupdate
Variant 15: Mupdate Approx date first sighted: October 13, 2003 Symptoms: Homepage changing to searchv.com, redirections to runsearch

when mistyping URLs, *.masspass.com in the Trusted Zone, hijack returning on a reboot.
Cleverness: 9/10
Manual removal difficulty: Involves some Registry editing and lots of ini file editing.
This variant isn't very common, but it makes up for this by being very persistent in its existance. It's ran from 3 places at boot, as well as merging a .reg file that reinstalls the hijack, and adding an adult site to the Trusted Zone. It also redirects any mistyped domains to runsearch.com.

CWS.Addclass

Variant 16: CWS.Addclass

Approx date first sighted: October 30, 2003
Symptoms: Redirections through ehttp.cc before reaching pages, IE homepage/searchpage changing to rightfinder.net, hijack returning on reboot.
Cleverness: 4/10
Manual removal difficulty: Involves lots of Registry editing
This one just surfaced when a sample (and thus a CWShredder update) was found for it. The hijack involves AddClass.exe installing the hijack and reinstalling it on reboot. It also changes the DefaultPrefix, WWW Prefix and a non-functional 'www.' prefix which makes each URL you type without 'http://' in front of it redirect through ehttp.cc before reaching the correct destination. IOW, they log everywhere you go. Luckily they are even kind enough to provide a uninstall for this 'Enhanced HTTP protocol' at their site **here**. This will only partially remove CWS.Addclass though.

CWS.Googlems

Variant 17: CWS.Googlems

Approx date first sighted: November 1, 2003
Symptoms: IE pages changed to http://www.idgsearch.com/, hijack reinstalled on reboot and when running Windows Media Player.
Cleverness: 7/10
Manual removal difficulty: Involves some Registry editing, and reinstalling Windows Media Player
This variant is first of its kind, since an important development was observed here: the Windows Media Player executable was deleted and replaced by the trojan. This file reinstalled the hijack when ran. No other variants modify or delete system files, but this one seems to.
It also installs a BHO that reinstalls hijack on a reboot. Deleting GoogleMS.dll and reinstalling Windows Media Player fixes the hijack.

CWS.Googlems.2: A mutation of this variant exists that hijacks IE to idgsearch.com and 2020search.com, installs a BHO named 'Microsoft SearchWord' using the filename SearchWord.dll in the same location as the first version. It also adds *.xxxtoolbar.com to the Trusted Zone.

CWS.Googlems.3: A mutation of this variant exists that hijacks IE to idgsearch.com, installs a BHO named 'Microsoft SearchWord' using the filename Word10.dll in the location C:\Documents And Settings\[username]\Application Data\Microsoft\Office.
This version can also be loaded by a fake Notepad.exe file in the Windows system folder. The fake file has an icon different from the default notepad one.

CWS.Googlems.4: A mutation of this variant exists that hijacks IE to idgsearch.com, 2020search.com and possibly coundnotfind.com. It installs a hosts file hijack to 69.56.223.196 (idgsearch.com), redirecting from several CWS affiliate domains (!), one Lop.com domain, one misspelled Spywareinfo domains (hehe) and several porn domains. It installs a BHO named 'Microsoft Excel' using the filename Excel10.dll, located at the same place as the third mutation. It also adds *.xxxtoolbar.com and *.teensguru.com to the Trusted Zone.

CWS.Xplugin

Variant 18: CWS.Xplugin

Approx date first sighted: November 11, 2003
Symptoms: Some links in Google results redirecting to umaxsearch.com or coolwebsearch.com every now and then
Cleverness: 10/10
Manual removal difficulty: Involves some Registry editing
This variant is the first one that is not visible in a HijackThis log. It works invisible, changing links from Google search results to other pages. It took a while to find out how this variant works, since it doesn't use any of the standard locations.
A file xplugin.dll is installed, which creates a new protocol filter for text/html. In normal english, this means it reads most of the web pages downloaded to your browser. It also randomly alters some links in Google search results to pages on umaxsearch.com and coolwebsearch.com. It claims to be made by something called TMKSoft.
It is unknown if deleting the file has no side-effects, but using CWShredder or running regsvr32 /u c:\windows\system32\xplugin.dll (may vary depending on Windows version) fixes the hijack completely.

CWS.Alfasearch

Variant 19: CWS.Alfasearch

Approx date first sighted: November 5, 2003
Symptoms: IE pages changed to alfa-search.com, possibly porn sites being redirected to 216.200.3.32 (alfa-search.com), error message about a 'runtime error' at startup, 4 porn bookmarks added to favorites (one possible child porn).
Cleverness: 1/10
Manual removal difficulty: Involves a little Registry editing
Possibly the most simple CWS variant since **CWS.Datanotary**, this hijack only does the basic stuff: changes your IE homepage and search pages, adds porn bookmarks, and pops up a bogus error message at startup.
Deleting MSupdate.exe from the All Users Startup group, deleting the porn bookmarks and resetting the IE homepage and search pages fixed the hijack. The MSupdate.exe file is capable of installing a hosts file hijack as well, but doesn't seem to do this.

CWS.Alfasearch.2: A mutation of this variant exists, that hijacks IE to www.find-itnow.com, drops 7 porn bookmarks in the IE Favorites, and causes error messages concerning 'Win Min' at system shutdown, as well as bogus runtime errors at system startup. It drops a fake Winlogon.exe file in the 'All Users' Startup group of the Start Menu, or in the Startup group of the current

user. The file is always running, and hard to remove. If CWShredder repeatedly reports removing this variant, it cannot remove winlogon.exe. To remove this file manually, move it out of the Startup folder, restart, and then delete the file.

CWS.Alfasearch.3: A mutation of this variant exists, that hijacks IE to www.alfa-search.com, and reinstalls by running an encryped VBS script from three places in the Registry, named rundll32.vbe using the name Windows Security Assistant. It also installs a custom stylesheet named readme.txt in the Windows sytem folder, drops 9 porn bookmarks in the IE Favorites and 6 on the desktop, and installs a hosts file hijack of 8 major search engines and one porn site to 64.124.222.169 (alfa-search.com).

CWS.Loadbat

Variant 20: CWS.Loadbat

Approx date first sighted: November 1, 2003
Symptoms: DOS window flashing by at system startup, IE pages being hijacked to ie-search.com, redirection to 'FLS' or Umaxsearch when mistyping URLs or visiting porn sites
Cleverness: 9/10
Manual removal difficulty: Involves some Registry editing and deleting a few files
Overlooked at first, this CWS variant used a clever way of reloading the hijack by making it look like some other file (shell.dll or win64.drv) was doing it, when in fact it was just a LOAD.BAT file merging a .reg file.

The second variant added a hosts file hijack of auto.search.msn.com and the Verisign Sitefinder to something called 'FLS' that linked to Umaxsearch, as well as hijacking smutserver.com domains to another porn site.

To remove this manually, killing the autostarts and removing hp.htm , load.bat and srch.reg from the Windows folder along with resetting the IE homepage/search page is enough.

CWS.Msconfd

Variant 22: CWS.Msconfd

Approx date first sighted: November 26, 2003
Symptoms: IE pages being changed to webcoolsearch.com, bogus error message about msconfd.dll at startup, porn bookmarks added to Favorites (some possibly childporn)
Cleverness: 7/10
Manual removal difficulty: Involves quite some Registry editing and deleting porn bookmarks, plus struggling to unload the dll which is always in memory
This is the first variant to use a dll file together with the Windows rundll32 file. This makes it a little harder to find the culprit msconfd.dll, responsible for hijacking IE to webcoolsearch.com and adding 11 adult bookmarks to IE, of which 4 are possibly child porn sites.

Deleting the autorun entry, resetting IE and deleting the porn bookmarks fixes most of the hijack. Removing msconfd.dll involves renaming the file, restarting the system and deleting the renamed file.

CWS.Msconfd.2: A mutation of this variant exists, that uses the filename avpcc.dll or ctrlpan.dll that hooks into Windows in the same way as the first

version. This version also deletes all the bookmarks in the IE Favorites folder, before replacing them with porn bookmarks.

CWS.Msconfd.3: A mutation of this variant exists, that uses the filename cpan.dll.

CWS.Therealsearch

Variant 23: CWS.Therealsearch

Approx date first sighted: November 29, 2003
Symptoms: IE pages changed to therealsearch.com, porn bookmarks added to IE Favorites, porn sites appearing in IE autocomplete
Cleverness: 4/10
Manual removal difficulty: Involves lots of Registry editing, a process killer, and deleting bookmarks
This variant of CWS appeared to be worse than it actually was at first. Since it had two running processes, it looked like the **Peper virus**, that was very hard to remove. Luckily these two processes didn't behave like that. The smallest one quicken.exe downloaded and ran the second one editpad.exe (like **CWS.Aff.Iedll** does) and hijacked IE to therealsearch.com, as well as setting themselves to run at startup.

To remove this variant a process killer is needed to kill editpad.exe and quicken.exe and deleting the files, as well as resetting the IE homepage/search pages and possibly removing **CWS.Aff.Tooncomics.2** which can be downloaded by this variant.

CWS.Therealsearch.2: There is a mutation of this variant that hijacks to my.search (sic), that also the filenames c:\windows\winrar.exe and c:\windows\waol.exe.

CWS.Control

Variant 24: CWS.Control

Approx date first sighted: December 7, 2003
Symptoms: IE pages changed to windoww.cc, super-spider.com and search2004.net
Cleverness: 3/10
Manual removal difficulty: Involves some Registry editing, and restoring a file from the Windows Setup CD for Windows 9x/ME
This variant is fairly simple, if it wouldn't drop a file in the Windows folder that overwrites a system file in Windows 9x/ME - it is possible your Control Panel will not be functioning normally after being infected with this CWS variant, and you need to use the System File Checker (SFC.EXE) to restore control.exe from your Windows Setup CD. Windows NT/2000/XP does not have this problem with this variant.

CWS.Control.2: A mutation of this variant exists that is identical in every way, but where control.exe always stays in memory.

CWS.Control.3: A mutation of this variant exists that uses random filenames and random startups.

CWS.Olehelp

Variant 25: CWS.Olehelp

Approx date first sighted: January 4, 2004
Symptoms: IE hijacked to omega-search.com, lots and lots of bookmarks added to IE Favorites
Cleverness: 3/10
Manual removal difficulty: Involves a little bit of Registry editing, and deleting lots of files
This variant is pretty simple. It autoruns a file named olehelp.exe at startup from the Registry, which changes the IE homepage/search page to omega-search.com, and adds a mind-boggling 107 bookmarks to the IE Favorites, of which 14 are porn.

Killing the autostart and deleting the file + bookmarks fixes this.

CWS.Smartsearch

Variant 26: CWS.Smartsearch

Approx date first sighted: January 7, 2004
Symptoms: IE hijacked to smartsearch.ws, redirections to smartsearch.ws when entering incomplete URLs into the address bar, antispyware programs closing without reason only a few seconds after opening them
Cleverness: 5/10
Manual removal difficulty: Involves a process killer, lots of registry editing and deleting a few files.
This variant is mostly hard to spot since it can use over a dozen different filenames, luckily all with the same registry value. The file is always running and reinstalls the hijack to smartsearch.ws every 10 seconds. Killing the trojan process, deleting/restoring all the Registry values it added or changed and deleting its files fixed the hijack.

CWS.Smartsearch.2: A mutation of this variant exists that attempts to close CWShredder, HijackThis, Ad-Aware, Spybot S&D and the SpywareInfo forums when they are opened. It uses the filename IEXPLORER.EXE (note the extra 'R') and a different Registry value. It drops a hosts file that blocks over two dozen anti-spyware sites. CWShredder has been updated to circumvent this.

CWS.Smartsearch.3: A mutation of this variant exists that uses the startup 'coolwebprogram', and attempts to close CWShredder, HijackThis, Ad-Aware, Spybot S&D and the SpywareInfo forums when they are opened. It also drops notepad32.exe and hijacks the .txt and .log filetypes to open with this file (before showing it in the real Notepad), reinstalling the hijack.

CWS.Smartsearch.4: A mutation of this variant exists that hijacks to magicsearch.ws instead of smartsearch.ws, uses the startup 'MicrosoftWindows' and also drops the notepad32.exe Notepad hijacker like CWS.Smartsearch.3. It also hijacks the DefaultPrefix and WWW Prefix to magicsearch.ws like **CWS.Vrape** and attempts to kill several firewalls, including (but not limited to) ZoneAlarm and Kerio Personal Firewall.

Known filenames used by this variant:

C:\Program Files\directx\directx.exe
C:\Program Files\Common Files\System\systeem.exe
C:\Windows\explore.exe (note the missing 'r')
C:\Windows\System\internet.exe
C:\Windows\Media\wmplayer.exe
C:\Windows\Help\helpcvs.exe
C:\Program Files\Accessories\accesss.exe
C:\Games\systemcritical.exe
C:\Documents Settings\sistem.exe
C:\Program Files\Common Files\Windows Media Player\wmplayer.exe
C:\Windows\Start Menu\Programs\Accessories\Game.exe
C:\Windows\sistem.exe
C:\Windows\System\RunDll16.exe
C:\Windows\iexplorer.exe (note the extra 'i' or the extra 'r')
C:\y.exe
C:\x.exe

c:\funny.exe
c:\funniest.exe
c:\Windows\notepad32.exe
C:\Windows\system\kazaa.exe
C:\Windows\system32\kazaa.exe
C:\Program Files\Common Files\Services\iexplorer.exe
C:\Program Files\Common Files\Services\explore.exe
C:\Program Files\Common Files\Services\exploreer.exe
C:\Program Files\Common Files\Services\sistem.exe
C:\Program Files\Common Files\Services\critical.exe
C:\Program Files\Common Files\Services\directx.exe
C:\Program Files\Common Files\Services\internet.exe
C:\Program Files\Common Files\Services\window.exe
C:\Program Files\Common Files\Services\winmgnt.exe
C:\Program Files\Common Files\Services\clrssn.exe
C:\Program Files\Common Files\Services\explorer32.exe
C:\Program Files\Common Files\Services\win32e.exe
C:\Program Files\Common Files\Services\directx32.exe
C:\Program Files\Common Files\Services\uninstall.exe
C:\Program Files\Common Files\Services\volume.exe
C:\Program Files\Common Files\Services\autorun.exe
C:\Program Files\Common Files\Services\users32.exe
C:\Program Files\Common Files\Services\notepad.exe
C:\Program Files\Common Files\Services\win64.exe
C:\Program Files\Common Files\Services\inetinf.exe
C:\Program Files\Common Files\Services\time.exe
C:\Program Files\Common Files\Services\systeem.exe

c:\Windows\system32\iexplorer.exe
c:\Windows\system32\explore.exe
c:\Windows\system32\exploreer.exe
c:\Windows\system32\sistem.exe
c:\Windows\system32\critical.exe
c:\Windows\system32\directx.exe
c:\Windows\system32\internet.exe
c:\Windows\system32\window.exe
c:\Windows\system32\winmgnt.exe
c:\Windows\system32\clrssn.exe
c:\Windows\system32\explorer32.exe
c:\Windows\system32\win32e.exe
c:\Windows\system32\directx32.exe
c:\Windows\system32\uninstall.exe

c:\Windows\system32\volume.exe
c:\Windows\system32\autorun.exe
c:\Windows\system32\users32.exe
c:\Windows\system32\win64.exe
c:\Windows\system32\inetinf.exe
c:\Windows\system32\time.exe
c:\Windows\system32\systeem.exe

CWS.Yexe

Variant 27: CWS.Yexe

Approx date first sighted: January 17, 2004
Symptoms: IE start page hijacked to search.thestex.com
Cleverness: 2/10
Manual removal difficulty: Involves deleting some Registry values and keys, deleting one folder and restoring the IE homepage
This variant uses a filename often seen as installer for either CWS or Lop.com (y.exe), but uses it as the actual hijacker file. It loads from win.ini as well as system.ini in a weird way that shouldn't even work, and installs a BHO with seemingly the purpose to react to certain keywords on webpages. Removing the BHO and the autorunning y.exe file fixes this hijack.

CWS.Yexe.2: Possibly a mutation of this variant exists that uses the filename services.exe instead of y.exe.

CWS.Gonnasearch

Variant 28: CWS.Gonnasearch

Approx date first sighted: January 18, 2004
Symptoms: IE hijacked to gonnasearch.com
Cleverness: 2/10
Manual removal difficulty: Involves deleting some registry keys and values
This variant differs from the others in that it installs not one, but three (!) BHOs. Their exact purpose is unknown. Killing the three BHOs and restoring the IE pages fixed this hijack.

CWS.Smartfinder

Variant 29: CWS.Smartfinder

Approx date first sighted: January 11, 2004
Symptoms: IE hijacked to nkvd.us and smart-finder.biz, redirections to nkvd.us and smart-finder.biz when typing incomplete URLs into address bar.
Cleverness: 10/10
Manual removal difficulty: Involves some registry editing, and renaming the trojan file, restarting, and deleting it
This variant was surprisingly smart: it used two startup methods (ShellServiceObjectDelayLoad and SharedTaskScheduler) that have to be the absolutely rarely used ones seen ever - and it used them differently on Windows 9x/ME and Windows NT/2k/XP. On top of that, both methods ensure that the file is loaded when Explorer is loaded, making it always in memory like **CWS.Msconfd**. Additionally, the actual responsible files are invisible in HijackThis, and only one shows in a StartupList logfile

(ShellServiceObjectDelayLoad). The responsible file is mtwirl32.dll, and to delete it manually you need to rename it (deleting is impossible since it is in use), restart the system, and then delete the file and its Registry key.

CWS.Smartfinder.2: a second version of this variant exists, that is harder to remove but basically uses the same method of loading, as well as the same CLSID. In addition, it uses a BHO to restore any of the autostarting regkeys you delete to remove this.

CWS.Winproc32

Variant 30: CWS.Winproc32

Approx date first sighted: January 23, 2004
Symptoms: IE being hijacked to icanfindit.net or 4-counter.com, hijack returning on system restart or possibly sooner
Cleverness: 2/10
Manual removal difficulty: Involves using a process killer and some Registry editing
A very simple variant. Winproc32.exe loads at startup, and hijacks IE. The file stays in memory so a process killer is needed to remove it. It drops 4 porn bookmarks in the IE Favorites folder. It also tries to hijack the default user (HKEY_USERS\.DEFAULT) but fails to do so.

CWS.Msconfig

Variant 31: - CWS.Msconfig

Approx date first sighted: February 5, 2004
Symptoms: IE pages being hijacked to www.31234.com on system startup and when changing homepage back, continuous errors about an invalid Registry script in temp2.txt, extra item in right-click menu of webpages named '??????'
Cleverness: 2/10
Manual removal difficulty: Involves a process killer, some Registry editing and restoring a Windows system file from CD
This variant uses the filename msconfig.exe which overwrites the real Windows file in Windows 98/98SE/ME. The temp2.txt file it drops is actually a Registry script, but since it's in the wrong format, Windows 9x/ME will throw up an error about an invalid Registry script. Windows 2000/XP will import it without complaining, creating the '??????' item in the IE right-click menu. The msconfig.exe file will always stay in memory, reinstalling the hijack every 5 seconds. Killing the process, deleting the file and restoring the IE homepages/search pages fixes this hijack.

The real Windows file msconfig.exe can be download **here**, if you can't restore it from your Windows Setup CD for some reason.

CWS.Xxxvideo

Variant 32: CWS.Xxxvideo

Approx date first sighted: February 11, 2004
Symptoms: IE pages changed to enjoysearch.info, 4 bookmarks added to Favorites, all returning when system is restarted

Cleverness: 3/10
Manual removal difficulty: Involves some Registry editing
A very simple variant, with a encrypted script file running at startup, reinstalling the hijack. Killing the autorun entries, deleting the two .hta files and the four bookmarks fixes this.

CWS.Winres

Variant 33: CWS.Winres

Approx date first sighted: February 10, 2004
Symptoms: IE pages changed to 2020search.com, about:blank page changed to search engine
Cleverness: 7/10
Manual removal difficulty: Involves some Registry editing
This variant is the first to achieve a remarkable result: it changes the about:blank page itself to look like a search engine. This is later seen in the **CWS.Xmlmimefilter** variant, using a different method. The variant possibly adds three domains to the Trusted Zone and adds two bookmarks to the desktop.

Deleting the BHO, resetting the IE homepage, and removing the sites and bookmarks fixes this.

CWS.Xmlmimefilter

Variant 34: CWS.Xmlmimefilter

Approx date first sighted: February 29, 2004
Symptoms: IE homepage changed to about:blank, which is changed to a search engine named 'Microsoft Search the Web', mistyped URLs being redirected to this same search engine
Cleverness: 10/10
Manual removal difficulty: Involves quite some Registry editing
Though the hijacking of the about:blank page was also done by the **CWS.Winres** variant, this new variant accomplishes it in a much more elegant way. The DLL itself used for handling the 'about:' protocol is changed to a malicious msxmlpp.dll one, displaying a search engine instead of a blank page filled with links to 66.117.38.91.

Changing the CLSID of the about protocol back to the default {3050F406-98B5-11CF-BB82-00AA00BDCE0B}, deleting the file and removing the hosts file hijack fixes this.

CWS.Aboutblank

Variant 35: CWS.Aboutblank

Approx date first sighted: March 2, 2004
Log reference: Reconstruction
Symptoms: IE pages changed to about-blank.ws and 213.159.118.226 (1-se.com), hijack returning on system restart
Cleverness: 5/10
Manual removal difficulty: Involves some Registry editing and deleting a randomly named file

This variant does everything in its powers to redirect you to a domain owned by 1-se.com. IE is hijacked to it, the hosts file is replaced to redirect about 100 porn and CWS domains to 1-se.com, and a randomly named stylesheet is dropped that redirects to 1-se.com when certain keywords appear in webpages.Restoring the IE pages by searching the Registry for about-blank.ws, removing the hosts file, the svchost.exe file in the Windows directory (the one in the System32 folder is legit) and the randomly named stylesheet (1079 or 1087 bytes in size) fixed this.

CWS.Systeminit

Variant 36: CWS.Systeminit

Approx date first sighted: March 21, 2004
Symptoms: IE pages changed to your-search.info, redirections to search-dot.com, hijack returning on system reboot, URL shortcuts appearing on desktop and in favorites
Cleverness: 2/10
Manual removal difficulty: Involves some Registry editing
A small variant, using two files to reinstall the hijack. The stylesheet links to search-dot.com, the two autostarting files set the IE homepage/search pages to your-search.info. A backup of the systeminit.exe file is kept at C:\Documents And Settings\sys.exe (this location is hardcoded into the trojan file). Deleting the three trojan files, the stylesheet, the bookmarks and restoring the IE pages fixes this hijack.

CWS.Sounddrv

Variant 37: CWS.Sounddrv

Approx date first sighted: March 12, 2004
Symptoms: IE pages changed to defaulsearching.com, hijack returning on system reboot.
Cleverness: 3/10
Manual removal difficulty: Involves some Registry editing
This variant is very small, but its sneakiness lies in the filename used, which was originally mistaken for a sound card driver. Apart from that, this hijack is really simple. Deleting the file and restoring the IE pages fixes this hijack.

CWS.Searchx

Variant 38: CWS.Searchx

Approx date first sighted: April 6, 2004
Symptoms: IE pages changed to about:blank (which is changed to a search portal linking to searchx.cc) and a search page inside a DLL on the system, hijack returning on system reboot
Cleverness: 8/10
Manual removal difficulty: Involves lots of Registry editing
This variant is not very hard to spot, but slightly harder to troubleshoot since its symptoms look a lot like those of **CWS.Xmlmimefilter**. It drops a randomly named DLL in the system folder and sets the IE homepage/search pages to it. A BHO is also added pointing to the same DLL. The about:blank page is modified by creating two new protocol filters for text/html and text/plain which allows the DLL to control most of the content flowing through the IE browser as

web pages. The trojan keeps a record of all actions in a log file at c:\filter.log. Removing the two filters in the Registry, deleting the BHO, the DLL and the logfile and restoring the IE pages fixes this hijack.

Note: The **CWS.Realyellowpage** has been sighted together with this variant sometimes, causing CWShredder to not be able to remove this one. Refer to the manual removal method for that variant to delete the offending dll, then run CWShredder again to remove CWS.Searchx.

CWS.Realyellowpage
Variant 39: CWS.Realyellowpage Approx date first sighted: March 16, 2004 Symptoms: IE pages changed to real-yellow-page.com, drxcount.biz, list2004.com or linklist.cc, hijack inexplicably returning on reboot with no file seemingly responsible Cleverness: 10/10 Manual removal difficulty: Extremely Difficult This variant is a nightmare. If you come across an infected machine that keeps changing back to the aforementioned sites over and over again for no visible reason, you've probably seen this one. It's like whoever is reponsible for this hired some blackhat coder and told him to make the most complex, invisible and devious hijacker he could think of. And he did. The file is randomly named, and normally hooks into the IE process, loading itself as a module into it. And then it hides the host process from the process list. Yes, you read that right, the process hosting the dll *disappears* from the task list and most process viewers/managers we tried. Right now, CWShredder does not remove this variant. As soon as we figure out how to do it, we will update CWShredder for it.

CWS.SysTime
Variant 40: CWS.SysTime Approx date first sighted: Symptoms: Start Page hijacked Cleverness: 1/10 Manual removal difficulty: Difficult Hijacks various IE Pages to: http://213.159.117.134/index.php. The file loads at startup, resetting homepages and search pages.

CWS.HomeSearch
Variant 41: CWS.HomeSearch Approx date first sighted: Symptoms: Start Page hijacked, "Only The Best" popups Cleverness: 9/10 Manual removal difficulty: Difficult Hijacks various IE Pages to "HomeSearch" and displays Pop Up ads titled "Only The Best". This variant uses random filenames in several locations on the disk

and uses random CLSIDs for the Helper objects. A cleverly disguised windows service replaces and partially removed components of this variant.

CWS.Look2Me
Variant 42: CWS.Look2Me Approx date first sighted: Symptoms: AdDestroyer and Virtual Bouncer adware that keeps coming back after being removed. Hosts file redirections that keep coming back after being deleted. Cleverness: 9/10 Manual removal difficulty: Very Difficult Hijacks numerous pages through HOSTS file redirections. Remains resident and downloads adware to the pc while connected to the internet. Look2Me has several redundant files that monitor for partial removal and replace missing components. In order to elude detection and removal this variant changes its signature with each restart of the system and removes security rights from administrative users.

CWS.MSFind
Variant 43: CWS.MSFind Approx date first sighted: Symptoms: Hijacks to coolwebsearch.com/search.php Cleverness: 2/10 Manual removal difficulty: Involves some Registry editing Hijacks IE to coolwebsearch.com when searching. File loads at startup and monitors IE, does not actually change any of IE's settings.

CWS.Cassandra
Variant 44: CWS.Cassandra Approx date first sighted: Symptoms: Hijacks to letgohome or here4search and leaves a "security warning" desktop hijack Cleverness: 8/10 Manual removal difficulty: Very Difficult Hijacks IE to letgohome or here4search. Creates a desktop hijack and changes policy settings to disable certain display settings.

CWS.SnugWeb
Variant 45: CWS.SnugWeb Approx date first sighted:

Symptoms: IE pages changed to about:blank (which is changed to a search portal linking to snugweb.com) and a search page inside a DLL on the system
Cleverness: 8/10
Manual removal difficulty: Involves some of Registry editing
Alias: StartPage-DU.dll (NAI), Trojan-Downloader.Win32.Small.qt (KAV), Win32/Startpage.OW (CAI), Trj/Multidropper.OT (Panda)

This UPX compressed trojan drops QWSXP.DLL in the system folder and sets the IE homepage/search pages to it. A BHO is also added pointing to the same DLL. The about:blank page is modified by creating two new protocol filters, one for text/html which allows the DLL to control most of the content flowing through the IE browser as web pages. The other protocol filter is randomly named and probably caused by a bug in trojan code. Because of it close similarity with **CWS.SearchX**, it is probable that CWS.SnugWeb is a corrupted or earlier version of the said trojan.

Removing the two filters in the Registry, deleting the BHO and the DLL and restoring the IE pages fixes this hijack.

CWS.CoolSearchA

Variant 46: CWS.CoolSearchA

Approx date first sighted: February 4, 2005
Symptoms: IE hijacked to bettersearch.biz
Cleverness: 4/10
Manual removal difficulty: Involves a killing running processes, a lot of Registry editing and deleting a few files.
Alias: Win32/Small.QL (RAV), Trojan-Clicker.Win32.Agent.bz (KAV), Dropper.Small.10.L (Grisoft), ADW_COOLSEARCH.A (Trend)

This CoolWebSearch variant consists of two Browser Helper Objects that support each other. The first one is WinTitle Module BHO which installs itself as WinTitle.dll in the Windows System directory. The other one is the WinSuck Module BHO which installs itself as WinSuck.dll also under the Windows System directory. Both BHOs hijack IE to bettersearch.biz when performing searches to Yahoo and Google.

For more information on this variant, please refer to **ADW_COOLSEARCH.A**

CWS.EZSearch

Variant 47: CWS.EZSearch

Approx date first sighted: March 25, 2005
Symptoms: Displays unwanted popups and advertisements, the addition of certain urls into the user's favorite folders and redirection of certain websites.
Cleverness: 9/10
Manual removal difficulty: Involves killing running processes, some Registry editing, deletion of shortcuts from the "My Favorites" folder and some hosts file editing.
Aliases for CWS.EZSearch.A: AdClicker-CI (NAI), TrojanClicker:Win32/Agent.BX (RAV), Trojan-Clicker.Win32.Agent.bo (KAV/Ikarus), W32/AdClicker.AT (F-Prot), Trj/Clicker.DD (Panda), Win32:Trojano-993 [Trj] (Alwil), ADW_EZSEARCH.A (Trend)
Aliases for CWS.EZSearch.B: Trojan-Clicker.Win32.Agent.dv (KAV),

ADW_EZSEARCH.B (Trend)

CWS.EZSearch.A drops a randomly named DLL in the Windows temporary folder on every system restart and links it to Internet Explorer as a BHO. The hijack installs dozens of redirections from international Google domains, MSN and Yahoo search engines to a certain webserver and also adds several shortcuts/urls to the infected machine's "Favorites" folder. This CWS variant removes and updates previous installations of CoolWebSearch such as **CWS.BootConf** and **CWS.SVCHost32**. It also disables firewall and antivirus software notifications of the Windows Security Center (found in WinXP SP2 and Win2003 SP1). It drops a copy of itself in the Windows system folder (usually as scrsvc.exe) and creates an autorun entry for this. If Windows Firewall is installed in the system, the hijack will also register itself in the Firewall policy as among the authorized applications that can access the network.

CWS.EZSearch.B has the same features as the first variant. It also installs random applications in the system such as the Google taskbar add-on to IE and WorldAntiSpy anti-spyware software. It also creates registry entries with very long value names that sometimes result to the entries becoming invisible when viewed in the standard Registry editing application Regedit.exe

Killing two watchdog processes, deleting the BHO and the DLL and removing the added URLs in the "Favorites" folder fixes this hijack.

For more information on CWS.EZSearch.A, please refer to **ADW_EZSEARCH.A**
For more information on CWS.EZSearch.B, please refer to **ADW_EZSEARCH.B**

CWS.FindOnline

Variant 48: CWS.FindOnline

Approx date first sighted: April 17, 2005
Symptoms: IE pages changed to www.lookfor.cc, www.find-everything.com, www.find-more.net. New bookmarks in the IE Favorites.
Cleverness: 3/10
Manual removal difficulty: Registry editing and deletion of bookmarks from the IE Favorites.
Alias: Generic.ca (McAfee), Trojan.Win32.StartPage.rx (KAV), Startpage.20.AV (Grisoft), SPYW_STARTPAGE.J (Trend)

The CWS variant primarily does is to alter the homepage, search pages and start page to http://lookfor.cc. At specific intervals, the Start page is also set to www.find-everything.com and www.find-more.net. It also adds lot of bookmarks in the IE Favorites related to porn sites and adult products.

For more information on this variant, please refer to **SPYW_STARTPAGE.J**

CWS.CraftSearch

Variant 49: CWS.CraftSearch

Approx date first sighted: June 26, 2005
Symptoms: Modifies IE pages. The home, start and search pages are redirected to http://www.all-find.org
Cleverness: 8/10
Manual removal difficulty: Involves a killing running processes, a lot of Registry

editing, deleting a few files and hosts file editing.
Alias: Adware-CraftSearch (McAfee), Trojan.Win32.StartPage.xs (Kaspersky)

This CWS variant drops several DLL in the windows system directory, most significant of which is wirl.dll -- the real DLL file and installed into the system as a Browser Helper Object (BHO). It prevents access to the MSN search website by modifying user's hosts file and changes settings for Microsoft Internet Explorer, including Start Page and search settings. The other dropped DLL file are not actual library files are harmless data files used by this variant.

Killing a running process, deleting the BHO and the DLL and some Registry editing fixes this hijack.

CWS.LookFor

Variant 50: CWS.LookFor

Approx date first sighted: June 26, 2005
Symptoms: IE pages such as homepage, start page and search pages changed to http://lookfor.cc.
Cleverness: 3/10
Manual removal difficulty: Lots of registry editing
Alias: QLowZones-15 (McAfee), Trojan-Downloader.Win32.Small.abq (Kaspersky)

This CWS variant lowers the security settings of Internet Explorer by modifying lot of registry entries. This makes the affected system more vulnerable to malware or spyware attacks while the user browses the Internet. It also adds several domains into the Trusted Sites zone for IE.

Removing added domains from IE's Trusted sites and restoring the security settings for IE fixes the changes made by this malware.

Affiliate variants - not directly related to CWS, but sighted together with it very often

CWS.Aff.iedll

Affiliate variant: iedll

Approx date first sighted: August 18, 2003
Symptoms: Errors in a file 'iedll.exe' or 'loader.exe' on Windows startup. Sighted a lot together with other CWS variants.
Cleverness: 3/10
Manual removal difficulty: Involves a process killer and a bit of Registry editing.
This affiliate variant, with unknown origin, consists of two files. The first one, loader.exe downloads the second one, iedll.exe and runs it. Both files are set to autostart when Windows starts. The 'hijack' becomes obvious when iedll.exe crashes - and it does this frequently. Apparently, this program is programmed so badly, it won't even carry out its payload and does not hijack IE. It is only displayed here because it has been sighted together with other CWS variants on very numerous occasions.

CWS.Aff.iedll.2: A mutation of this variant exists, that has the same files iedll.exe and loader.exe located at C:\Program Files\Windows Media Player.

CWS.Aff.Winshow

Affiliate variant: Winshow

Approx date first sighted: July 13, 2003
Symptoms: Changed IE pages to youfindall.com, BHO added to IE named 'winshow.dll'. Second variant hijacks to searchv.com and also redirects mistyped URLs to a porn site, and reloads the hijack on a reboot, or even sooner.
Cleverness: 5/10, second variant 8/10
Manual removal difficulty: Involves lots and lots of Registry editing, a bit of hosts file editing and deleting one file.
This affiliate variant originally was quite innocent, consisting only of one Browser Helper Object (BHO) named 'Winshow', with unknown goal. It was frequently sighted together with other CWS variants.

CWS.Aff.Winshow.2: The second variant of this one also used the BHO and filename, but added a hosts file hijack that redirected mistyped domains/URLs to a porn site, and reloaded a IE hijack to searchv.com on reboot using a Registry command file. One file named MSUpdater.exe was sitting in the 'All Users' startup folder in the Start Menu, and also reloaded the hijack. Deleting both files fixed the hijack. It is still unknown what the BHO actually does.

CWS.Aff.Winshow.3: A third version of this variant exists, that uses the filename winlink.dll for the BHO. It hijacks to both searchv.com and thesten.com. It does not have the additional files the second version has.

CWS.Aff.Winshow.4: A fourth version of this variant exists, that adds an uninstall entry in Add/Remove Software labelled Winshow, and auto-updates from a Registry value named WinShowUpdate.

CWS.Aff.Winshow.5: A fifth version of this variant exists, that uses the filename iefeatsl.dll, hijacks to search-click.com and auto-updates from a Registry value named iefeatslUpdate. It also downloads and installs a BHO named SubmitHook.

CWS.Aff.Winshow.6: A sixth version of this variant exists, that uses a random string for its filename and folder, with the same CLSID as the previous two variants, {587DBF2D-9145-4c9e-92C2-1F953DA73773}. It also downloads and installs a BHO named SubmitHook and autoupdates from a Registry value named Updater.

CWS.Aff.Madfinder

Affiliate variant: Madfinder

Approx date first sighted: October 15, 2003
Symptoms: IE homepage changed to madfinder.com, BHO with filename 'BrowserHelper.dll', hijack returning on reboot, or even sooner.
Cleverness: 5/10
Manual removal difficulty: Involves a process killer and lots of Registry editing.
This variant seems to consist of two files that support each other. svc.exe runs invisible, downloads the second BrowserHelper.dll and installs it as a BHO. However, this BHO file also contains the first file and probably puts it back when it is deleted. The variant is always accompanies by a hijack to madfinder.com.

CWS.Aff.Tooncomics

Affiliate variant: Tooncomics

Approx date first sighted: September 18, 2003
Symptoms: IE hijacked to tooncomics.com, targets of hyperlinks on websites changed to porn sites
Cleverness: 9/10
Manual removal difficulty: Involves really lots of Registry editing, and some hosts file editing
This variant seems to be in the league of **CWS.Vrape**, hijacking to porn sites, redirecting other porn sites to itself, and even using a BHO to change the target of hyperlinks to porn sites like eZula Toptext does. Some users even reported being unable to download CWShredder because the links at the bottom of this article were altered to point to porn sites. Manual removal is pretty hard, because the DNSErr.dll file responsible for the latter part of the hijack has no uninstall built-in like most dlls. However, flat-out deleting the file has no side effects.

CWS.Aff.Tooncomics.2: There is a second version of this hijack that Uses the filename dnse.dll as the BHO, and a second file ld.exe that is always running, reloading the hijack. In this version, the IE homepage and search pages are changed to fastwebfinder.com. A process killer is needed to get rid of ld.exe.

Epilogue - The Fix Known As CWShredder

After reading all of this, you must be under the impression that a CoolWebSearch hijack is near impossible to fix since there are so many variants. Though it is true that most anti-spyware tools won't fix all of the variants, there is one tool that will.

It's called **CWShredder** and can be downloaded **here** .

For more information, visit **Trend Micro's CWShredder website.**

In general, it's a good idea to keep your system up-to-date with **WindowsUpdate**!!

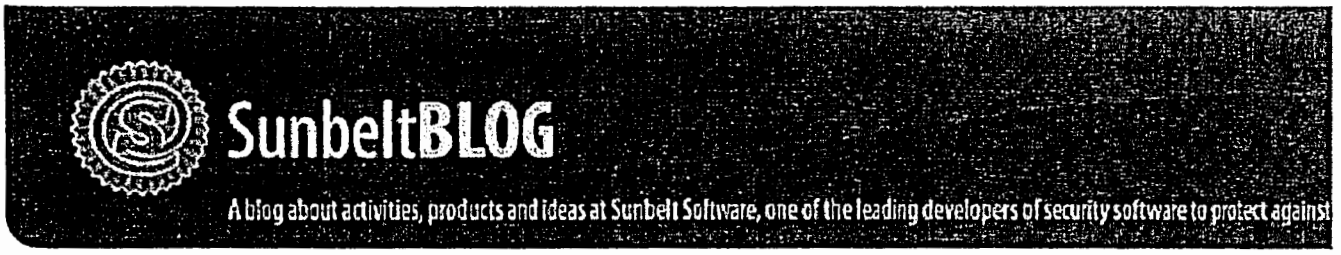
Trend Micro™ Anti-Spyware Solutions

For real-time protection against spyware and browser hijackers, CWShredder is integrated into Trend Micro™ Anti-Spyware. Click on the appropriate link below to learn more:

- **Enterprise**
- **Small and Medium Business**
- **Home and SOHO**

Exhibit B

Exhibit "B"


SunbeltBLOG
A blog about activities, products and ideas at Sunbelt Software, one of the leading developers of security software to protect against

MONDAY, AUGUST 29, 2005

The spyware/kiddie porn/spam zombie connection

Here's a video taken last week by one of our spyware researchers of an exploit-driven installation of multiple malware and adware apps from a pornographic website

It's from a child porn site and the disgusting images and the URL have been obfuscated (the website is being reported to the authorities).

The site is clearly linked with the very nasty vxiframe(dot)biz crew (purveyors of fun things such as Cool Web Search browser hijacks and the rest).

The researcher surfed to the site in question and immediately get hit with a security exploit that hijacked his browser, installed Spy Sheriff, and dropped a spam zombie/bot (not visible in the video) on his system. His browser window was then closed.

After a short bit he was presented with a combination of nags and ActiveX Security Warning prompts for CrazyWinnings (with Internet Explorer closed, mind you). The EULA for that installation is here.

Most users will never see that EULA, however, or the links to multiple other EULAs for the apps to be installed, which include:

- DirectRevenue/ABI/Aurora
- 180search Assistant
- SurfSidekick
- BullsEye Network
- ShopAtHomeSelect

Every time he cancelled the install he was presented with a nag to allow the install (all the while Spy Sheriff was warning him from the System Tray that his PC was infected).

After finally caving to the CrazyWinnings nag/prompt combo, his PC was deluged with the aforementioned adware. *266 new files (including 77 executables and 24 DLLs) were dropped on his PC and 516 new Registry keys were created.*

180 Solutions did indeed pop up a prompt (called a "CBC Force Prompt"), but read the language of that prompt carefully and consider the context in which it is presented.

He chose "Cancel".

Sunbelt Software

RSS feed

Download FREE CounterSpy

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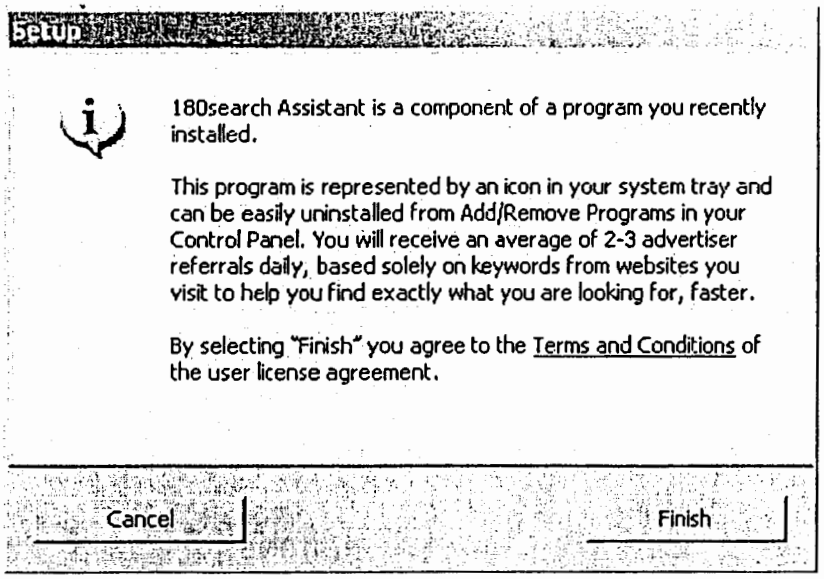
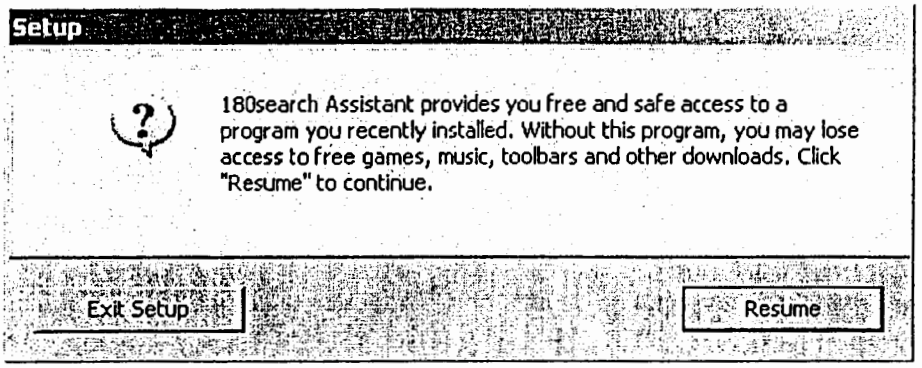


He was then confronted with this warning that unless he allowed the installation to continue, he may lose acces to a program he recently installed, as well as free games, music, toolbars, etc.



So he allowed the install, as one would assume users would, out of fear that their PCs or internet connections might break.

This installation was initiated by a security exploit, driven by a combination of bullying nags and warning prompts, and greased with false and deceptive claims from the parties involved. At no point was he ever shown a clear, conspicuous, and truthful description of the software to be installed, and at no time was meaningful consent ever gained to the installation of the software.

So!

Apart from the fact that 180Solutions' and Direct Revenue software is being installed along a spam zombie and installed through a security exploit (both of which they will blame on a rogue distributor), why did DirectRevenue and 180solutions consent to the CrazyWinnings distribution, when notice and disclosure is so obviously poor (no EULA shown to the user, EULA contains only links to EULAs from multiple other adware vendors, etc.)?

(For the record, installation logs and copies of all files installed from that exploit have been archived.)

Alex Eckelberry

POSTED BY SUNBELT SOFTWARE BLOG AT 12:38 PM PERMALINK

COMMENTS (5) | TRACKBACK (0)

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Exhibit C

The Personal Computer Radio Show

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August 31, 2005 Show

In The News

AOL agreed to pay a $1.25 million fine for not canceling the accounts of customers when requested to do so.

- AOL To Reform Customer Service Procedures Press release from the New York State AG. Settlement Requires Company to Remove Obstacles Consumers Face When Seeking to Switch or Cancel Service
- Canceling AOL? Just Offer Your Firstborn by Tom Zeller in the New York Times. August 29, 2005.
- Fifty Ways to Leave AOL By Ed Foster August 26th, 2005.
- AOL Settles Case Accusing It of Thwarting Cancellations by Jennifer Bayot in The New York Times August 25, 2005. AOL was sued by Eliot Spitzer, the New York State attorney general for *"making it unduly difficult for customers to drop the service."* Mr. Spitzer claimed that employees could earn a bonus up to $3,115 a month by recording 975 "saves." AOL agreed to pay a fine of $1.25 million and said it would no longer award bonuses to employees that talked customers out of quitting. The article points out that AOL is constantly losing customers to other Internet Service Providers that offer faster connection speeds for less money. If you tried to cancel your AOL service but couldn't, you can file a claim for up to four months of charges at www.oag.state.ny.us/internet/internet.html

RIO is getting out of the business of competing with the iPod.

- An iPod Casualty: The Rio Digital-Music Player The Wall Street Journal September 1, 2005

Topic

Our topic was The Convergence of Personal Computers and Consumer Electronics. Where have we come from and where are we going... computer trade show shows and flea markets are going out of business, computer clubs and user groups are shrinking... what's happening to the personal computer industry and technology, and why?

Our guest was Marty Winston, Industry Analyst and Guru. Marty runs newstips.com

Update

As a result of the discussion during his appearance on our August 17th show, Alex Eckelberry, President of Sunbelt Software, added an entry to his blog called Security on the cheap (August 25, 2005). Quoting Alex: *"I make my living making and selling software, so my interest is always to have you pay for it. But for those who want to save a buck or two, I've got my Security on the Cheap guide below. Getting these (mostly) free basics in now will make your internet experience dramatically more secure..."* He recommends free and cheap programs for antivirus, firewall, anti-spam, anti-phishing, etc. etc.

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August 24, 2005 Show

In The News

Ever thought about obtaining a free credit report? You can do so from www.annualcreditreport.com. All states are not yet on-line but should be by September 2005. You can also get it at the web site of the Federal Trade Commission, www.ftc.gov. Click on the link for Free Credit Reports. Do not use consumerinfo.com or freecreditreport.com. They are scams and were fined by the FTC. See also A Fine Print Fine by Scott Reeves at forbes.com, August 17, 2005.

For help in dealing with your credit report see Deciphering A Credit Report by Scott Reeves at forbes.com. August 22, 2005. Back in December 2004, Forbes wrote about this, see Get Your Free Credit Report Now by Scott Reeves, December 1, 2004.

Not a computer user? You can also order a free credit report by calling (877) 322-8228 or by mail to: Annual Credit Report Request Service, P.O. Box 105281 Atlanta, Ga., 30348-5281.

Verizon has launched a new low-end, cheap DSL service. For only $15 a month, they offer DSL with a download speed 768 kilobytes/second. While this is not fast compared to their regular service or to cable service, it is much faster than the 50K that a modem user maxes out at. Over half of the on-line households still connect with dial-up, so Verizon is hoping to grab these customers before they sign up for cable service. Verizon is following in the steps of SBC, which has done the same thing.

This service is cheaper than many dial-up accounts. Someone who uses dial-up and *also* maintains a second phone line for Internet use, will find this saves in two ways, as DSL does not require a separate phone line.

- Verizon to offer slower DSL to gain broadband users August 22, 2005 Reuters
- Verizon Launches Low-Priced DSL, Partners With Yahoo August 23, 2005 Internet Week
- Verizon packages and prices

Apple released bug fixes to their previously released OS X Tiger (10.4.2) bug fixes. The bug prevented the OS from running 64 bit applications.

The next generation of DVDs will hold a lot more data. The bad news is that a new VHS vs. Beta war seems to be in the offing. Sony leads a group of companies backing the Blu-ray standard. Toshiba heads a group that prefers HD-DVD. Talks aimed at a compromise just fell apart. Blu-ray disks have a more sophisticated format which will be more expensive to produce but will hold 25 GB of data. HD DVDs only hold 15 GB of data but will be cheaper to produce. Toshiba expects to release HD DVD players by the end of 2005.

Microsoft released a new version of their Malicious Software Removal Tool, one that can remove 10 variations of the Zotob worm. A number of anti-virus companies beat them to it. This is malicious program that garnered a ton of publicity last week for attacking a bug in the Plug and Play component of Windows, just days after Microsoft released a fix for the bug.

When publicity was greatest about the Zotob worm, Microsoft claimed that only Windows 2000 was effected. Oops. Some anti-virus software vendors proved to them that other versions of Windows were also effected. XP SP1 is vulnerable to the Plug and Play problem is the Guest account is enabled and you are running as an Administrative class user. In their description of the Zotob.C variant, Trend Micro says it effects Windows 98, ME, NT, 2000, XP and Server 2003.

If you use the Adobe Acrobat Reader (and pretty much everyone does) be aware that Adobe released two new versions recently to fix a bug. See www.adobe.com/products/acrobat/readerupdate082005.html

Reviews

Alfred reviewed Music Maker 10 DeLuxe by MAGIX. He liked it. It lets you make your own music and much more. You can create your own drum riffs, edit WAV files, use a host of royalty-free sounds, add audio special effects, make videos to accompany your music and burn it all to a CD. It sells for under $60.

Joe discussed ZoneAlarm version 6 Security Suite which seems not ready for prime time. ZoneLabs, the vendor, expects to issue a large update to ZoneAlarm 6 Security Suite next week.

Calls

One caller had a digital camera that used to happily connect to his computer via FireWire. After installing the Microsoft patches from August 9th on two computers, the camera no longer is recognized on either computer. After the show a listener suggested that it might be the camera's configuration. If the USB mode was changed from Mass Device (flash card) to WebCam mode, the card won't be recognized by the computer.

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August 17, 2005 Show

In The News

The big news this week is the exploitation of a bug in the Plug and Play component of Windows. The bug fix for this problem was released by Microsoft on August 9th. By the 12th software was posted online to attack and exploit the bug. At least four different malicious programs have been released. Microsoft says the problem only exists in Windows 2000, but anti-virus companies have said that it affects many other versions of Windows too.

Apple released 40 bug fixes to OS X Panther and Tiger (the current and prior releases). Security firm Secunia describes them as highly critical.

When Apple announced they were converting to use Intel processors, their OS X was supposed to run only on special Intel hardware provided only by Apple. Their security scheme enforcing this was cracked very quickly and knowledgeable computer nerds can now run Mac OS X on any Intel based computer.

IBM is making accessibility code available to Firefox users. This is software to enable computer use by people with assorted disabilities. It includes a web page reader and more.

Is the Intel Pentium 4 at the end of its life? The maximum speed is now 3.8 GHz and it generates a lot of heat. Too much heat, it turns out. In contrast, their mobile Pentium M uses less current and generates less heat. Intel just cut the price of Pentium 4 processors by a third.

Spyware

Our topic was Spyware and our guest was Alex Eckelberry, President of Sunbelt Software, the makers of CounterSpy. Joining Alex was Eric Sites, the VP of R&D at Sunbelt. Sunbelt was in the news recently for their discovery of an identity theft ring.

- More on the identity theft ring August 6, 2005. Blog by Alex Eckelberry
- Spyware Researchers Discover ID Theft Ring By Ryan Naraine August 8, 2005 eWeek
- New Keylogger Steals Passwords From IE Internet Week August 11, 2005

In the normal course of their anti-Spyware research, Sunbelt stumbled across key logging software that was doing identity theft. True Spyware.

Eric led the team that made this discovery. He said that Patrick Jordan, another Sunbelt employee, was researching a very malicious piece of software called Cool Web Search (CWS). Towards that end, he purposely infests computers to test CounterSpy. He found a remote callback to a server on the Internet. He traced it back, poked around on the server, and was amazed at what he found. Every 30 minutes about 200 K of data was being uploaded to this machine. The data was coming from all over the world. Sunbelt contacted the FBI.

Sunbelt could read this data and even called a potential victim to warn them of the identity theft. This person's computer was not only infested with a key logger, it was also a spam zombie, being used to send out tons of spam email messages. Comcast had already warned her that she was sending too much email, but she wasn't doing it herself. She did notice a lot of pop-ups on her computer.

Sunbelt found megabytes of detailed personal information on scores of people. The key logging program took advantage of the AutoComplete feature of Internet Explorer. When using this default feature, IE remembers usernames and passwords entered into web pages and records them in the Protected Storage Area (part of the Windows Registry). The key logger stole all your passwords from the not-so Protected Storage Area. It was also logging the kinds of things people were searching for and their bank account numbers.

Sunbelt contacted the web hosting company that was hosting the server collecting the data. Alex said it was a large company and the tech person they spoke with was not very well trained. Alex did not identify the company, and they did take the server off-line.

Alex said this particular Spyware program was very small, very sophisticated and was a version of an existing Trojan Horse program. At the time they found it, only one anti-virus program could detect the program (now they all can).

One aspect of its sophistication was that it could get through firewalls. This is because the Spyware installed itself inside Internet Explorer. To the outside world, and to a firewall, it appears to be, and is, Internet Explorer. The fact that it's an infected version of IE is not noticeable. Technically, the program ran as a Browser Helper Object (BHO). Firefox does not support BHOs, which is one reason it is safer to use than IE.

Speaking of firewalls, Joe mentioned that he does not like the latest version (6) of ZoneAlarm at all. Alex too, felt that it suffered from too many false positives, the same point Joe made recently. The problem with false positives is that many computer users will not understand the message and question from ZoneAlarm. If you answer a question from a firewall wrong, it is not protecting your computer.

To protect yourself from bugs in Windows and IE, either visit update.microsoft.com or turn on Automatic Updates in Windows XP (and 2000). Your computer can get infected with Spyware in many ways and at many web sites.

A caller asked if someone using a Mac but running Windows in a virtual machine can get infected with Spyware. Yes. Windows is Windows whether running in a real or a virtual machine.

Web sites mentioned on the show

- At ihatespyware.com Sunbelt has made available a free utility to get rid of the Spyware they discovered. You can also download a free trial of Counterspy from Sunbelt Software.
- sunbeltblog.com is Alex's blog. It covers security issues and has an RSS feed. Alternate Link. Alex lies RSS Popper for reading RSS feeds, but it only works with Outlook.
- Olivia was enthusiastic about the web site mybodylanguage.co.uk about nutrition and food and what your body is telling you.

Being safe on the Internet requires:

- A Firewall
- An Anti-Virus program
- An Anti-Spyware program
- The latest bug fixes from Microsoft for Windows
- Luck

Alex recommended the free AVG anti-virus program from Grisoft and two free firewalls, ZoneAlarm and Sygate. Besides being partial to his own anti-spyware product Counterspy, Alex said SpySweeper from Webroot is also a very good product.

Our webmaster, Michael, teaches a class on Defensive Computing.

As a result of the discussion during his appearance on our August 17th show, Alex Eckelberry, President of Sunbelt Software, added an entry to his blog called Security on the cheap (August 25, 2005). Quoting Alex: *"I make my living making and selling software, so my interest is always to have you pay for it. But for those who want to save a buck or two, I've got my Security on the Cheap guide below. Getting these (mostly) free basics in now will make your internet experience dramatically more secure..."* He recommends free and cheap programs for antivirus, firewall, anti-spam, anti-phishing, etc. etc.

AudioArchives
TOP

August 10, 2005 Show

Our topic was **Podcasting**: The Hottest subject on the Internet. Our guest was Todd Cochrane, author of Podcasting - the do-it-yourself guide published by Wylie. Todd is the chief geek behind www.geeknewscentral.com and the host of one of the more popular podcasts on the web with over 10,000 subscribers.

- www.apple.com/podcasting Apple on podcasting with their iTunes program
- podcast.net is a directory of podcasts
- podcastalley.com is also a directory of podcasts
- Podcasts can infect your PC By Brian Livingston July 28, 2005

AudioArchives
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August 3, 2005 Show

Catching up news stories from the last couple weeks.

If you are using Windows 98 SE, there is an unofficial "service pack" available for it. That is, you can download a single file, run it, and apply all the bug fixes (over 100) issued for Windows 98 SE at once. This is a free download, maintained by Alper Coskun (a Turkish computer engineering student) and is not sanctioned by Microsoft. The "service pack" includes only fixes for Windows, not the fixes for Internet Explorer v6 or for Windows Media Player v9. It is available at exuberant.ms11.net.

Hank warned against using the just released version of ZoneAlarm, version 6. Apparently the number and quality of warnings issued by the "smart defense advisor" can be confusing to naive or non-power users who can't interpret them and may make a wrong decision. Michael noted there were also assorted problems back when version 4 and version 5 of ZoneAlarm were first released.

The only product mentioned was the peel-n-stick Laptop LegsT for PCs and Mac FeetT for Macs. They attach to the bottom of any standard notebook (2 per computer), then flip down to elevate it to a choice of two heights - 1" or 1 3/8" - for improved typing ergonomics and increased cooling and ventilation underneath the laptop.

The legs sell for $19.95 in packages of four (two sets) each of either the Laptop Legs or Mac Feet. The Laptop Legs are PC gray and the Feet are Mac white and available direct from LapWorks at www.laptopdesk.net.

Exhibit D

Exhibit D

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Suspected paedophile cleared by computer forensics

Trojans found on accused man's HDD

42 New Articles

By John Leyden → More by this author
Published Tuesday 28th October 2003 17:16 GMT
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IT forensics firm Vogon has explained how its work helped clear a man accused of storing child pornography on his computer by proving his PC was contaminated by Trojan horse infection capable of downloading illicit images onto his machine.

Julian Green was arrested in October 2002 after police raided his home and found 172 indecent pictures of children on his hard drive. His solicitor, Chris Bittlestone of South Devon law firm Kitson Hutchings, called in one of Vogon International's forensic investigators, Martin Gibbs, to help.

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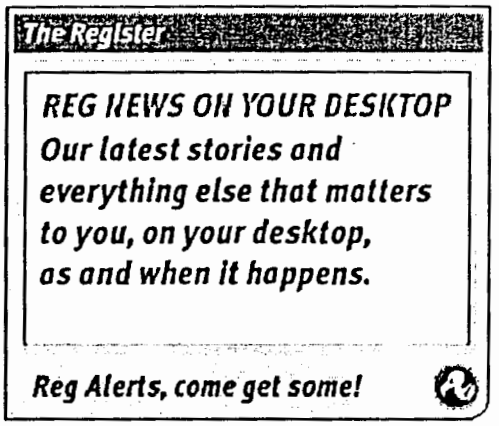

A clone of Green's hard drive was sent to Vogon International in Bicester, where it was imaged and processed in the forensic laboratory using Vogon's specialist software. The data was then extensively examined and a report prepared, which highlighted that the Trojans were most likely to have come from unsolicited emails that Green opened before he deleted them.

Gibbs identified 11 Trojan horse programs on Green's computer which were set to log onto "inappropriate sites" without Green's permission whenever he loaded up a browser to access the Internet.

These findings were decisive in clearing Green of the 13 charges of making indecent images he faced at Exeter Crown Court this summer. On receiving evidence from Vogon the prosecution decided to drop the case.

"The prospects of my client being able to effectively defend himself without Vogon's help were very remote," said Bittlestone. "The stakes for him were extremely high - if he had been convicted, prison was a strong likelihood.

"The maximum sentence for possession of such images is ten years' imprisonment, and anyone convicted of such a matter would have become subject to registration with the police as a sex offender for a period of five years. Martin Gibbs' report was pivotal in this very important case."

Green's acquittal is one of three recent cases where a Trojan defence has succeeded in a British court. In April this year, Karl Schofield, 39, was cleared of possession of child porn when prosecutors accepted expert testimony that the unnamed Trojan could have been responsible for the presence of 14 child porn images on his PC.

Aaron Caffrey, the teenager hacker accused of crippling the Port of Houston's web-based systems, was found not guilty of computer crime offences this month after a jury accepted his story that attackers used an unspecified Trojan to gain control of his PC and launch the assault.

The prosecution argued that no trace of Trojan infection was found on Caffrey's PC but the defence was able to counter this argument with testimony from Caffrey that it was possible for a Trojan to wipe itself.

Nobody is disputing the validity of these verdicts, however legal and security experts have expressed concerns that the Trojan defence might become subject to misuse.

Vogon's Gibbs believes such concerns have been overplayed.

"I don't believe, as some have suggested, that recent cases with 'open the floodgates' to Trojan defences in cybercrime cases. When we look at how indecent images got onto a PC, for example, there is more to substantiate a claim that a Trojan was responsible than just the viral infection of a PC," Gibbs told *The Register*.

Gibbs was reluctant to go into details but said that factors like file directory structures and registry entries are among the items it considers when making a forensic examination of evidence. Vogon is asked to carry out computer forensic examinations in a variety of civil and criminal cases, working for both the prosecution and defence.

When a Trojan defence is used in a criminal case it is "down to the prosecution expert to dispute the claim", Gibbs added. ®

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Child porn case highlights browser hijack risks

Cautionary tales

By John Leyden → More by this author
Published Thursday 13th May 2004 10:28 GMT
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Browser hijacking programs can redirect users to pornographic websites. But could these malicious programs also lead to false accusations of possession of child pornography?

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Malware such as CoolWebSearch (AKA CWS) can change browser start-up and search pages and generate pop-up pages - often punting illegal pornographic websites - on infected PCs. The program exploits IE vulnerabilities to slither onto unpatched PCs. Users would normally have to visit dodgy websites to get infected but it's easy to see how xxx rated spam email received and auto-executed through unpatched versions of Outlook could result in unwitting infection.

The Register

Our new and improved Desktop News Alerts allows you to receive all the latest updates on everything that's important to you, on your desktop, as it happens.

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The end result would be the URL of borderline-criminal websites appearing in the history file of Net users. And how are spouses or employers to interpret this?

Wired this week carried an illuminating article, quoting several people who claimed their good reputation was threatened because browser hijacking programs had left indications of visits for porn websites on their PCs.

In one case, a Russian-born US resident called 'Jack' (not his real name) said he was forced to confess to child pornography offences on the basis of material he claims may have been deposited on his PC by a browser-hijacking program.

Jack may well have been railroaded in the case and there are issues about how evidence was handled. The chain of custody of the suspect PC, for example, is one area of particular concern. *Wired* quotes the conclusion of Brian Rothery, a former IBM systems engineer who researched Jack's claims, that "evidence wasn't handled properly".

However, the browser hijack explanation fails to adequately explain how some of the images appeared in locations not used for normal browsing sessions, *Wired* reports. The location of material and access times of content gives vital clues for investigators. If material is accessed after it is downloaded, especially at a time when a PC is offline, then this points towards a suspect's guilt.

It is straightforward to determine if the possession of illegal content is caused by browser hijacking, according to Neil

The Register

Barrett, technical director of security consultancy IRM, and a veteran expert witness in numerous computer crime cases.

"Unless there is an exploit, material would only appear within the browser context. If illicit material was found on a PC a prosecution could be initiated but analysis is straightforward. It would leap up at a computer forensics expert that a pop-up was responsible for the content found," he said.

Police won't be blindsided

Some child pornography cases have been dismissed after suspects testified that a Trojan horse infection on their PCs could have downloaded without their knowledge (example here and here). According to Barrett, police were unable to counter defence arguments that a Trojan was responsible for the dodgy content found on a PC in these cases because they didn't know enough about what it did. This won't happen again in future. he said.

UK police now routinely check for Trojans on seized computers. In future, police will take virus infection into account in preparing evidence for court. Just because a virus is found on a PC doesn't mean someone is innocent of a computer crime and doesn't necessarily undermine the value of any other evidence recovered. "Police won't be blindsided by any Trojan defence in future," Barrett said.

So skilled and ethical investigators can determine if malicious code - and not salacious urges - explains the presence of dodgy content on PCs. Relying on this safety net is hardly sensible, though. The best approach for Joe Punter is to prevent such content getting onto his PC in the first place. This is yet another reason to use an updated version or IE and Outlook or (easier) to consider using alternative browsers and email clients. ®

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Jack's story

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Exhibit F

Exhibit "F"

The New York Times
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August 11, 2003

Acquitted Man Says Virus Put Pornography on Computer

By JOHN SCHWARTZ

One evening late in 2001, Julian Green's 7-year-old daughter came upstairs from the computer room of their home in the resort town of Torquay, in western England, and said, "The home page has changed, and it's something not very nice."

When Mr. Green checked the machine, he found that the family PC seemed almost possessed. The Internet home page had somehow been switched so that the computer displayed a child pornography site when the browser software started up. Even if he turned the machine off, it would turn itself back on and dial the Internet on its own.

Mr. Green called the computer maker and followed instructions to return his PC to a G-rated state. The pornography went away, but the computer still often crashed and kept connecting to the Internet even when "there was no one in the blinking house," he said.

But Mr. Green's problems were only beginning. Last October, local police knocked on his door, searched his home and seized his computer. They found no sign of pornography in his home but discovered 172 images of child pornography on the computer's hard drive. They arrested Mr. Green.

This month, Mr. Green was acquitted in Exeter Crown Court after arguing that the material had been gathered without his knowledge by a rogue program created by hackers — a so-called Trojan horse — that had infected his PC, probably during innocent Internet surfing. Mr. Green, 45, is one of the first people to use this defense successfully.

While a case that played out in the British legal system sets no precedent in the United States, legal experts say the technical issues raise two troubling possibilities. For one, actual child pornographers could arm themselves with a new alibi that would be difficult to disprove. Or, unknowing Web surfers could find themselves charged with possessing illegal material that a lurking software program has acquired.

"The scary thing is not that the defense might work," said Mark Rasch, a former federal computer crime prosecutor. "The scary thing is that the defense might be right," and that hijacked computers could be turned to an evil purpose without an owner's knowledge or consent.

"The nightmare scenario," Mr. Rasch said, "is somebody might go to jail for something he didn't do because he was set up."

Mr. Green was eventually exonerated, but his life has been turned upside down by the accusations. His ex-wife went to court soon after his arrest and gained custody of their youngest child and his house. Mr. Green, who is disabled because of a degenerative disk disease, spent nine days in prison and three months in a "bail hostel," or halfway house, and was allowed only supervised visits with his daughter.

"There's some little sicko out there who's doing this," Mr. Green said, "and he's ruined my life. I've got to fight to get everything back."

He said he had no clue how the rogue software showed up on his computer. "I never download anything. and as far as I knew, no others had," he said.

When his solicitor, Chris Bittlestone, hired a computer security consultant to examine the PC, nearly a dozen Trojan horse programs showed up on the hard drive. "When the report came in, it was very much what you would call a eureka moment," Mr. Bittlestone said. But Mr. Green took the news differently.

"He was very quiet and said, `See? I told you,' " Mr. Bittlestone recalled.

Tony Dearsley, the computer investigations manager for Vogon International Ltd., the company that examined the machine, says Trojan horse programs are increasingly common.

"Any Web site could contain this sort of thing," he said. "The reputable ones don't. The less reputable ones may." Anyone using the computer who visits sites offering legal adult fare, gambling or even a music file-swapping site might pick up malicious software, he said.

Mr. Green, who now lives with his son and his 83-year-old mother in the nearby town of Paignton, said that it was possible that some member of his family had accidentally infected the computer in that way. "I know my son had a look at some iffy sites," he said. "He's a teenager."

Antivirus software and programs like Ad-Aware can ferret out and disable Trojans, but they must be kept up to date to be effective in a fast-changing field. Mr. Green said that he had antivirus software on his computer, but that it was outdated.

The police would not disclose the source of the original tip in the case, but Mr. Green noted that the raid came two weeks after he had won custody of his daughter in court. Mr. Bittlestone would not comment directly on the matter. "Calls may well have been made," he said. "I'm not quite sure what the dynamics were within the family at that time."

Mr. Bittlestone said that he was troubled that prosecutors did not mention the Trojan programs after his client's arrest: "Either the police didn't spot this issue, or if they did spot it they chose not to pursue it." Mr. Green, he said, is now considering a lawsuit against the police.

Calls to the local police in Mr. Green's area were referred late on Friday to the pedophile unit at Ashburton, which could not be reached. But the prosecutor in the case, David Sapieca, told the BBC: "We don't accept the conclusions of the defense expert report, but there were already other issues in the case regarding the history of the computer itself. We cannot show that Mr. Green downloaded the images on to the computer, so the Crown reluctantly offer no evidence in this case."

Mr. Green's case could point the way to a new defense in courts in the United States, said Andrew Grosso, a lawyer and former federal prosecutor in Washington. The presence of a Trojan could mean that the computer is "not entirely under your control," he said, and a defendant could "legitimately point a finger elsewhere."

A senior official at the Department of Justice said that the defense, while novel, might not hold up in court. "There are ways to look at the evidence to see if something like this — even if it is present — is responsible for the conduct at issue," the official said. Thus a prosecutor would scan the computer to make sure that it did, in fact, have rogue software, and would try to determine whether the software could do what the defendant claimed that it did.

In a child pornography case, he said, investigators would also try to discover other corroborating

evidence, like Internet communications with known pedophiles, or a stack of child pornography in the suspect's home.

Mr. Bittlestone said: "You will only be able to use this defense if you can show that Trojan horse viruses have infected" a computer. If not, he said, "You have to account for your actions."

Mr. Green said that despite the disruption in his life, things could have been much worse: he could have spent years in prison, lost all visitation rights to see his daughter, and could have been entered into lists of sex offenders. "There would have been no point to living after that," he said. "Everything is just taken away from you."

But he said he had no sympathy for pedophiles and users of child pornography, many of whom he met in the bail hostel. He called them "nasty little people," and said, "Whatever they do to them isn't enough."

Things are beginning to turn around for him since the British press has written about his acquittal, he said. One of the parents from his daughter's school, who hadn't spoken to him since the arrest, began talking to him the other day.

"She must have said, `Perhaps he's not a pervert after all,' " Mr. Green said.

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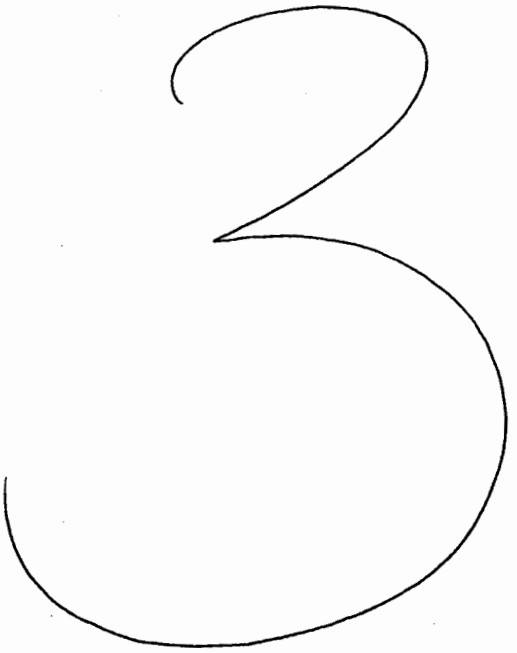

STATE OF NEW JERSEY

VS

ROBERT J. TETI
Defendant

SUPERIOR COURT OF NEW JERSEY
00 GLOUCESTER COUNTY
Complaint / Indictment / Accusation No(s)
W2005-000996-0802

Promis # 05002048-001
CAPS # T18732
Prob. Officer J. Matthews

SUPERIOR COURT
GLOUCESTER COUNTY
FILED
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CRIMINAL CASE
MANAGEMENT OFFICE

PRETRIAL INTERVENTION
ORDER OF DISMISSAL
UNDER *RULE* 3:28

Upon application of the Vicinage Chief Probation Officer and recommendation of the Criminal Division Manager for an Order to Dismiss the above captioned Complaint(s)/Indictment(s)/Accusation(s) pursuant to *Rule* 3:28 and with the consent of the Prosecutor and defendant;

The Court having considered the report of the Pretrial Intervention Program concerning the defendant's participation and noting that the defendant has released the complainant from any claims which might arise from failure to prosecute this matter in the ordinary course;

It is on this 1st day of June, 07, ORDERED that the Complaint(s)/Indictment(s)/Accusation(s) is/are hereby dismissed and matter adjusted without cost to the defendant.

It is further ORDERED that bail posted in this matter be discharged.

Judge of the Superior Court
Walter L. Marshall, Jr., PJCr

I hereby consent to the entry
of the above Order

Robert J. Teti
Defendant

Prosecutor

Distribution: Criminal Division, Finance Division, Probation Division, Prosecutor, Defense Attorney, Defendant

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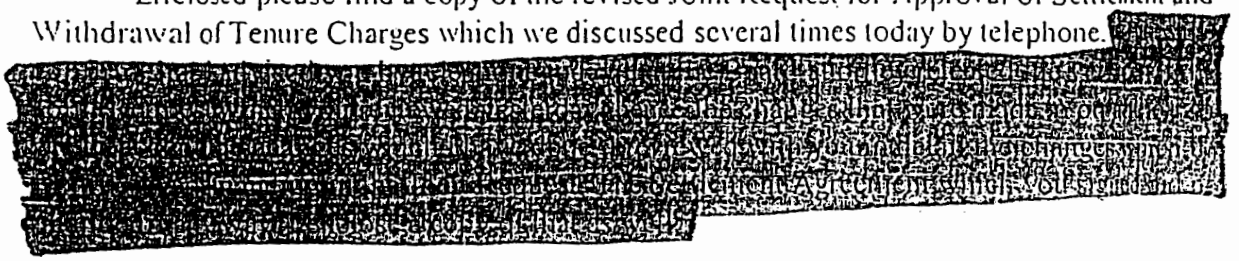
October 12, 2007

Robert J. Teti
108 Sonesta Court
Sewell, NJ 08080

Re: *In the Matter of Tenure Charges Against Robert J. Teti*
Willingboro Board of Education
OAL Docket No. EDUTH 12278-2006S
Agency Ref. No. 449-12/06
Our File No. 4959

Dear Mr. Teti:

Enclosed please find a copy of the revised Joint Request for Approval of Settlement and Withdrawal of Tenure Charges which we discussed several times today by telephone.



As we discussed on numerous occasions, including today, if the Board approves the agreement, it will go to the Administrative Law Judge (ALJ) who will consider it and determine whether or not to recommend approval to the Commissioner of Education. If the ALJ recommends approval, the Commissioner of Education will review it and either approve it or approve it with the recommendation for the Board of Examiners or Division of Pensions to consider possible license/pension revocation proceedings or reject it. If rejected, the case would go back to the Office of Administrative Law for the parties to attempt to revise the agreement or a trial.

Subsequent to our conversations today, I signed the Joint Request and sent it to the Board attorney today for the Board meeting on Monday.

Very truly yours,
SELIKOFF & COHEN, P.A.

BY: _____
MICHAEL C. DAMM
mdamm@selikoffcohen.com

MCD:ebz
Enclosures

31-08

AMELIA COLON-SERRANO :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner – who claims to have acquired tenure as an attendance aide in respondent Board's district pursuant to *N.J.S.A.* 18A:17-2, prior to her voluntary transfer in 1994 to the nontenured position of classroom aide – contends that the Board violated her tenure rights when it failed to return her to a clerical position upon nonrenewal of her contract as a classroom aide in 2006. Respondent contends that petitioner is not tenured, as her initial position of attendance aide was not a tenured position.

The ALJ identified two issues to be determined: whether petitioner's initial position of attendance aide is properly classified as a clerical position, and whether petitioner acquired tenure in this position. The ALJ found that: it is well settled that the duties performed, rather than the title of a position, control whether or not that position is protected by tenure; the duties performed by petitioner in her former position as attendance aide were primarily clerical in nature; therefore, pursuant to *N.J.S.A.* 18A:17-2, the petitioner earned tenure for the time she served in a clerical position as attendance aide. The ALJ ordered the Board to place petitioner in a clerical position held by a nontenured or less senior employee.

Upon a thorough and independent review of the record, the Commissioner adopted in part, and rejected in part, the Initial Decision. The Commissioner concurred that the petitioner had acquired tenure as a clerical employee by virtue of her service as an attendance aide, but found that – because petitioner voluntarily left her tenured clerical employment for the distinct and nontenurable position of classroom aide – the protections of *N.J.S.A.* 18A:17-2 were no longer applicable and she had no entitlement to continued employment in the district. Accordingly, the petition was dismissed.

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

January 28, 2008

OAL DKT. NO. EDU 11588-06
AGENCY DKT. NO. 357-10/06

AMELIA COLON-SERRANO,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY,	:	
RESPONDENT.	:	

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

Upon review, the Commissioner adopts in part, and rejects in part, the OAL Decision.

Initially, the Commissioner fully concurs with the Administrative Law Judge (ALJ) – for the reasons set forth in her recommended decision – that the petitioner acquired tenure as a clerical employee by virtue of her service as an attendance aide in the school district of the respondent Board of Education (Board).

However, the Commissioner cannot concomitantly agree that the petitioner – who voluntarily left her tenured position in 1994 to accept the separate and nontenurable position of classroom aide, which she then held until the nonrenwal of her contract in 2006 – is now entitled to "bump back" into a clerical position held by a nontenured or less senior clerical employee, as reflected in the Order of the ALJ.

As noted in the Initial Decision, *N.J.S.A.* 18A:17-2 provides that clerical employees who acquire tenure "shall hold [their] office, position or employment under

tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation except for neglect, misbehavior or other offense and only in the manner prescribed by [the Tenure Employees Hearing Law]." (at 3-4) In this matter, however, the employment from which the petitioner was dismissed was neither her tenured clerical employment nor an extension or "hybrid" continuation of such employment,[1] but rather the clearly distinct, nonclerical, and nontenured classroom aide position to which she voluntarily transferred in 1994 and continued to hold thereafter by virtue of a series of annual contract renewals. Under these circumstances, when the petitioner was advised in July 2006 that her contract would not be renewed, the protections of *N.J.S.A.* 18A:17-2 were no longer applicable; in the absence of express legislative provision for retention of accrued tenure rights upon transfer to a position which is not tenure eligible, the petitioner must be deemed to have relinquished the protections associated with her clerical tenure upon acceptance of the nonprotected position of classroom aide.[2] [3]

Accordingly, the Initial Decision of the OAL is adopted as to its finding that the petitioner acquired tenure in her position as attendance aide, but rejected as to its implicit conclusion that the petitioner's tenure protection continued beyond the voluntary

---

[1]See, by way of contrast, *Peter A. Keaney v. Bd. of Ed. of the Township of Bloomfield*, Commissioner of Education Decision No. 311-05, decided August 31, 2005; and *Quinlan v. Bd. of Ed. of North Bergen Twp.*, 73 *N.J. Super.* 40 (App. Div. 1962)

[2] See *Lange v. Bd. of Ed. of Borough of Audubon,* 26 *N.J. Super.* 83 (App. Div. 1953)

[3] It is noted that no allegation is made of misrepresentation on the part of the Board as to the nontenured status of classroom aides, nor does the petitioner claim detrimental reliance on Board promises.

relinquishment of her tenured employment in 1994. Because no relief can now be awarded as a result of the petitioner's one-time tenured status, the petition is dismissed.[4] [5]

IT IS SO ORDERED.[6]

COMMISSIONER OF EDUCATION

Date of Decision: 1/28/08

Date of Mailing: 1/28/08

[4]The Commissioner deems unpersuasive the case law cited by the petitioner in support of her claim (Post-Hearing Brief at 2-3). Specifically, the petitioner ignores that *Marybeth Driscoll v. Bd. of Ed. of the West Essex Regional School District*, 1993 *N.J.A.R.*2d (EDU) 761 was reversed by the State Board of Education at 95 *N.J.A.R.*2d (EDU)348, while *Dianne Giardina v. Bd. of Ed. of the Twp. of Pequannock*, Commissioner of Education Decision No. 124-05, decided April 4, 2005, affirmed State Board of Education Decision No. 23-05, September 7, 2005, pertained to an employee who had transferred from one tenurable position covered by *N.J.S.A.* 18A:17-2 to another – as did the case on which it relied, *Julia R. Given v. Bd. of Ed. of the East Windsor Regional School District*, 1978 *S.L.D.* 43, also quoted by the petitioner.

[5] While the petitioner has no legal entitlement to continued employment in the district, the Commissioner notes that nothing herein is intended to preclude the Board from offering the petitioner – a longtime district employee who, from all appearances, performed satisfactorily as an attendance aide and whose employment as a classroom aide was terminated solely as the result of newly enhanced educational requirements which she could not meet – an available position for which she is qualified.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL Docket No. EDU 11588-06N

AGENCY Dkt. No. 357-10/06

AMELIA COLON-SERRANO,

Petitioner

v.

CITY OF PLAINFIELD BOARD OF EDUCATION,

Respondent.

Gail Oxfeld Kanef, Esq., for petitioner (Oxfeld Cohen, P.C. attorneys)

Raymond L. Hamlin, Esq., for respondent (Hunt, Hamlin & Ridley attorneys)

Record Closed: November 1, 2007 Decided: December 13, 2007

BEFORE: **CARIDAD F. RIGO,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The petitioner, Amelia Colon-Serrano, contends that she worked for ten years in respondent's district as a tenured employee in the position of an attendance aide before transferring to a position as a non-tenured classroom aide. Petitioner was laid off from the classroom aide position. The petitioner alleges that the respondent Board violated her tenure rights when it failed to return her to the position of an attendance

aide. Respondent district contends that petitioner's initial position of an attendance aide was not a tenured position and therefore does not have tenure.

The matter was filed as a contested case and received at the Office of Administrative Law (OAL) on or about December 6, 2006. A telephone scheduling conference was conducted on February 6, 2007, and the matter was heard on May 18, 2007. Closing briefs were submitted on June 26, 2007 and the undersigned obtained an order of extension which supplemented the record until September 24, 2007. Additional information was received on November 1, 2007, the record closed on that date.

ISSUES

Was the position of attendance aide a clerical position?
Did petitioner acquire tenure as an attendance aide?

FINDINGS OF FACT

The relevant facts are not in dispute. Based upon the testimony of Amelia Colon-Serrano I **FIND** the relevant **FACTS** to be the following:

Amelia Colon-Serrano was hired by the City of Plainfield Board of Education in October 1984. She was hired as an attendance aide. As an attendance aide she performed all of the duties outlined in joint exhibit marked J-1 except job responsibility numbered seventeen (17).

I **FIND** and it is **STIPULATED** that petitioner did not attain tenure as a classroom aide. I **FIND** and it was further **STIPULATED** that petitioner did not work as an attendance aide throughout the summer at the high school or the elementary school for the summer school programs.

Petitioner was an attendance aide until March of 1994, when she voluntarily transferred to the position of classroom aide. She became a classroom aide in 1994 until July of 2006. On or about July 2006, respondent board notified her that her contract for employment as a classroom aide would not be renewed because she did not meet the mandated requirements of forty-eight college credits. Ms. Colon-Serrano completed high school in 1965 in Puerto Rico, that is the highest level of education she obtained. I **FIND** that petitioner did not receive any special or specific training as an attendance aide.

I **FIND** that as an attendance aide, Ms. Colon-Serrano performed the following duties: She answered the telephones, photocopied all kinds of records, filed student records, prepared reports documenting student absences, completed student transfer forms and performed all the items enumerated in exhibit J-1 except items numbered 16 and 17.

I **FIND** that petitioner over the years worked under the supervision of the various attendance coordinators. Petitioner prepared weekly reports documenting students' absences and gave the reports to the supervising attendance coordinator. I **FIND** that the petitioner was not the attendance officer or coordinator. I **FIND** that petitioner performed ministerial tasks in the attendance office.

DISCUSSION

The relevant statute in this matter is N.J.S.A. 18A:17-2, which provides that:

> ...[a]ny person holding any...clerical position or employment under a board of education of any school district or under any officer thereof, after
>
> 1. The expiration of a period of employment of three consecutive calendar years in the district or such shorter period as may be fixed by the board or officer employing him, or
> 2. Employment for three consecutive academic years, together with employment at the beginning of the next succeeding academic year, an academic year being the

> period between the time when school opens in the district after the general summer vacation and the beginning of the next succeeding summer vacation,...
>
> Shall hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except for neglect, misbehavior or other offense and only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title.

It is settled law that it is the duties performed rather than the title of a position that controls whether or not a position is protected by tenure. Quinlan v. Bd. of Educ. Of North Bergen, 1959-1960 S.L.D. 113, 114, 73 N.J. Super. 40 (App. Div. 1962). In the case of Barnes v. Bd. of Educ. Of Jersey City, 85 N.J. Super. 42 (App. Div. 1964), *certif. den.* 43 *N.J.* 450 (1964). The Appellate Division addressed the intended meaning of the phrase "clerical position" under N.J.S.A. 18:6-27 which, was the predecessor statute to N.J.S.A. 18A:17-2, by conferring tenure on all persons "holding any secretarial or clerical position" under any board of education.

The case of Berardi v. Board of Education of the School district of South Orange and Maplewood, 95 N.J.A.R. 2d (EDU) 239, lends the most guidance in this case. The petitioner in Berardi alleged that she was terminated from her position as a full time "clerical aide" in violation of her tenure rights pursuant to N.J.S.A. 18A:17-2. The instant petitioner, like in Berardi performed mostly clerical duties. It is undisputed that petitioner performed all of the duties outlined in exhibit marked J-1. Petitioner testified that she answered the telephones, answered the phone for her various supervisors, filed, photocopied student records, photocopied papers for her superiors; petitioner testified that she performed the above duties not only for herself or her department but also for the neighboring departments.

Respondent school district contends that petitioner performed predominantly non-clerical duties such as traveling into the community three (3) times a week and interacted with parents and the community. I agree that petitioner performed these

other traditionally non clerical duties but I disagree that these were her predominant duties.

Webster's Ninth New Collegiate Dictionary defines a clerk as a) "an official responsible for correspondence, records, and accounts and vested with specified powers or authority, b) "one employed to keep records or accounts or to perform general office work".

Petitioner in the instant matter performed the duties and responsibilities of a clerk as defined above. I **FIND** she held a clerical position as an attendance aide. In addition, I have considered the fact that petitioner is not a specifically trained attendance aide. Petitioner's highest level of education is her achievement of a high school diploma, which, on its surface, would not qualify her as employable in the category of a paraprofessional.

Therefore, I **CONCLUDE** that petitioner served the requisite time in a clerical position and has earned tenure for the time she served as an attendance aide for the respondent district.

ORDER

It is hereby **ORDERED** that Amelia Colon-Serrano be entitled to bump back into her former position as a clerical employee over and above any non-tenured clerical employee and over and above any clerical employee who has fewer years of service in a clerical position than she.

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

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

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

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

December 13, 2007
DATE

CARIDAD F. RIGO, ALJ

Date Received at Agency:

December 13, 2007

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

DEC 14 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

ljb

APPENDIX

Witnesses:

For petitioner

Amelia Colon-Serrano

Exhibits

J-1 Joint Exhibit job description including duties and responsibilities of an attendance aide.

35-08

OAL DKT. NO. EDU 10535-07
AGENCY DKT. NO. 394-12/07

MIRIAM MCFARLANE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY, ET AL.,	:	DECISION
RESPONDENTS.	:	

The record of this matter, the executed "Settlement Agreement" and "Addendum to Settlement Agreement" (Agreements), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. The Commissioner of Education (Commissioner) approves the terms of the Agreements with one comment.

Section 3 of the Settlement Agreement recites "without agreeing that Petitioner is entitled to attorney's fees, Respondent acknowledges that Petitioner reserves the right to move for compensation of reasonable attorney's fees and damages pursuant to the applicable State and Federal law." This provision is also referenced in Section 5 of the Settlement Agreement.

The Commissioner reminds the parties that it is well established that, due to the lack of express statutory authority for so doing, the Commissioner does not have plenary authority to award counsel fees in determining controversies and disputes presented under Education Law. *Maurice S. Kaprow v. Board of Education of the Township of Berkeley, Ocean County, et al.*, Commissioner Decision No. 260-06, decided August 2, 2006, p.8;

Balsley v. North Hunterdon Bd. of Educ., 117 *N.J.* 434, 442-443 (1990). Thus, the Department of Education is not the proper forum for any such future claim by petitioner. [1]

Accordingly, the Commissioner adopts the Initial Decision as the final decision in this case, supplemented by the foregoing caveat.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/31/08

Date of Mailing: 1/31/08

[1] The Settlement Agreement does not specify the nature of the "damages" sought. Nevertheless, the Commissioner reiterates that any claim for damages that lacks a statutory basis in the education laws may not be entertained by the Commissioner.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10535-07
AGENCY DKT. NO. 394/12/07

MIRIAM MCFARLANE,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY, ET AL,
Respondent.

Lawrence W. Lindsay, Esq., for petitioner (Loughry & Lindsay, attorneys)

Harvey C. Johnson, Esq., for respondent (Wolf, Block, Schorr & Solis-Cohen, attorneys)

Record Closed: January 3, 2008 Decided: January 7, 2008

BEFORE **LAURA SANDERS,** CHIEF ALJ:

This matter was transmitted to the Office of Administrative Law on December 28, 2006, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The matter was then scheduled for oral argument on January 3, 2008.

The parties have agreed to a settlement and have prepared a Settlement Agreement dated January 2, 2008 and an Addendum to Settlement Agreement dated

January 4, 2008 together "The Settlement" indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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

January 7, 2008
DATE

Laura Sanders
LAURA SANDERS, CHIEF ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties: Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JAN 10 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

/ns

ADDENDUM TO SETTLEMENT AGREEMENT

This Addendum to the Settlement Agreement (hereinafter "the Addendum") is intended to be attached to and read with the previously entered Settlement Agreement by and among Miriam McFarlane ("Petitioner") and Calvin Gunning, Merry Ellerbe, Herbert Simons, Woodrow Wilson High School, Dr. Bessie LeFra Young and the City of Camden Board of Education ("Respondent") on January 2, 2008.

WHEREAS, on January 2, 2008, Petitioner and Respondent jointly submitted a Settlement Agreement with the Office of Administrative Law of New Jersey, Docket No. EDU-10535-07; and

WHEREAS, Petitioner and Respondent mutually desire to ensure that all counts contained in Petitioner's Prayer for Relief are addressed by the Settlement Agreement and the Addendum.

NOW, THEREFORE, in consideration of the mutual promises and obligations contained herein, it is additionally hereby agreed as follows:

1. Petitioner's grades will be marked as Incomplete ("INC") for the time that she was not present in school, with the understanding that Petitioner will attend make-up sessions of any missed classes for the purposes of obtaining a letter grade. Any references to INC following Petitioner's completion of her make-up sessions will be removed by the Respondent.

2. Respondent will draft and distribute a memorandum to all staff regarding the already-established policies and law governing the protocol for suspending a student. This memorandum will be discussed at the next available staff meeting to ensure all employees are apprised of the correct procedure.

3. In the event that any provision in this Addendum is determined to be legally invalid or unenforceable by any court of competent jurisdiction, and cannot be modified to be enforceable, the affected provision shall be stricken from the Addendum, and the remaining terms of the Addendum and its enforceability shall remain unaffected thereby.

IN WITNESS WHEREOF, the parties hereby execute this Agreement as set forth below.

By: _____ Dated: 1/4/08
Lawrence W. Lindsay, Esquire
Attorney for Petitioner

By: _____ Dated: 1-4-08
Harvey C. Johnson, Esquire
Attorney for Respondents

36-08

OAL DKT. NO. EDU 8235-07
AGENCY DKT. NO. 266-9/07

UPPER TOWNSHIP EDUCATION ASSOCIATION,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF UPPER, CAPE MAY COUNTY,	:	
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 1/31/08

Date of Mailing: 1/31/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8235-07
AGENCY DKT. NO. 266-9/07

UPPER TOWNSHIP EDUCATION ASSOCIATION,
Petitioner,
v.
BOARD OF EDUCATION OF UPPER TOWNSHIP, CAPE MAY COUNTY,
Respondent.

Ned P. Rogovoy, Esq., for petitioner

Paul C. Kalac, Esq., for respondent (Parker, McCay& Criscuolo, attorneys)

Record Closed: December 24, 2007 Decided: January 8, 2008

BEFORE **LILLARD E. LAW,** ALJ, T/A:

This matter was transmitted to the Office of Administrative Law on October 3, 2007, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures, and as placed on the record on December 18, 2007.

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

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

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

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

January 8, 2008
DATE

Lillard E. Law
LILLARD E. LAW, ALJ, T/A

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 11 2008

DIRECTOR AND ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

/sd

Law Office of
NED P. ROGOVOY, ESQUIRE
A Limited Liability Company

NED P. ROGOVOY, ESQUIRE
Member of NJ Bar

Madison Square Complex
782 S. Brewster Road • Unit A6
Vineland, NJ 08361

(856) 205-9701
Fax: (856) 205-9704

December 21, 2007

RECEIVED
2007 DEC 24 A 10:54
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

Lillard E. Law, T/A,
Administrative Law Judge
Office of Administrative Law
1601 Atlantic Ave., Sixth Floor
Atlantic City, NJ 08401

Re: Upper Township Education Association
Vs: Board of Education of Upper Township, Cape May County
OAL Docket No. EDU-8235-07
Agency Docket No. 266-9/07

Dear Judge Law:

Enclosed please find an original and two copies of the proposed Order which I am submitting to you under the Five-Day Rule.

If the Order meets with your approval and you receive no objections, would you kindly sign same and return a conformed copy to me in the stamped, self-addressed envelope provided.

Thank you.

Very truly yours,

NED P. ROGOVOY

NPR:pal
enc.
c w/enc: Paul C. Kalac, Esquire
Thomas Myers, UniServ Rep.

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OFFICE OF ADMINISTRATIVE LAW

NED P. ROGOVOY, ESQUIRE
782 South Brewster Road, Unit A-6
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(856) 205-9701
Attorney for Petitioner

UPPER TOWNSHIP EDUCATION ASSOCIATION

Petitioner

v.

BOARD OF EDUCATION OF UPPER TOWNSHIP, CAPE MAY COUNTY

OFFICE OF ADMINISTRATIVE LAW

OAL DOCKET NO. EDUTH 08619-2005S
AGENCY DOCKET NO. 2176-10/05

ORDER

This matter having been brought by the petitioner, Upper Township Education Association, represented by Ned P. Rogovoy, Esquire, against the respondent, Board of Education of Upper Township, Cape May County, represented by Paul C. Kalac, Esquire of Parker McCay P.A., and the parties having convened at trial date at 1601 Atlantic Avenue, Atlantic City, New Jersey, before Lillard E. Law, Administrative Law Judge, and the parties having conferred and resolved all issues raised in the Petition;

It is on this 8th day of January, 2008, ORDERED as follows:

1. That the development of the Professional Improvement Plan (PIP) now Professional Development Plan (PDP) for the school year 2008-2009 shall be mutually developed by interaction between the supervisor and the teaching staff member, pursuant to N.J.A.C. 6A:32-4.4(f)3.

2. Pages 1 and 2 of the 2007-2008 Professional Development Plan (PDP) are hereby voided since they were not mutually developed, however, the voiding of pages 1 and 2 and the inclusion of the original page 3 shall remain in tact for the sole purpose of

accumulation of professional development hours and shall act as the Professional Development Plan (PDP) for the remainder of the 2007-2008 school year.

3. Pages 1 and 2, while not mutually developed, were administratively designed for the purpose of:

(a) ensuring compliance with Federal, State and District mandates;

(b) improving the communication channels between the Upper Township School District and the community; and

(c) enabling all staff members to acquire professional development hours toward the accumulation of the required 100 hours of professional development as set forth by New Jersey Administrative Regulations.

Lillard E. Law

LILLARD E. LAW, ALJ, T/A

37-08

OAL DKT. NO. EDU 4685-04
AGENCY DKT. NO. 168-5/04

VALERIE NORTHEY-ARMSTRONG,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner observes that the President of the Franklin Township Board of Education signed the Settlement Agreement with Release and Waiver on behalf of the Board. In that neither the file nor the settlement agreement contains a copy of the Board's resolution approving the settlement and designating this individual to sign the agreement on its behalf – nor, in the alternative, is the agreement signed by the Board attorney, who is the Board's duly authorized representative in litigation – the Commissioner cannot approve the within settlement agreement.

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

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 1/31/08

Date of Mailing: 1/31/08

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4685-04

AGENCY DKT NO. 168-5/04

VALERIE NORTHEY-ARMSTRONG,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, SOMERSET COUNTY,

Respondent.

Michael B. Berman, Esq., for petitioner

Russell Weiss, Jr., Esq., for respondent (Parker McCay, attorneys)

Record Closed: January 7, 2008 Decided: January 9, 2008

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

This matter involves a dispute wherein petitioner seeks reinstatement of sick leave. The case was transmitted to the Office of Administrative Law (OAL) on June 25, 2004, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13 and was assigned to the undersigned Administrative Law Judge (ALJ) for hearing.

Thereafter, the parties requested that the matter be listed inactive, pending the outcome of a Workers' Compensation claim.

On July 26, 2007, attorney for petitioner advised the undersigned that the Workers' Compensation matter was completed. In light of this, the matter was preheard and scheduled for hearing.

Prior to the February 1, 2008, hearing date, the parties filed a fully executed Settlement Agreement, closing the record in this matter on January 7, 2008.

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

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

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

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

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

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

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

January 9, 2008

DATE

DOUGLAS H. HURD, ALJ

Date Received at Agency:

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JAN 11 2008

DATE

OFFICE OF ADMINISTRATIVE LAW

/cs

Law Offices
PARKER McCAY P.A.
1009 Lenox Drive, Suite 102A
Bldg. 4 East
Lawrenceville, New Jersey 08648
(609) 896-4222
Attorneys for Respondent Franklin Township Board of Education

OFFICE OF ADMIN LAW

VALERIE NORTHEY f/k/a VALERIE NORTHEY - ARMSTRONG, Petitioner, vs. FRANKLIN TOWNSHIP BOARD OF EDUCATION (Somerset County) Respondent.	BEFORE THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY OAL Docket No. EDU 4685-05 04 Agency Dkt. No: 168-5/04 SETTLEMENT AGREEMENT with RELEASE and WAIVER

WHEREAS the above matter, by which petitioner seeks reinstatement of fifty-four (54) sick leave days, is currently pending between parties to this Agreement; and

WHEREAS the parties agree that it would be in their mutual best interest to settle this matter by reinstating one-half of the sick leave days in dispute; and

WHEREAS parties wish to waive all rights to further litigation over the issues in this matter; now, therefore, the parties

RESOLVE and agree to the following terms:

1. **Mutual releases and waiver of right to sue.**

1.1. By entering into this Agreement each party releases the other with respect to all claims and rights that either party may have against or involving the other at the present time, regarding the issues in the above matter. This release includes a release of all claims petitioner may have or wish to pursue against the Board and all claims against all agents of the Board, regarding the issues in the above matter. (For purposes of this Agreement, the term "agent of the Board" includes all members of the Board and all employees of the Board.)

1.2. The parties agree that neither party will bring any action or file any suit or claim against the other or against any agent of the Board, regarding the issues in the above matter. Any such matters, claims, suits or charges which may be pending at any level shall be withdrawn as soon as this Agreement is signed by the Parties.

1.3. This release includes a waiver of all rights, regarding the issues in the above matter, to sue or bring a grievance or claim of any type, including rights secured by Board policy, collective bargaining agreement, employment contract, employment laws, civil rights laws and all other state and federal laws.

2. **Reinstatement of sick leave.**

2.1. Upon the approval of this Settlement Agreement and the dismissal of the pending matter with prejudice, twenty-seven (27) sick leave days, out of the fifty-four (54) sick leave days at issue in the above matter, will be restored to petitioner's sick leave bank. The remaining sick leave days will be considered to have been properly charged, and will not be restored.

2.2. There will be no other compensation to petitioner.

3. **Opportunity to consult attorney; voluntariness.** The parties acknowledge that each has had ample opportunity to seek independent legal counsel, financial or other advice regarding this Agreement. The parties further acknowledge that each party fully understands the terms of this Agreement, and that each party is signing this Agreement freely and voluntarily, without any coercion, duress or pressure from the other party.

4. **Entire agreement.** This document, together with the proposed Order placed before the Administrative Law Judge, contain the entire agreement of the parties and neither may be altered, amended or modified except by instrument in writing signed by the parties.

Please read this Agreement carefully before signing.

Valerie Northey f/k/a Valerie Northey - Armstrong

_____ Witness:_____
petitioner print name:

date_____

Franklin Township Board of Education (Somerset County)

Eva M Nagy Witness: [signature]
by: Eva M. Nagy, President print name:
Gary P. Hall

date 12/20/07

4. **Entire agreement.** This document, together with the proposed Order placed before the Administrative Law Judge, contain the entire agreement of the parties and neither may be altered, amended or modified except by instrument in writing signed by the parties.

Please read this Agreement carefully before signing.

Valerie Northey f/k/a Valerie Northey - Armstrong

petitioner

date 12/8/07

Witness: _____

print name: Anna Thomas Abraham

Franklin Township Board of Education (Somerset County)

by: Eva M. Nagy, President

Witness: _____

print name:

date _____

38-08

#38-08SEC

AGENCY DKT. NO. 317-10/07

IN THE MATTER OF JUANDA BOXLEY,	:	
NEW HORIZONS COMMUNITY	:	COMMISSIONER OF EDUCATION
CHARTER SCHOOL, ESSEX COUNTY.	:	**AMENDED DECISION**
	:	

On November 19, 2007, the Commissioner of Education (Commissioner) rendered a decision concurring with the October 11, 2007 recommendation of the School Ethics Commission (Commission) that the respondent Board member be removed from office – effective upon filing of the Commissioner's decision – for failure to attend the Board member training required by *N.J.S.A.* 18A:12-33.

Subsequently, by letter dated December 20, 2007, the Executive Director of the School Ethics Commission advised respondent – and the Commissioner – that the Commission had voted on December 18, 2007 to vacate its prior decision finding respondent in violation of the School Ethics Act, since the respondent – who resigned from her position on July 1, 2006 – had been the Director of the charter school, not a voting member of the Board of Trustees, and as such was not required to undergo new board member training.

Accordingly, the finding of violation upon which it was based having now been vacated by the Commission, the Commissioner's decision of November 19, 2007 is concomitantly VACATED and shall be deemed of no force and effect.

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 1/30/08

Date of Mailing: 1/31/08

State of New Jersey

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

JON S. CORZINE
Governor

LUCILLE E. DAVY
Commissioner

December 20, 2007

Ms. Juanda Boxley
New Horizons Community Charter School
45-59 Hayes Street
Newark, NJ 07103

Subject: Withdrawal of Order to Show Cause
School Ethics Commission Docket No. T13-07
Agency Docket No. 317-10/07
Commissioner Decision No. 454-07SEC

Dear Ms. Boxley:

You received an Order to Show Cause (OTSC) on August 17, 2007 from the School Ethics Commission based upon information that you failed to attend training within the first year of your first term on the New Horizons Community Charter School Board of Trustees (Board). You did not respond to the OTSC. At its September 25, 2007 meeting, the Commission found that you violated N.J.S.A. 18A:12-33 and recommended that the Commissioner of Education impose a penalty of suspension from the Board until you attended the October 23, 2007 training session and removal if you failed to attend the October 23, 2007 training session. No comments were filed with the Commissioner and you did not attend the October 23, 2007 training session. By decision dated November 19, 2007, the Commissioner concurred with the penalty of removal recommended by the Commission and removed you as of November 24, 2007.

However, on December 3, 2007, the Commission received correspondence from the current Director of the New Horizons Community Charter School indicating that you resigned from your position of Director as of July 1, 2006. As Director of the New Horizons Charter School, you were not a voting member of the board of trustees. Thus, under N.J.S.A. 18A:12-33, you were not required to undergo new board member training. Therefore, at its December 18, 2007 meeting, the Commission voted to withdraw its Order to Show Cause and vacate its September 25, 2007 Decision for Failure to Attend Training in this matter.

By copy of this letter to Kathleen Duncan, Director of Controversies and Disputes, the Commission is providing this information to the Commissioner of Education to take action as she deems appropriate based upon this information received

by the School Ethics Commission subsequent to the issuance of the Commissioner's decision.

We are sorry for any inconvenience that this may have caused you.

Sincerely,

Joanne Boyle, Executive Director
School Ethics Commission

JB/MET/training/correspondence/T13-07 withdraw OTSC
c: Board Secretary
County Superintendent
Kathleen Duncan
Walter Meyer, NJSBA

#39-08SEC

39-08

AGENCY DKT. NO. 15-1/08

IN THE MATTER OF SERAFINA BANICH,	:	
BOARD OF EDUCATION OF THE BOROUGH	:	COMMISSIONER OF EDUCATION
OF SEA BRIGHT, MONMOUTH COUNTY.	:	DECISION

On January 2, 2008, this matter was forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 for review of the penalty recommended by the School Ethics Commission in light of its finding that the respondent had violated the School Ethics Act through failure to file requisite disclosure statements.

However – prior to issuance of a final decision – the Commissioner was advised that, on January 22, 2008, the Commission had voted to vacate its prior decision due to its discovery that the respondent had, in fact, filed statements as required.

Accordingly, given that the finding of violation upon which it was based has now been vacated by the Commission, this matter is deemed withdrawn and dismissed as a controversy before the Commissioner.

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 1/30/08

Date of Mailing: 1/31/08

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

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	**Docket No.: D20-07**
SERAFINA BANICH SEA BRIGHT BOARD OF EDUCATION MONMOUTH COUNTY	:	**RESOLUTION VACATING DECISION FOR FAILURE TO FILE DISCLOSURE STATEMENTS**

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

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

WHEREAS, at its December 18, 2007 meeting, the Commission found that Ms. Banich had violated N.J.S.A. 18A:12-25 and 26 and recommended that the Commissioner of Education impose a sanction of suspension until she files the disclosure statements, removal if the disclosure statements are not filed within 30 days of the Commissioner's decision on penalty, and censure if the disclosure statements are filed prior to issuance of the Commissioner's decision; and

WHEREAS, the Commission received information from Ms. Banich, which the county office verified, that Ms. Banich timely filed her disclosure statements after she became a voting member on the Oceanport Board of Education; and

WHEREAS, the Commission finds that Sarafina Banich did not violate N.J.S.A. 18A:12-25 and 26;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission hereby vacates its December 18, 2007 decision on this matter and its penalty recommendation to the Commissioner of Education and forwards this decision to the Commissioner of Education to take action as she deems appropriate.

Paul C. Garbarini, Chairperson
School Ethics Commission

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on January 22, 2008.

Joanne Boyle
Executive Director

40-08

#40-08E

OAL DKT. NO. EDU 12495-07
AGENCY DKT. NO. 368-12/07

JEFFREY JACOVINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST MILFORD, PASSAIC COUNTY,	:	DECISION ON APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this matter – including the audiotape of proceedings conducted at the Office of Administrative Law (OAL) on January 7, 2008 – and the recommended Order of the OAL have been reviewed.

Upon such review, it was evident that the Administrative Law Judge (ALJ) contemplated that her findings and conclusion in this matter were sufficient to constitute a recommendation on the underlying appeal – notwithstanding that her decision was issued in the form of an Order. Therefore, the parties were provided an opportunity to object to resolution of this matter on emergent motion and invited to file exceptions and/or reply exceptions to the ALJ's decision pursuant to *N.J.A.C.* 1:1-18.4. Exceptions of the Board and petitioner's reply thereto were timely filed.

After a comprehensive review of the audiotape of proceedings conducted below – along with papers filed in support of and in opposition to the grant of emergent relief and arguments advanced in exceptions – I have determined to reject the ALJ's recommended grant of petitioner's emergent application in this matter.

The record here evidences the following uncontested facts:

- Petitioner is a 12th grade student in the West Milford School District.
- While a student in the district, Petitioner has amassed eight suspensions, seven of which were for the use of vulgar language toward staff members.
- Petitioner was most recently suspended – pending a Board hearing – on October 26, 2007. A school staff member suspected that petitioner was under the influence of drugs or alcohol and asked that the district's substance abuse policy be invoked. Petitioner tested positive for a controlled dangerous substance.
- Subsequent to conducting an administrative due process hearing on November 20, 2007, the Board passed a resolution suspending petitioner for the remainder of the academic year.
- Petitioner was provided with an alternative educational placement at Memorial Hall in Bloomfield, New Jersey, which he rejected. Since that time the Board has attempted, with varying degrees of success, to provide home schooling.
- Petitioner has interposed a number of challenges to the validity of the Board's action, and his application here seeks that he be immediately returned to the District's regular educational program.

It is well-established that the granting of emergent relief is an extraordinary remedy that can only be awarded when the party seeking such relief demonstrates the existence of **each** of four separate conditions: 1) that the petitioner will suffer irreparable harm if the requested relief is not granted; 2) that the legal right underlying petitioner's claim is settled; 3) that there is a likelihood that petitioner will prevail on the merits of the underlying controversy; 4) that when the equities and interests of the parties are balanced, the petitioner

will suffer greater harm than the respondent if the requested relief is not granted. (See *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). The Commissioner finds that the instant matter is replete with significant factual disputes requiring resolution through testimony and evidence before a conclusion can be reached as to the propriety of the Board's challenged action.[1] Such factual disputes – at a very minimum – preclude a finding that petitioner has sustained his burden of establishing either that the legal right underlying his claim is settled or that there is a likelihood that he will ultimately prevail on the merits of the underlying controversy. Consequently, his emergent application must be denied.

Accordingly, the recommended Order of the OAL is rejected. This case shall proceed at the OAL for a hearing on its merits which, due to the circumstances of this matter, should – to the greatest extent possible – be conducted on an expedited basis. The Board is directed to pay tuition and transportation costs for Jeffrey Jacovino's attendance at the alternative education program at Memorial Hall, should petitioner elect to avail himself of this option, or – in the alternative – it must ensure that he is provided home instruction pending final adjudication of this matter.

IT IS SO ORDERED.[2]

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 1/31/08

Date of Mailing: 1/31/08

[1] Indeed, as recognized by the ALJ a number of times during the course of the hearing, "with respect to this incident we have more questions than answers." (Audiotape of January 7, 2008 hearing)

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
EMERGENT RELIEF
OAL DKT. NO. EDU 12495-07
AGENCY DKT. NO. 368-12/07

JEFFREY JACOVINO,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST MILFORD, PASSAIC COUNTY,
Respondent.

Jeffrey Jacovino, pro se

Michael Rowan, Esq., for respondent (Porzio, Bromberg & Newman, P.C., attorneys)

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

This matter having been opened on the filing of a petition for emergent relief, submitted by petitioner, Jeffrey Jacovino, and respondent, Board of Education of the Township of West Milford, Passaic County having been represented by Porzio, Bromberg & Newman, P.C., Michael Rowan, Esq. appearing, and the undersigned having considered the moving papers, Certification and exhibits submitted by the petitioner, and opposition papers, Certification and exhibits submitted by respondent and having heard the arguments of petitioner and of counsel for respondent, and for good cause shown, and

The undersigned having further determined from the proofs, as more particularly set forth in the oral decision rendered on January 7, 2008, that petitioner has met the standards to grant emergent relief as set forth in N.J.A.C. 6A:3-1.6, pursuant to Crowe v. DeGioia, 90 N.J. 126 (1986), that:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;

2. The legal right underlying petitioner's claim is settled;

3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

4. When the equities and interest of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

IT IS therefore on this 7th day of January, 2007,

ORDERED that petitioner's application for emergency relief is **GRANTED**.

No issues remain and no further relief was being sought.

IT IS FURTHER ORDERED that a copy of the within **ORDER** be served upon all parties within 7 days of receipt.

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

January 7, 2008
DATE

LESLIE Z. CELENTANO, ALJ

da

#41-08

OAL DKT. NO. EDU 2659-07
AGENCY DKT. NO. 25-1/07

BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION DECISION
C.G. and L.G. on behalf of minor child, C.G.,	:	
RESPONDENTS.	:	

The record of this matter, the executed "Stipulation to Dismiss Certain Parties" (Stipulation), the "Full and Complete Release and Settlement" (Release), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. The Commissioner approves the terms of the Stipulation and Release with one comment.

Section 2 of the Release recites that respondent will pay petitioner installments of $1,060 on a monthly basis beginning in November 2007 and ending on May 1, 2008. Thus, these provisions anticipated that certain conduct would occur on a date that ultimately fell before the Settlement was considered by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves same.

Accordingly, the Commissioner adopts the Initial Decision as the final decision in this case, providing that the parties have already implemented the settlement terms, or have agreed upon a mutually satisfactory alternate date for effectuation of same.

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 1/31/08

Date of Mailing: 2/01/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2659-07

AGENCY DKT. NO. 25-1/07

BOARD OF EDUCATION OF THE TOWSNHIP OF PENNSAUKEN,

Petitioner,

v.

C.G. AND L.G. ON BEHALF OF C.G.,

Respondents.

Karl N. McConnell, Esq., for petitioner (Quinlan, Dunne & McConnell, attorneys)

Phinorice J. Boldin, Esq., for respondent (Fineman, Krekstein & Harris, attorneys)

Record Closed: December 20, 2007 Decided: December 20, 2007

BEFORE **JOSEPH F. FIDLER**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on May 3, 2007, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a settlement agreement indicating the terms thereof, along with a Stipulation to Dismiss, which are both attached and fully incorporated herein.

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

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

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

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

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

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

December 20, 2007
DATE

Joseph F Fidler
JOSEPH F. FIDLER, ALJ

Date Received at Agency:

DEC 2 1 2007
DATE

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

/cad

FINEMAN KREKSTEIN & HARRIS, P.C.

A Pennsylvania Professional Corporation

ATTORNEYS-AT-LAW

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WASHINGTON, D.C. OFFICE
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Washington, DC 20036
(202) 207-1005
Fax: (202) 331-1663

RECEIVED
2007 DEC 20 A 10:50
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

PLEASE REPLY TO PHILADELPHIA

December 17, 2007

The Honorable Joseph Fidler
State of New Jersey
Office of Administrative Law
Quakerbridge Plaza, Building 9
P.O. Box 049
Mercerville, NJ 08625-0049

Re: Township of Pennsauken Board of Education v. Gilliam, et al
OAL Docket No. EDUOS 02659-2007S
Agency Docket No. 25-1/07
Our File No. 3111-19282

Township of Pennsauken Board of Education v. Robert D. Davis, et.al
OAL Docket No. EDUOS 02369-07-
Agency Docket No. 27-1/07

Dear Judge Fidler:

Attached hereto, for filing in the above entitled matter, is a copy of the fully executed Release related to the claims asserted against the Gilliams in the above entitled matter. Also attached are the original and one copy of the fully executed Stipulation dismissing the claims asserted against the Gilliams. We assume that the filing of the attached documents with you effectuates the dismissal of the claims asserted against the Gilliams.

If you have any questions, or if you require any additional information to effectuate the dismissal of the claims against the Gilliams, please let me know. Thank you for your time and attention.

Very truly yours,

Phinorice J. Boldin

PJB/jgm
Cc: Karl N. McConnell, Esquire
Mr. and Mrs. Curtis Gilliam
{00082780;v1}

FINEMAN KREKSTEIN & HARRIS, P.C.
By: Phinorice J. Boldin, Esquire
Hema Patel Mehta, Esquire
30 S. 17th Street, Suite 1800
Philadelphia, PA 19103-5413
(215) 893-9300

Attorney for Respondents C. G. and L. G.,
on behalf of Minor Child C.G.

RECEIVED
2007 DEC 20 A 10: 50
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

TOWNSHIP OF PENNSAUKEN BOARD OF EDUCATION	:	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
Petitioner	:	DOCKET NO. 25 – 1/07
v.	:	CIVIL ACTION
C.G. AND L.G., ON BEHALF OF MINOR CHILD C.G.	:	
Respondents		

STIPULATION TO DISMISS CERTAIN PARTIES

AND NOW, this 22 day of October, 2007, the parties by and through their undersigned counsel, hereby agree that C. G. and L. G., individually and on behalf of Minor Child C. G. are hereby dismissed from this action, with prejudice.

QUINLAN, DUNNE& McCONNELL, LLC

Karl McConnell, Esquire
Attorneys for Petitioner Board of Education
for the Town of Pennsauken
16 North Center Street
Merchantville, New Jersey 08109-2519
(856)665-4141

FINEMAN KREKSTEIN & HARRIS, P.C.

Phinorice J. Boldin, Esquire
Hema Patel Mehta, Esquire
Attorneys for Respondents C. G. and L. G.
30 S. 17th Street, Suite 1800
Philadelphia, PA 19103-5413
(215) 893-9300

FINEMAN KREKSTEIN & HARRIS, P.C.
By: Phinorice J. Boldin, Esquire
Hema Patel Mehta, Esquire
30 S. 17th Street, Suite 1800
Philadelphia, PA 19103-5413
(215) 893-9300

Attorney for Respondents C. G. and L. G., on behalf of Minor Child C.G.

RECEIVED
2007 DEC 20 A 10:50
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

TOWNSHIP OF PENNSAUKEN BOARD OF EDUCATION	:	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
Petitioner	:	DOCKET NO. 25 – 1/07
v.	:	CIVIL ACTION
C.G. AND L.G., ON BEHALF OF MINOR CHILD C.G.	:	
Respondents		

STIPULATION TO DISMISS CERTAIN PARTIES

AND NOW, this 22 day of October, 2007, the parties by and through their undersigned counsel, hereby agree that C. G. and L. G., individually and on behalf of Minor Child C. G. are hereby dismissed from this action, with prejudice.

QUINLAN, DUNNE & McCONNELL, LLC

Karl McConnell, Esquire
Attorneys for Petitioner Board of Education
for the Town of Pennsauken
16 North Center Street
Merchantville, New Jersey 08109-2519
(856)665-4141

FINEMAN KREKSTEIN & HARRIS, P.C.

Phinorice J. Boldin, Esquire
Hema Patel Mehta, Esquire
Attorneys for Respondents C. G. and L. G.
30 S. 17th Street, Suite 1800
Philadelphia, PA 19103-5413
(215) 893-9300

FULL AND COMPLETE RELEASE AND SETTLEMENT AGREEMENT
- READ IT CAREFULLY -

2007 DEC 20 A 10:50

This Release, dated October [insert date], 2007, is given by **the Releasors**, Board of Education of the Township of Pennsauken (/a/ka the Pennsauken Board of Education) (hereinafter referred to as **"We"**, **Us**, **Our**, and/or the **"Releasors"**), to **the Releasees** Curtis Gilliam and LaTanya Gilliam (a/k/a C. G. and L. G., respectively), individually and on behalf of C.G., a minor (hereinafter referred to as **"You"** , **"Your"**, and/or **"Releasees"**).

1. Release. **We** release and give up any and all claims and rights which **We** may have against **You**. This releases all claims, including those of which **We** are not aware and those not mentioned in this Release. This Release applies to claims resulting from anything which has happened up to now. **We** specifically release the following claims:

Any and all claims for reimbursement of tuition, transportation costs, and any other fees, costs, expenses related to and/or arising out of the attendance of C. G. (a minor) at the Leap Charter School during the 2005 – 2007 period; including, but not limited to, any and all claims, including claims for attorneys fees, which were asserted and which could have been asserted in the lawsuit instituted with State of New Jersey Office of Administrate Law entitled ***Board of Education of the Township of Pennsauken v. C.G. and L.G. on behalf of Minor Child C. G., Agency Docket No. 25-1/07; OAL Docket No. EDUOS 02659-2007S*** (the "Administrative Action").

In consideration for making this Release, **You** have agreed to pay **Us** a settlement of $7,417.98 (the "Payment"), as described in the Paragraph 2 of this Release. **We** understand and agree that **We** will not seek anything further, including any other payments from **You**.

It is also understood and agreed that **Our** acceptance of the above mentioned Payment is in full accord and satisfaction and in compromise of all disputed claims; and that the Payment thereof is not an admission of liability, but is made for the purpose of terminating all disputes and litigation between the parties.

2. Payment. In consideration of the Release set forth herein, the **Releasees** hereby agree to make the Payment in monthly installments, as set forth below, after the execution of this Release:

(a)	November 1, 2007	- $1,060.00;
(b)	December 1, 2007	- $1,060.00;
(c)	January 1, 2008	- $1,060.00;
(d)	February 1, 2008	- $1,060.00;
(e)	March 1, 2008	- $1,060.00;
(f)	April 1, 2008	- $1,060.00;
(g)	May 1, 2008	- $1,057.98.

3. Who is Bound. **We** are bound by this Release. Anyone who succeeds to **Our** rights and responsibilities, such as **Our** executors, administrators, successors, assigns and heirs are also

bound. This Release is made for **Your** benefit and all who succeed to **Your** rights and responsibilities, such as **Your** heirs, executors, next of kin, administrators, successors and assigns.

4. Confidentiality: By execution of this instrument, **We** acknowledge that **We** have not disclosed the financial terms of this settlement. The terms of this settlement shall remain strictly confidential and shall not be disclosed to any person or other entity with the exception of **Our** attorney, accountant, or as may otherwise be compelled by a court of competent jurisdiction. Disclosure to **Our** attorney and accountant shall be made with the proviso that those individuals shall be informed of the confidential nature of this settlement. **We** shall be responsible for any third-party disclosure made by any individual to whom **We** have divulged financial information concerning the terms of this settlement. **We** specifically acknowledge that the terms of this paragraph concerning confidentiality are contractual and not merely recital and that the confidentiality provisions of this instrument represent a material consideration on **Your** part and represent a material part of **Your** decision to make the Payment described herein.

5. Dismissal of the Action: **We** agree that **We** will take all steps necessary and required to effectuate the dismissal, with prejudice, of the Administrative Action described above.

6. Signatures. **We** understand and agree to the terms of this Release.

Board of Education for the Township of Pennsauken, New Jersey

Witness:

By: James F. Chapman, Superintendent and Chief School Administrator for the Board of Education for the Township of Pennsauken, New Jersey

bound. This Release is made for **Your** benefit and all who succeed to **Your** rights and responsibilities, such as **Your** heirs, executors, next of kin, administrators, successors and assigns.

4. Confidentiality: By execution of this instrument, **We** acknowledge that **We** have not disclosed the financial terms of this settlement. The terms of this settlement shall remain strictly confidential and shall not be disclosed to any person or other entity with the exception of **Our** attorney, accountant, or as may otherwise be compelled by a court of competent jurisdiction. Disclosure to **Our** attorney and accountant shall be made with the proviso that those individuals shall be informed of the confidential nature of this settlement. **We** shall be responsible for any third-party disclosure made by any individual to whom **We** have divulged financial information concerning the terms of this settlement. **We** specifically acknowledge that the terms of this paragraph concerning confidentiality are contractual and not merely recital and that the confidentiality provisions of this instrument represent a material consideration on **Your** part and represent a material part of **Your** decision to make the Payment described herein.

5. Dismissal of the Action: **We** agree that **We** will take all steps necessary and required to effectuate the dismissal, with prejudice, of the Administrative Action described above.

6. Signatures. **We** understand and agree to the terms of this Release.

Board of Education for the Township of Pennsauken, New Jersey

Witness:

_____

By: _____
James F. Chapman, Superintendent and Chief School Administrator for the Board of Education for the Township of Pennsauken, New Jersey

Witness:

_____

By: _____
Curtis Gilliam

Witness:

_____

By: _____
LaTanya Gilliam

42-08

AGENCY DKT. NO. 11-1/08

IN THE MATTER OF AMANDA NAPOLITANI,	:	
INTERLAKEN BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
MONMOUTH COUNTY.	:	DECISION
	:	

The record of this matter, the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 solely for review of the Commission's recommended penalty, and respondent's comments have been reviewed, as have exceptions filed by the respondent pursuant to *N.J.A.C.* 1:6C-18.3.

In her exceptions, the respondent conveyed the reasons why she believes that the sanction of reprimand should not be imposed upon her. More specifically, respondent states that her omission of income information on her disclosure form was inadvertent and that she was not aware of the deadline for resubmissions.

Upon review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to timely and fully file the requisite disclosure statement, in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials. While the Commissioner appreciates the respondent's good intentions, the fact remains that the Commission found a violation to have occurred, and the Commissioner cannot disagree that a penalty is warranted even where the violation resulted from oversight rather than deliberate disregard of the law.[1]

[1] The Commissioner notes that reprimand is the least of the penalties available for imposition under the School Ethics Act.

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

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 2/01/08

Date of Mailing: 2/01/08

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

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	**Docket No.: D14-07**
AMANDA NAPOLITANI INTERLAKEN BOARD OF EDUCATION MONMOUTH COUNTY	:	**DECISION FOR FAILURE TO FILE DISCLOSURE STATEMENTS**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued on November 20, 2007, through regular and certified mail return receipt requested, directing Amanda Napolitani, a "school official" under N.J.S.A. 18A:12-23 of the School Ethics Act, to show cause as to why the Commission should not find the school official in violation of the School Ethics Act, (Act) N.J.S.A. 18A:12-21 et seq., for failing to file personal/relative and financial disclosure statements pursuant to N.J.S.A. 18A:12-25 and 26. In its letter enclosing the OTSC, the Commission provided notification that this school official had 20 days to respond to the OTSC, that the Commission would discuss this matter at its December 18, 2007 meeting, that the school official had the right to attend the meeting, and that the school official could be found in violation of the Act and receive a penalty up to removal. The school official filed the disclosure statements on November 28, 2007.

The school official did not appear at the Commission's meeting of December 18, 2007, at which time the Commission found probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission also found that the material facts were not in dispute and, therefore the Commission found that the school official's failure to timely file the disclosure statements was a clear violation of N.J.S.A. 18A:12-25 and 26. The Commission recommended that the Commissioner of Education impose a sanction of reprimand.

ANALYSIS

N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file personal/relative and financial disclosure statements and N.J.S.A. 18A:12-26 requires each school official to file the personal/relative and financial disclosure statements with the School Ethics Commission. The deadline to file these disclosure statements was April 30, 2007 for school officials in office since January 30, 2006 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators. The School Ethics Commission was advised by the County Superintendent that this school official did not file the disclosure statements as required by the Act. The Commission notes that the school official filed the disclosure statements on November 28, 2007. The Commission finds probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The

Commission also finds that the material facts are not in dispute and, therefore the school official's failure to timely file the disclosure statements constitutes a clear violation of N.J.S.A. 18A:12-25 and 26.

DECISION/PENALTY RECOMMENDATION

Based on the foregoing, the Commission finds that Amanda Napolitani violated N.J.S.A. 18A:12-25 and 26. The Commission recommends that the Commissioner of Education impose a sanction of reprimand.

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

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – D14-07

Whereas, the School Ethics Commission has considered its Order to Show Cause in this matter; and

Whereas, at its meeting of December 18, 2007, the Commission found that Amanda Napolitani violated N.J.S.A. 18A:12-25 and 26; and

Whereas, at its meeting of December 18, 2007, the Commission recommended that the Commissioner of Education impose a sanction of reprimand; and

Whereas, the Commission reviewed this draft decision as prepared by its staff;

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

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on December 18, 2007.

Joanne Boyle
Executive Director

PCG/LJB/MET/ethics/financial disclosure/decisions/D14-07 reprimand

#43-08

KAREN VUKSAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, a teacher employed by the Board, contends that she should have been compensated for five days of spring recess, when she would have been able to return to work following a period of approved medical leave. Petitioner exhausted her sick leave and was placed on unpaid leave for the period immediately preceding the District's spring break. Respondent Board urges that it was within its managerial discretion to extend petitioner's unpaid leave pursuant to *N.J.S.A.* 18A:30-7 and the District's collective bargaining agreement.

The ALJ found that: the collective bargaining agreement allows the Board, at its discretion, to change the requested date for the resumption of duties following an unpaid leave, provided that the date change is not medically contraindicated; the Board properly exercised its discretion to determine the petitioner's duties would resume following spring recess; and petitioner is not entitled to wages for days in which the schools were closed for spring recess since she did not resume her teaching duties until after recess was over. The ALJ ordered the determination of the respondent be affirmed.

Upon careful and independent review, the Commissioner concurs with the ALJ that the petitioner is not entitled to relief. Accordingly, the Initial Decision of the OAL is adopted, and the instant petition is dismissed.

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

February 1, 2008

OAL DKT. NO. EDU 9693-05
AGENCY DKT. NO. 184-7/05

KAREN VUKSAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

On exception petitioner essentially recasts and reiterates her arguments advanced below. As it is determined that the Administrative Law Judge's (ALJ) decision fully considered and addressed all of petitioner's credible advancements, these will not be revisited here.

Upon careful and independent review, the Commissioner concurs with the ALJ – for the reasons clearly stated in her decision – that petitioner is not entitled to the relief she seeks.

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

IT IS SO ORDERED.*

Lucille Davy
COMMISSIONER OF EDUCATION

Date of Decision: 2/01/08

Date of Mailing: 2/01/08

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9693-05
AGENCY DKT. NO. 184-7/05

KAREN VUKSAN,
Petitioner,
v.
BOARD OF EDUCATION OF CITY OF CLIFTON, PASSAIC COUNTY,
Respondent.

Richard A. Friedman, Esq., for petitioner
(Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Anthony P. Sciarrillo, Esq., and **Jeffery R. Merlino**, Esq., for respondent
(Lindabury, McCormick & Estabrook, P.A. attorneys)

Record Closed: September 25, 2007 Decided: December 24, 2007

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Karen Vuksan, a teacher employed by respondent Clifton Board of Education, contends she should have been compensated for days during spring recess. On August 25, 2005, the matter was transmitted to the Office of Administrative Law

(OAL) pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The parties filed cross motions for summation decision. The undersigned reviewed the documents and closed the record on September 25, 2007. The forty-five (45) day statutory period within which to file the initial decision with the Department of Education expired on November 9, 2007. Based on the administrative law judge's voluminous case load, a forty-five (45) day extension of time to complete the initial decision was granted. N.J.S.A. 52:14B-10(c) and N.J.A.C. 1:1-18.8.

FACTS

The relevant facts are undisputed. Therefore, I **FIND**:

1. In September 2003, Petitioner began employment in the Clifton School District.
2. Petitioner is certified with endorsements in English and elementary education.
3. Pursuant to Petitioner's employment contract for the 2004-2005 school-year she held a full time ten month position for an annual salary of $42,640.00, to be paid in twenty (20) equal semi-monthly installments of $2,132.00.
4. From April 4 to April 23, 2005, Petitioner was on approved medical leave.
5. Petitioner used accumulated sick leave from April 4 to April 11, 2005, on which date she exhausted her sick leave.
6. On April 12, 2005, Petitioner was placed on unpaid sick leave for April 12, 13, 14, and 15, 2005.
7. Petitioner was on unpaid leave for the week of April 18, 2005.
8. On April 15, 2005, Petitioner received her regular semi-monthly gross pay of $2,133.35.
9. During the month of May 2005, respondent deducted monies from Petitioner's paychecks for the four (4) days in April 2005, in which Petitioner exhausted her accumulated sick. (April 12, 13, 14, and 15, 2005).

10. Petitioner did not receive a paycheck on April 30, 2005.
11. Petitioner's physician cleared her to return to work after April 23, 2005.
12. April 23, 2005 fell on a Saturday.
13. Petitioner would have returned to her classroom on Monday, April 25, 2005. However, spring recess began on Monday, April 25, 2005 and school was closed for five (5) days from April 25 to April 29, 2005.
14. Petitioner returned to her classroom when school reopened on Monday, May 2, 2005.
15. Article X of the collective bargaining agreement between Respondent and Clifton Teachers' Association addresses teacher absences. Paragraph B(11)(f) provides, "Whenever, in the opinion of the Board, the requested date of commencement of an unpaid disability leave or the requested date for the resumption of duties would substantially interfere with the administration of the school district or the education of pupils, the requested dates may be changed by the Board, provided that such date change is not medically contraindicated."
16. Article X B(4) of the collective bargaining agreement provides that teaching staff members may take a maximum of five (5) days leave of absence during a school year in connection with that teaching staff member's own marriage, and further provides that a ten-month teaching staff member will be "docked" 1/200th of his or her annual salary for each such day of absence. The language implies that one day's pay is equivalent to 1/200th of a ten-month teacher's annual salary.

ISSUE

Did the Board properly calculate petitioner's compensation?

Position of the Parties

Petitioner asserts she was ready and able to return to work on April 24, 2005, but it was impossible, due to the school closure. Therefore, the Board impermissibly

"docked" her pay for the period of spring break. Petitioner further claims she was subjected to disparate treatment because other teachers, not on sick leave immediately before the spring break, received their salary for that period. Petitioner relies on N.J.S.A.18A:27-6(3), which sets forth the method of payment to be included in the contract. For example, her salary is predicated on twenty (20) equal monthly installments while school is in session. Petitioner maintains the Board impermissibly calculated her salary on a *per diem* basis. Petitioner maintains she was ready to return to work and she should have been paid, even though she had not accumulated sufficient sick-time to cover the week school was closed for spring break. She relies on Parker v. Board of Education of Hammonton, 1980 S.L.D. 58; Brunner v. Upper Freehold Regional Board of Education, 1980 S.L.D. 1093; Leeb v. Board of Education of the Township of Holland, 1988 S.L.D 2003; Tucker v. Board of Education of the Township of Montgomery, EDU 6393-03, Initial Decision, (June 20, 2005), adopted, Comm'r. (August 3, 2005) http://lawlibrary.rutgers.edu/oal/search.html.

The Board argues that it was within its managerial discretion to extend petitioner's unpaid leave pursuant to N.J.S.A. 18A:30-7, and Article X, B(11)(f) of the Collective Bargaining agreement , which states:

> Whenever, in the opinion of the Board, the requested date of commencement of an unpaid disability leave or the requested date for the resumption of duties would substantially interfere with the administration of the school district or the education of pupils, the requested dates may be changed by the Board, provided that such date change is not medically contraindicated.
>
> [Id.]

DICUSSION

The pivotal issue concerns a school teacher who was on sick leave, had exhausted her leave time, and was not paid for the spring recess, which commenced on the Monday following date she was medically cleared to return to work. I have considered carefully Petitioner's position. The cases relied on address the method

applied to calculate the final paychecks upon acceptance of the resignations of school employees. In each instance, the employees were not completing their contracts and the Boards calculated their final salary on a per diem basis. There the Boards were admonished for violating their own rules. (Parker v. Board of Education of Hammonton, 1980 S.L.D. 58; Brunner v. Upper Freehold Regional Board of Education, 1980 S.L.D. 1093; Leeb v. Board of Education of the Township of Holland, 1988 S.L.D. 2003).

However, in Tucker v. Board of Education of the Township of Montgomery, EDU 6393-03, Initial Decision, (June 20, 2005), adopted, Comm'r. (August 3, 2005) http://lawlibrary.rutgers.edu/oal/search.html, petitioner ended her maternity leave, returned to work the day before spring break, and was placed on pay status. Tucker even acknowledged that she returned to work prior to spring break instead of waiting after the spring break in order to be placed on the pay roll period. The Board refused to pay her for the spring break, and the ALJ concluded differently, noting that petitioner returned to work on April 16th, the first day of the second pay period that month. It was also the last day school was in session prior to closing for Good Friday and spring recess. She then returned on April 28, the date school reopened and worked the last three days of the pay period, April 28, 29 and 30. Consequently, she worked every day the schools were open. "Once she crossed the threshold her first day back at work, she should not have been treated any differently than any other teacher in the building". [Id. at 20-21]. The Commissioner agreed and stated:

> N.J.S.A. 18A:27-6(3) and the case law interpreting it--regardless of differences in argument and circumstances--fundamentally require that teacher salaries, including those of tenured teachers and teachers who work less than a full year, be calculated on the basis of monthly or semi-monthly pay periods. While this certainly does not preclude receipt of an adjusted paycheck for any pay period during which a teacher does not have sufficient leave days to cover an absence occurring on a day when school is in session--indeed, N.J.S.A. 18A:30-6 expressly contemplates such adjustment--it *does* preclude a board from adjusting the contracted salary installment for a teacher not on leave status who has worked each day during the period that teaching staff members were required to report to work. To the extent that, in the current situation, this preclusion produces a result deemed inequitable by the Board, such

> result could have been avoided--as noted by the ALJ--by the Board's exercising its undisputed authority to change the requested end date of petitioner's leave so as to prohibit her return to full status on the first day of a pay period encompassing a substantial number of days when school was not in session.
>
> [Id. at 6-7]

Here, the Board made the decision to extend Petitioner's leave. For guidance, I have also considered Berkowitz v. BOE of the City of Elizabeth, EDU 11428-03, Initial Decision, (October 29, 2004), adopted, Comm'r. (December 9, 2004) <http://lawlibrary.rutgers.edu/oal/search.html. Similarly, in Berkowitz, the teacher exhausted her accumulated leave by June 13, 2003. On June 16, 2003, she was placed on unpaid leave. School was scheduled to close for the summer on June 18th, but was extended until June 24, 2003 to make up time missed due to various emergency closings throughout that year. Petitioner did not receive a paycheck on June 30, 2003, and appealed. The ALJ concluded there was no equitable reason to require the Board to pay petitioner for June 25, 26 and 27, 2003. The Commissioner affirmed and stated:

> Petitioner is not entitled to the relief she seeks. However petitioner attempts to characterize her situation, the fact remains that the days for which she asks "not to be docked" occurred at a time during which she was on a *pre-arranged leave of absence*, unpaid because she had exhausted all her accumulated leave. Petitioner's status from June 16 onward, by its very nature precluded any entitlement to or expectation of pay for the duration of her leave, which extended through the remainder of the school year (June 30); it is of no import that active teachers, *i.e.*, those not on leave, were not required to report to work on three days falling within the unpaid leave period. In effect, with respect to the days at issue, petitioner is demanding that the Board treat her as an employee not on leave, which she clearly was not.
>
> [Id. at 3]

Here, Petitioner was on unpaid leave once she exhausted her accumulated leave time. Although she was cleared by her physician to return to work "after April 23," there

was no work for her to return to until May 2, 2005. It was within the discretion of the Board to extend Petitioner's leave pursuant to Article X of the collective bargaining agreement. which provides, "Whenever, in the opinion of the Board, the requested date of commencement of an unpaid disability leave or the requested date for the resumption of duties would substantially interfere with the administration of the school district or the education of pupils, the requested dates may be changed by the Board, provided that such date change is not medically contraindicated." The Board opined that Karen Vuksan's resumption of her duties from April 23 to May 2, 2005 would have substantially interfered with the administration of the school district or education of the pupils since the school would be closed for spring break. Thus, the Board maintains the changed date of May 2, 2005 was not medically contraindicated, and its determination should be upheld.

CONCLUSION

Based on the whole record I **CONCLUDE** the Board properly exercised its discretion to determine the Petitioner's duties would resume on May 2, 2005, after the spring recess. Therefore, I further **CONCLUDE** that Karen Vuksan is not entitled to wages for days in which the schools were closed for spring recess as she resumed her duties on May 2, 2005.

ORDER

It is **ORDERED** that the determination of Clifton Board of Education be **AFFIRMED.**

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

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

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

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

December 24, 2007
DATE

MUMTAZ BARI-BROWN, ALJ

Date Received at Agency: 12-24-07

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DEC 31 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

da

44-08

#44-08SEC

AGENCY DKT. NO. 12-1/08

IN THE MATTER OF KAREN WATT,	:	
INTERLAKEN BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
MONMOUTH COUNTY.	:	DECISION
	:	

The record of this matter, the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 solely for review of the Commission's recommended penalty, and respondent's comments have been reviewed, as have exceptions filed by the respondent pursuant to *N.J.A.C.* 1:6C-18.3.

In her exceptions, the respondent conveyed the reasons why she believes that the sanction of reprimand should not be imposed upon her. More specifically, respondent states that her omission of income information on her disclosure form was inadvertent and that she was not aware of the deadline for resubmissions.

Upon review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to timely and fully file the requisite disclosure statement, in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials. While the Commissioner appreciates the respondent's good intentions, the fact remains that the Commission found a violation to have occurred, and the Commissioner cannot disagree that a penalty is warranted even where the violation resulted from oversight rather than deliberate disregard of the law.[1]

[1] The Commissioner notes that reprimand is the least of the penalties available for imposition under the School Ethics Act.

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

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 2/01/08

Date of Mailing: 2/01/08

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

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	**Docket No.: D15-07**
KAREN WATT INTERLAKEN BOARD OF EDUCATION MONMOUTH COUNTY	:	**DECISION FOR FAILURE TO FILE DISCLOSURE STATEMENTS**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued on November 20, 2007, through regular and certified mail return receipt requested, directing Karen Watt, a "school official" under N.J.S.A. 18A:12-23 of the School Ethics Act, to show cause as to why the Commission should not find the school official in violation of the School Ethics Act, (Act) N.J.S.A. 18A:12-21 et seq., for failing to file personal/relative and financial disclosure statements pursuant to N.J.S.A. 18A:12-25 and 26. In its letter enclosing the OTSC, the Commission provided notification that this school official had 20 days to respond to the OTSC, that the Commission would discuss this matter at its December 18, 2007 meeting, that the school official had the right to attend the meeting, and that the school official could be found in violation of the Act and receive a penalty up to removal. Ms. Watt filed an answer to the OTSC wherein she indicated that she had filed the disclosure statements, but that her filing was incomplete. However, the Monmouth County office has informed the Commission that the original incomplete filing was received in the county office on June 5, 2007, which is past the April 30, 2007 deadline. Ms. Watt filed the completed disclosure statements on November 28, 2007.

The school official did not appear at the Commission's meeting of December 18, 2007, at which time the Commission found probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission also found that the material facts were not in dispute and, therefore the Commission found that the school official's failure to timely file the disclosure statements was a clear violation of N.J.S.A. 18A:12-25 and 26. The Commission recommended that the Commissioner of Education impose a sanction of reprimand.

ANALYSIS

N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file personal/relative and financial disclosure statements and N.J.S.A. 18A:12-26 requires each school official to file the personal/relative and financial disclosure statements with the School Ethics Commission. The deadline to file these disclosure statements was April 30, 2007 for school officials in office since January 30, 2006 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators. The School

Ethics Commission was advised by the County Superintendent that this school official did not file the disclosure statements as required by the Act. The Commission notes that the school official filed the disclosure statements on November 28, 2007. The Commission finds probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission also finds that the material facts are not in dispute and, therefore the school official's failure to timely file the disclosure statements constitutes a clear violation of N.J.S.A. 18A:12-25 and 26.

DECISION/PENALTY RECOMMENDATION

Based on the foregoing, the Commission finds that Karen Watt violated N.J.S.A. 18A:12-25 and 26. The Commission recommends that the Commissioner of Education impose a sanction of reprimand.

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

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – D15-07

Whereas, the School Ethics Commission has considered its Order to Show Cause in this matter; and

Whereas, at its meeting of December 18, 2007, the Commission found that Karen Watt violated N.J.S.A. 18A:12-25 and 26; and

Whereas, at its meeting of December 18, 2007, the Commission recommended that the Commissioner of Education impose a sanction of reprimand; and

Whereas, the Commission reviewed this draft decision as prepared by its staff;

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

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on December 18, 2007.

Joanne Boyle
Executive Director

PCG/LJB/MET/ethics/financial disclosure/decisions/D15-07 reprimand

45-08

#45-08SEC

AGENCY DKT. NO. 13-1/08

IN THE MATTER OF JOANN WEEDEN,	:	
INTERLAKEN BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
MONMOUTH COUNTY.	:	DECISION
	:	

The record of this matter, the decision of the School Ethics Commission – forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 solely for review of the Commission's recommended penalty – and respondent's comments have been reviewed, as have exceptions filed by the respondent pursuant to *N.J.A.C.* 1:6C-18.3.

In her exceptions, the respondent conveyed the reasons why she believes that the sanction of reprimand should not be imposed upon her. More specifically, respondent states that her omission of income information on her disclosure form was inadvertent and that she was not aware of the deadline for resubmissions.

Upon review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to timely and fully file the requisite disclosure statement, in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials. While the Commissioner appreciates the respondent's good intentions, the fact remains that the Commission found a violation to have occurred, and the Commissioner cannot disagree that a penalty is warranted even where the violation resulted from oversight rather than deliberate disregard of the law.[1]

[1] The Commissioner notes that reprimand is the least of the penalties available for imposition under the School Ethics Act.

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

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 2/01/08

Date of Mailing: 2/01/08

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

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	**Docket No.: D16-07**
JOANN WEEDEN INTERLAKEN BOARD OF EDUCATION MONMOUTH COUNTY	:	**DECISION FOR FAILURE TO FILE DISCLOSURE STATEMENTS**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued on November 20, 2007, through regular and certified mail return receipt requested, directing Joann Weeden, a "school official" under N.J.S.A. 18A:12-23 of the School Ethics Act, to show cause as to why the Commission should not find the school official in violation of the School Ethics Act, (Act) N.J.S.A. 18A:12-21 et seq., for failing to file personal/relative and financial disclosure statements pursuant to N.J.S.A. 18A:12-25 and 26. In its letter enclosing the OTSC, the Commission provided notification that this school official had 20 days to respond to the OTSC, that the Commission would discuss this matter at its December 18, 2007 meeting, that the school official had the right to attend the meeting, and that the school official could be found in violation of the Act and receive a penalty up to removal. Ms. Weeden filed an answer to the OTSC wherein she indicated that she had filed the disclosure statements, but that her filing was incomplete. However, the Monmouth County office has informed the Commission that the original incomplete filing was received in the county office on June 5, 2007, which is past the April 30, 2007 deadline. Ms. Weeden filed the completed disclosure statements on November 28, 2007.

The school official did not appear at the Commission's meeting of December 18, 2007, at which time the Commission found probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission also found that the material facts were not in dispute and, therefore the Commission found that the school official's failure to timely file the disclosure statements was a clear violation of N.J.S.A. 18A:12-25 and 26. The Commission recommended that the Commissioner of Education impose a sanction of reprimand.

ANALYSIS

N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file personal/relative and financial disclosure statements and N.J.S.A. 18A:12-26 requires each school official to file the personal/relative and financial disclosure statements with the School Ethics Commission. The deadline to file these disclosure statements was April 30, 2007 for school officials in office since January 30, 2006 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators. The School

Ethics Commission was advised by the County Superintendent that this school official did not file the disclosure statements as required by the Act. The Commission notes that the school official filed the disclosure statements on November 28, 2007. The Commission finds probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission also finds that the material facts are not in dispute and, therefore the school official's failure to timely file the disclosure statements constitutes a clear violation of N.J.S.A. 18A:12-25 and 26.

DECISION/PENALTY RECOMMENDATION

Based on the foregoing, the Commission finds that Joann Weeden violated N.J.S.A. 18A:12-25 and 26. The Commission recommends that the Commissioner of Education impose a sanction of reprimand.

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

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – D15-07

Whereas, the School Ethics Commission has considered its Order to Show Cause in this matter; and

Whereas, at its meeting of December 18, 2007, the Commission found that Joann Weeden violated N.J.S.A. 18A:12-25 and 26; and

Whereas, at its meeting of December 18, 2007, the Commission recommended that the Commissioner of Education impose a sanction of reprimand; and

Whereas, the Commission reviewed this draft decision as prepared by its staff;

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

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on December 18, 2007.

Joanne Boyle
Executive Director

PCG/LJB/MET/ethics/financial disclosure/decisions/D16-07 reprimand

46-08

AGENCY DKT. NO. 9-1/08

IN THE MATTER OF BENJAMIN DINEEN,	:	
UNIVERSITY ACADEMY CHARTER SCHOOL	:	COMMISSIONER OF EDUCATION
BOARD OF TRUSTEES, JERSEY CITY,	:	DECISION
HUDSON COUNTY	:	

The record of this matter, the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 solely for review of the Commission's recommended penalty, and respondent's comments have been reviewed, as have exceptions filed by the respondent pursuant to *N.J.A.C.* 1:6C-18.3.

In his exceptions, the respondent conveys the reasons why he believes that the sanction of reprimand should not be imposed upon him. More specifically, respondent points out that he has been a volunteer trustee for several years and has previously timely filed his annual disclosure statements.

Upon review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to timely file the requisite disclosure statement, in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials. While the Commissioner appreciates the respondent's good intentions, the fact remains that the Commission found a violation to have occurred, and the Commissioner cannot disagree that a penalty is warranted even where the violation resulted from oversight rather than deliberate disregard of the law.[1]

[1] The Commissioner notes that reprimand is the least of the penalties available for imposition under the School Ethics Act.

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

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 2/01/08

Date of Mailing: 2/01/08

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

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	**Docket No.: D11-07**
BENJAMIN DINEEN UNIVERSITY ACADEMY BOARD OF TRUSTEES HUDSON COUNTY	:	**DECISION FOR FAILURE TO FILE DISCLOSURE STATEMENTS**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued on November 20, 2007, through regular and certified mail return receipt requested, directing Benjamin Dineen, a "school official" under N.J.S.A. 18A:12-23 of the School Ethics Act, to show cause as to why the Commission should not find the school official in violation of the School Ethics Act, (Act) N.J.S.A. 18A:12-21 et seq., for failing to file personal/relative and financial disclosure statements pursuant to N.J.S.A. 18A:12-25 and 26. In its letter enclosing the OTSC, the Commission provided notification that this school official had 20 days to respond to the OTSC, that the Commission would discuss this matter at its December 18, 2007 meeting, that the school official had the right to attend the meeting, and that the school official could be found in violation of the Act and receive a penalty up to removal. The school official answered the Commission on December 13, 2007 and indicated that he had filed the disclosure statements on November 27, 2007.

The school official did not appear at the Commission's meeting of December 18, 2007, at which time the Commission found probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission also found that the material facts were not in dispute and, therefore the Commission found that the school official's failure to timely file the disclosure statements was a clear violation of N.J.S.A. 18A:12-25 and 26. The Commission recommended that the Commissioner of Education impose a sanction of reprimand.

ANALYSIS

N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file personal/relative and financial disclosure statements and N.J.S.A. 18A:12-26 requires each school official to file the personal/relative and financial disclosure statements with the School Ethics Commission. The deadline to file these disclosure statements was April 30, 2007 for school officials in office since January 30, 2006 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators. The School Ethics Commission was advised by the County Superintendent that this school official did not file the disclosure statements as required by the Act. The Commission notes that the school official filed the disclosure statements on November 27, 2007. The Commission finds probable

cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission also finds that the material facts are not in dispute and, therefore the school official's failure to timely file the disclosure statements constitutes a clear violation of N.J.S.A. 18A:12-25 and 26.

DECISION/PENALTY RECOMMENDATION

Based on the foregoing, the Commission finds that Benjamin Dineen violated N.J.S.A. 18A:12-25 and 26. The Commission recommends that the Commissioner of Education impose a sanction of reprimand.

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

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – D11-07

Whereas, the School Ethics Commission has considered its Order to Show Cause in this matter; and

Whereas, at its meeting of December 18, 2007, the Commission found that Benjamin Dineen violated N.J.S.A. 18A:12-25 and 26; and

Whereas, at its meeting of December 18, 2007, the Commission recommended that the Commissioner of Education impose a sanction of reprimand; and

Whereas, the Commission reviewed this draft decision as prepared by its staff;

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

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on December 18, 2007.

Joanne Boyle
Executive Director

PCG/LJB/MET/ethics/financial disclosure/decisions 2007/D11-07 reprimand

47-08SEC+

47-08

AGENCY DKT. NO. 14-1/08

CORRECTED DECISION

IN THE MATTER OF NEIL GOETZE, : COMMISSIONER OF EDUCATION

SEA BRIGHT BOARD OF EDUCATION, : DECISION

MONMOUTH COUNTY. :

The record of this matter, and the decision of the School Ethics Commission – forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 solely for review of the Commission's recommended penalty – have been reviewed. The Commissioner has also received and reviewed the disclosure statement which respondent submitted on January 8, 2008, along with an explanation and apology for the late filing.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to timely file the requisite disclosure statement, in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials. While the Commissioner appreciates the respondent's explanation and apology, the fact remains that the Commission found a violation to have occurred, and the commissioner cannot disagree that a penalty is warranted, even where the violation resulted from oversight, as opposed to deliberate disregard of the law.

Accordingly, the above-named respondent is hereby censured as a school official found to have violated the School Ethics Act.[1]

IT IS SO ORDERED.[2]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 2/25/08

Date of Mailing: 2/25/08

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[1] In her prior decision in this matter, although the Commissioner concurred with – and purported to adopt – the Commission's recommended penalty, she inadvertently imposed a penalty of reprimand rather than the intended censure. That error is corrected herein.

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

47-08

AGENCY DKT. NO. 14-1/08

IN THE MATTER OF NEIL GOETZE,	:	COMMISSIONER OF EDUCATION
SEA BRIGHT BOARD OF EDUCATION,	:	DECISION
MONMOUTH COUNTY.	:	

The record of this matter, and the decision of the School Ethics Commission – forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 solely for review of the Commission's recommended penalty – have been reviewed. The Commissioner has also received and reviewed the disclosure statement which respondent submitted on January 8, 2008, along with an explanation and apology for the late filing.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to timely file the requisite disclosure statement, in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials. While the Commissioner appreciates the respondent's explanation and apology, the fact remains that the Commission found a violation to have occurred, and the commissioner cannot disagree that a penalty is warranted, even where the violation resulted from oversight, as opposed to deliberate disregard of the law.

Accordingly, the above-named respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.[1]

IT IS SO ORDERED.[2]

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 2/01/08

Date of Mailing: 2/01/08

[1] The Commissioner notes that reprimand is the least of the penalties available for imposition under the School Ethics Act.

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

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	**Docket No.: D19-07**
NEIL GOETZE SEA BRIGHT BOARD OF EDUCATION MONMOUTH COUNTY	:	**DECISION FOR FAILURE TO FILE DISCLOSURE STATEMENTS**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued on November 20, 2007, through regular and certified mail return receipt requested, directing Neil Goetze, a "school official" under N.J.S.A. 18A:12-23 of the School Ethics Act, to show cause as to why the Commission should not find the school official in violation of the School Ethics Act, (Act) N.J.S.A. 18A:12-21 et seq., for failing to file personal/relative and financial disclosure statements pursuant to N.J.S.A. 18A:12-25 and 26. In its letter enclosing the OTSC, the Commission provided notification that this school official had 20 days to respond to the OTSC, that the Commission would discuss this matter at its December 18, 2007 meeting, that the school official had the right to attend the meeting, and that the school official could be found in violation of the Act and receive a penalty up to removal. The school official did not provide an answer to the Commission's OTSC and has failed to file the disclosure statements.

The school official did not appear at the Commission's meeting of December 18, 2007, at which time the Commission found probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission found that the material facts were not in dispute and, therefore, the Commission found that the school official's failure to file the disclosure statements after receipt of the OTSC constitutes a clear violation of N.J.S.A. 18A:12-25 and 26. The Commission recommended that the Commissioner of Education impose a sanction of suspension until the school official files the disclosure statements, removal if the disclosure statements are not filed within 30 days of the Commissioner's decision on penalty, and censure if the disclosure statements are filed prior to issuance of the Commissioner's decision.

ANALYSIS

N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file personal/relative and financial disclosure statements and N.J.S.A. 18A:12-26 requires each school official to file the personal/relative and financial disclosure statements with the School Ethics Commission. The deadline to file these disclosure statements was April 30, 2007 for school officials in office since January 30, 2006 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators. The School

Ethics Commission was advised by the County Superintendent that this school official did not file the disclosure statements as required by the Act. The school official has not filed the disclosure statements as of the date of this decision. The Commission finds probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission also finds that the material facts are not in dispute and, therefore, the Commission finds that the school official's failure to file the disclosure statements after receipt of the OTSC constitutes a clear violation of N.J.S.A. 18A:12-25 and 26.

DECISION/PENALTY RECOMMENDATION

Based on the foregoing, the Commission finds that Neil Goetze violated N.J.S.A. 18A:12-25 and 26. The Commission also finds that this school official was given ample opportunity to provide the complete disclosure statements. The Commission recommends that the Commissioner of Education impose a sanction of suspension until the school official files the disclosure statements, removal if the disclosure statements are not filed within 30 days of the Commissioner's decision on penalty, and censure if the disclosure statements are filed prior to issuance of the Commissioner's decision.

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

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – D19-07

Whereas, the School Ethics Commission has considered its Order to Show Cause in this matter; and

Whereas, at its meeting of December 18, 2007, the Commission found that Neil Goetze violated N.J.S.A. 18A:12-25 and 26; and

Whereas, at its meeting of December 18, 2007, the Commission recommended that the Commissioner of Education impose a sanction of suspension until the school official files the disclosure statements, removal if the disclosure statements are not filed within 30 days of the Commissioner's decision on penalty, and censure if the disclosure statements are filed prior to issuance of the Commissioner's decision; and

Whereas, the Commission reviewed this draft decision as prepared by its staff;

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

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on December 18, 2007.

Joanne Boyle
Executive Director

PCG/LJB/MET/ethics/financial disclosure/decisions 2007/D19-07 suspend-remove-censure

48-08

48-08SEC

AGENCY DKT. NO. 8-1/08

IN THE MATTER OF JOHN PETERSON,	:	COMMISSIONER OF EDUCATION
FAIRFIELD TOWNSHIP BOARD OF	:	DECISION
EDUCATION, CUMBERLAND COUNTY.	:	

The record of this matter and the decision of the School Ethics Commission – forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 solely for review of the Commission's recommended penalty – have been reviewed, as has respondent's letter dated December 10, 2007, stating that his disclosure statement(s) would be filed "before the scheduled December 18 meeting of the School Ethics Commission." The Commissioner notes, however, that the required disclosure statement(s) have not been filed as of the date of this decision.

Upon review of the matter, the Commissioner concurs with the penalty recommended by the Commission, and additionally admonishes the respondent for failure to file the requisite statement(s). Such disregard of the law has caused administrative and adjudicative time to be wasted by local, county and State education officials.

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

IT IS SO ORDERED. *

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 2/01/08

Date of Mailing: 2/01/08

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

SCHOOL ETHICS COMMISSION **V.** **JOHN PETERSON** **FAIRFILED TOWNSHIP** **BOARD OF EDUCATION** **CUMBERLAND COUNTY**	:	**BEFORE THE SCHOOL ETHICS COMMISSION** **Docket No.: D09-07** **DECISION FOR FAILURE TO FILE DISCLOSURE STATEMENTS**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued on November 20, 2007, through regular and certified mail return receipt requested, directing John Peterson, a "school official" under N.J.S.A. 18A:12-23 of the School Ethics Act, to show cause as to why the Commission should not find the school official in violation of the School Ethics Act, (Act) N.J.S.A. 18A:12-21 et seq., for failing to file personal/relative and financial disclosure statements pursuant to N.J.S.A. 18A:12-25 and 26. In its letter enclosing the OTSC, the Commission provided notification that this school official had 20 days to respond to the OTSC, that the Commission would discuss this matter at its December 18, 2007 meeting, that the school official had the right to attend the meeting, and that the school official could be found in violation of the Act and receive a penalty up to removal. The school official answered the Commission's OTSC on December 17, 2007 and stated that he completed and signed the disclosure statements at the April 2007 board meeting, that he could not explain why it was not filed and it would be rectified before the December 18, 2007 meeting of the Commission. However, the Cumberland County Office notified the Commission on December 17, 2007 that the school official's disclosure statements had not been filed.

The school official did not appear at the Commission's meeting of December 18, 2007, at which time the Commission found probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission found that the material facts were not in dispute and, therefore, the Commission found that the school official's failure to file the disclosure statements after receipt of the OTSC constitutes a clear violation of N.J.S.A. 18A:12-25 and 26. The Commission recommended that the Commissioner of Education impose a sanction of suspension until the school official files the disclosure statements, removal if the disclosure statements are not filed within 30 days of the Commissioner's decision on penalty, and censure if the disclosure statements are filed prior to issuance of the Commissioner's decision.

ANALYSIS

N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file personal/relative and financial disclosure statements and N.J.S.A. 18A:12-26 requires each

school official to file the personal/relative and financial disclosure statements with the School Ethics Commission. The deadline to file these disclosure statements was April 30, 2007 for school officials in office since January 30, 2006 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators. The School Ethics Commission was advised by the County Superintendent that this school official did not file the disclosure statements as required by the Act. The Commission notes that the school official answered that he completed and signed the disclosure statements at the board's meeting in April 2007. However, the school official has not filed the disclosure statements as of the date of this decision. Therefore, the Commission finds probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission also finds that the material facts are not in dispute and, therefore, the Commission finds that the school official's failure to file the disclosure statements after receipt of the OTSC constitutes a clear violation of N.J.S.A. 18A:12-25 and 26.

DECISION/PENALTY RECOMMENDATION

Based on the foregoing, the Commission finds that John Peterson violated N.J.S.A. 18A:12-25 and 26. The Commission also finds that this school official was given ample opportunity to provide the complete disclosure statements. The Commission recommends that the Commissioner of Education impose a sanction of suspension until the school official files the disclosure statements, removal if the disclosure statements are not filed within 30 days of the Commissioner's decision on penalty, and censure if the disclosure statements are filed prior to issuance of the Commissioner's decision.

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

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – D09-07

Whereas, the School Ethics Commission has considered its Order to Show Cause in this matter; and

Whereas, at its meeting of December 18, 2007, the Commission found that John Peterson violated N.J.S.A. 18A:12-25 and 26; and

Whereas, at its meeting of December 18, 2007, the Commission recommended that the Commissioner of Education impose a sanction of suspension until the school official files the disclosure statements, removal if the disclosure statements are not filed within 30 days of the Commissioner's decision on penalty, and censure if the disclosure statements are filed prior to issuance of the Commissioner's decision; and

Whereas, the Commission reviewed this draft decision as prepared by its staff;

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

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on December 18, 2007.

Joanne Boyle
Executive Director

PCG/LJB/MET/ethics/financial disclosure/decisions 2007/D09-07 suspend-remove-censure

51-08

AGENCY DKT. NO. 10-1/08

IN THE MATTER OF DEBORAH MUNAY,	:	
UNIVERSITY ACADEMY CHARTER SCHOOL	:	COMMISSIONER OF EDUCATION
BOARD OF TRUSTEES, JERSEY CITY,	:	DECISION
HUDSON COUNTY	:	

The record of this matter and the decision of the School Ethics Commission – forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 solely for review of the Commission's recommended penalty – have been reviewed. The respondent did not file comments or exceptions.

Upon review of the matter, the Commissioner concurs with the penalty recommended by the Commission, and additionally admonishes the respondent for failure to file the requisite disclosure statement(s). Such disregard of the law has caused administrative and adjudicative time to be wasted by local, county and State education officials.

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

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 2/04/08

Date of Mailing: 2/05/08

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

#54-08

54-08

BOARD OF EDUCATION OF THE TOWNSHIP OF MONROE, MIDDLESEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
R.O. and R.O. on behalf of minor child, R.O.,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning Board sought an order from the Commissioner authorizing it to conduct certain assessments of R.O. – a gifted student in math and science who showed weaknesses in some language arts skills – to evaluate his abilities and level of achievement; petitioner also asked the Commissioner to compel respondents' cooperation in the assessment process. Respondents subsequently filed an answer and counter petition requesting that the Commissioner enter an order dismissing the petition based on R.O.'s withdrawal from the school district; petitioner then submitted a letter requesting that the petition be withdrawn for mootness.

No opposition papers having been filed by the specified due date, the Commissioner dismissed the matter for mootness.

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

February 5, 2008

AGENCY DKT. NO. 358-11/07

BOARD OF EDUCATION OF THE TOWNSHIP OF MONROE, MIDDLESEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
R.O. and R.O. on behalf of minor child, R.O.,	:	DECISION
RESPONDENT.	:	

This matter was opened before the Commissioner of Education on November 21, 2007, by way of a verified petition by the school district against the respondent parents of minor child, R.O., a gifted student in math and science who showed weaknesses in some language arts skills. Petitioner requested that the Commissioner issue an order authorizing it to conduct certain assessments of R.O. – by a certified learning disabilities teacher/consultant and a school psychologist – to better evaluate R.O.'s abilities and level of achievement. The petition also asked the Commissioner to compel respondents' cooperation.

By notice dated November 21, 2007, the Bureau of Controversies and Disputes (the Bureau) directed respondent, via regular mail, to file an answer to the petition. On December 28, 2007, the Bureau directed respondent for a second time, via both certified and regular mail, to file an answer to the petition. Neither of the notices sent by regular mail was returned to the Commissioner, and the notice sent by certified mail was acknowledged as received ("green card").

On January 11, 2008, the Bureau received an "Answer and Counter Petition" from respondent R.O., in which respondent requested that the Commissioner of Education (Commissioner) enter an order dismissing the petition "because R.O. is no longer enrolled in the district as a student." In addition, the Commissioner received a letter from petitioner requesting that the petition be deemed "withdrawn without prejudice" for mootness – based upon the respondents' withdrawal of R.O. from petitioner's school district and based upon the language requesting dismissal in respondents' answer.

The parties were consequently directed to submit memoranda delineating why the Commissioner should not dismiss both the petition and counter petition as moot, and were advised that if no opposition papers were received by January 22, 2008, the Commissioner would deem the matter moot and dismiss it accordingly. As no opposition papers have been received to date, this matter is hereby dismissed for mootness.

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 2/05/08

Date of Mailing: 2/05/08

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

#55-08SEC

55-08

AGENCY DKT. NO. 7-1/08

IN THE MATTER OF JUDY L. FAYTER,	:	
BOARD OF EDUCATION OF	:	COMMISSIONER OF EDUCATION
UPPER TOWNSHIP, CAMDEN COUNTY.	:	DECISION

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

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

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

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 2/05/08

Date of Mailing: 2/05/08

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

SCHOOL ETHICS COMMISSION **V.** **JUDY FAYTER** **UPPER TOWNSHIP** **BOARD OF EDUCATION** **CAPE MAY COUNTY**	:	**BEFORE THE SCHOOL ETHICS COMMISSION** **Docket No.: D08-07** **DECISION FOR FAILURE TO FILE DISCLOSURE STATEMENTS**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued on November 20, 2007, through regular and certified mail return receipt requested, directing Judy Fayter, a "school official" under N.J.S.A. 18A:12-23 of the School Ethics Act, to show cause as to why the Commission should not find the school official in violation of the School Ethics Act, (Act) N.J.S.A. 18A:12-21 et seq., for failing to file personal/relative and financial disclosure statements pursuant to N.J.S.A. 18A:12-25 and 26. In its letter enclosing the OTSC, the Commission provided notification that this school official had 20 days to respond to the OTSC, that the Commission would discuss this matter at its December 18, 2007 meeting, that the school official had the right to attend the meeting, and that the school official could be found in violation of the Act and receive a penalty up to removal. Ms. Fayter responded to the Commission's OTSC and indicated that she had intended to resign on April 30, 2007, but when she decided to remain as a board member, she mailed her disclosure statements to the Upper Township School District in late May 2007. However, the disclosure statements were never filed with the county office. Ms. Fayter ultimately filed the form on December 11, 2007.

The school official did not appear at the Commission's meeting of December 18, 2007, at which time the Commission found probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission also found that the material facts were not in dispute and, therefore the Commission found that the school official's failure to timely file the disclosure statements was a clear violation of N.J.S.A. 18A:12-25 and 26. The Commission recommended that the Commissioner of Education impose a sanction of reprimand.

ANALYSIS

N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file personal/relative and financial disclosure statements and N.J.S.A. 18A:12-26 requires each school official to file the personal/relative and financial disclosure statements with the School Ethics Commission. The deadline to file these disclosure statements was April 30, 2007 for school officials in office since January 30, 2006 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators. The School Ethics Commission was advised by the County Superintendent that this school official did not

file the disclosure statements as required by the Act. The Commission notes that Ms. Fayter admits that she filed the disclosure statements after the April 30, 2007 deadline. The Commission also notes that the school official filed the disclosure statements on December 11, 2007. The Commission finds probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission also finds that the material facts are not in dispute and, therefore the school official's failure to timely file the disclosure statements constitutes a clear violation of N.J.S.A. 18A:12-25 and 26.

DECISION/PENALTY RECOMMENDATION

Based on the foregoing, the Commission finds that Judy Fayter violated N.J.S.A. 18A:12-25 and 26. The Commission recommends that the Commissioner of Education impose a sanction of reprimand.

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

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – D08-07

Whereas, the School Ethics Commission has considered its Order to Show Cause in this matter; and

Whereas, at its meeting of December 18, 2007, the Commission found that Judy Fayter violated N.J.S.A. 18A:12-25 and 26; and

Whereas, at its meeting of December 18, 2007, the Commission recommended that the Commissioner of Education impose a sanction of reprimand; and

Whereas, the Commission reviewed this draft decision as prepared by its staff;

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

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on December 18, 2007.

Joanne Boyle
Executive Director

PCG/LJB/MET/ethics/financial disclosure/decisions 2007/D08-07 reprimand

56-08

#56-08SEC

AGENCY DKT. NO. 6-1/08

IN THE MATTER OF WELLINGTON DAVENPORT, :
FREEDOM ACADEMY CHARTER SCHOOL :
BOARD OF TRUSTEES, CAMDEN COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

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

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

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

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 2/05/08
Date of Mailing: 2/05/08

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

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D07-07**
WELLINGTON DAVENPORT FREEDOM ACADEMY BOARD OF TRUSTEES CAMDEN COUNTY	:	**DECISION FOR FAILURE TO FILE DISCLOSURE STATEMENTS**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued on November 20, 2007, through regular and certified mail return receipt requested, directing Wellington Davenport, a "school official" under N.J.S.A. 18A:12-23 of the School Ethics Act, to show cause as to why the Commission should not find the school official in violation of the School Ethics Act, (Act) N.J.S.A. 18A:12-21 et seq., for failing to file personal/relative and financial disclosure statements pursuant to N.J.S.A. 18A:12-25 and 26. In its letter enclosing the OTSC, the Commission provided notification that this school official had 20 days to respond to the OTSC, that the Commission would discuss this matter at its December 18, 2007 meeting, that the school official had the right to attend the meeting, and that the school official could be found in violation of the Act and receive a penalty up to removal. Through his attorney, Robert J. Hagerty, Esquire, the school official filed a response to the OTSC on December 5, 2007. The school official filed the disclosure statements on December 4, 2007.

The school official did not appear at the Commission's meeting of December 18, 2007, at which time the Commission found probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission also found that the material facts were not in dispute and, therefore the Commission found that the school official's failure to timely file the disclosure statements was a clear violation of N.J.S.A. 18A:12-25 and 26. The Commission recommended that the Commissioner of Education impose a sanction of reprimand.

ANALYSIS

N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file personal/relative and financial disclosure statements and N.J.S.A. 18A:12-26 requires each school official to file the personal/relative and financial disclosure statements with the School Ethics Commission. The deadline to file these disclosure statements was April 30, 2007 for school officials in office since January 30, 2006 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators. The School Ethics Commission was advised by the County Superintendent that this school official did not file the disclosure statements as required by the Act. The Commission notes that the school official filed the disclosure statements on December 4, 2007. The Commission finds probable

cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission also finds that the material facts are not in dispute and, therefore the school official's failure to timely file the disclosure statements constitutes a clear violation of N.J.S.A. 18A:12-25 and 26.

DECISION/PENALTY RECOMMENDATION

Based on the foregoing, the Commission finds that Wellington Davenport violated N.J.S.A. 18A:12-25 and 26. The Commission recommends that the Commissioner of Education impose a sanction of reprimand.

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

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – D07-07

Whereas, the School Ethics Commission has considered its Order to Show Cause in this matter; and

Whereas, at its meeting of December 18, 2007, the Commission found that Wellington Davenport violated N.J.S.A. 18A:12-25 and 26; and

Whereas, at its meeting of December 18, 2007, the Commission recommended that the Commissioner of Education impose a sanction of reprimand; and

Whereas, the Commission reviewed this draft decision as prepared by its staff;

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

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on December 18, 2007.

Joanne Boyle
Executive Director

PCG/LJB/MET/ethics/financial disclosure/decisions/D07-07 reprimand

57-08

#57-08SEC

AGENCY DKT. NO. 5-1/08

IN THE MATTER OF ANGEL OSORIO,	:	
FREEDOM ACADEMY CHARTER SCHOOL	:	COMMISSIONER OF EDUCATION
BOARD OF TRUSTEES, CAMDEN COUNTY.	:	DECISION

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

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

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

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 2/05/08

Date of Mailing: 2/05/08

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

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	**Docket No.: D06-07**
ANGEL OSORIO FREEDOM ACADEMY BOARD OF TRUSTEES CAMDEN COUNTY	:	**DECISION FOR FAILURE TO FILE DISCLOSURE STATEMENTS**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued on November 20, 2007, through regular and certified mail return receipt requested, directing Angel Osorio, a "school official" under N.J.S.A. 18A:12-23 of the School Ethics Act, to show cause as to why the Commission should not find the school official in violation of the School Ethics Act, (Act) N.J.S.A. 18A:12-21 et seq., for failing to file personal/relative and financial disclosure statements pursuant to N.J.S.A. 18A:12-25 and 26. In its letter enclosing the OTSC, the Commission provided notification that this school official had 20 days to respond to the OTSC, that the Commission would discuss this matter at its December 18, 2007 meeting, that the school official had the right to attend the meeting, and that the school official could be found in violation of the Act and receive a penalty up to removal. Through his attorney, Robert J. Hagerty, Esquire, the school official filed a response to the OTSC on December 5, 2007. The school official filed the disclosure statements on December 4, 2007.

The school official did not appear at the Commission's meeting of December 18, 2007, at which time the Commission found probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission also found that the material facts were not in dispute and, therefore the Commission found that the school official's failure to timely file the disclosure statements was a clear violation of N.J.S.A. 18A:12-25 and 26. The Commission recommended that the Commissioner of Education impose a sanction of reprimand.

ANALYSIS

N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file personal/relative and financial disclosure statements and N.J.S.A. 18A:12-26 requires each school official to file the personal/relative and financial disclosure statements with the School Ethics Commission. The deadline to file these disclosure statements was April 30, 2007 for school officials in office since January 30, 2006 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators. The School Ethics Commission was advised by the County Superintendent that this school official did not file the disclosure statements as required by the Act. The Commission notes that the school official filed the disclosure statements on December 4, 2007. The Commission finds probable

cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission also finds that the material facts are not in dispute and, therefore the school official's failure to timely file the disclosure statements constitutes a clear violation of N.J.S.A. 18A:12-25 and 26.

DECISION/PENALTY RECOMMENDATION

Based on the foregoing, the Commission finds that Angel Osorio violated N.J.S.A. 18A:12-25 and 26. The Commission recommends that the Commissioner of Education impose a sanction of reprimand.

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

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – D06-07

Whereas, the School Ethics Commission has considered its Order to Show Cause in this matter; and

Whereas, at its meeting of December 18, 2007, the Commission found that Angel Osorio violated N.J.S.A. 18A:12-25 and 26; and

Whereas, at its meeting of December 18, 2007, the Commission recommended that the Commissioner of Education impose a sanction of reprimand; and

Whereas, the Commission reviewed this draft decision as prepared by its staff;

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

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on December 18, 2007.

_____

Joanne Boyle
Executive Director

PCG/LJB/MET/ethics/financial disclosure/decisions/D06-07 reprimand

58-08

#58-08

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

SYNOPSIS

Petitioner, who transferred into the respondent's district after completing the eleventh grade in another district, challenged the respondent's decision not to issue her a diploma at the end of the 2006-2007 school year, and requested special permission to graduate based on having completed the courses necessary for graduation from her prior school district. Respondent contends that petitioner failed to meet the district's academic requirements for receiving a diploma.

The ALJ found that: there are no genuine issues of material fact in this matter; petitioner transferred into the Jersey City school district with 81 credits in September 2006; petitioner completed 121 credits by the end of the 2006-2007 school year; pursuant to *N.J.S.A.* 18A:7C-2, respondent's district requires the completion of 140 credits to graduate; and petitioner admits that she did not have the 140 credits necessary to graduate from Jersey City schools at the end of the 2006-2007 school year. The ALJ concluded that the respondent's decision should be affirmed, and the petition dismissed with prejudice.

The Commissioner concurred with the ALJ and adopted the Initial Decision of the OAL as the final decision in this matter.

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

February 5, 2008

OAL DKT. NO. EDU 7848-07
AGENCY DKT. NO. 178-6/07

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

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the petitioner's exceptions and the Jersey City School District's (District) reply, both timely filed in accordance with *N.J.A.C.* 1:1-18.4.

In her exceptions, the petitioner contends that certain statements in the Initial Decision are misleading – largely because the Administrative Law Judge (ALJ) failed to ask pertinent follow-up questions that would have clarified the petitioner's situation – and seeks to place these statements in context by elaborating upon the OAL factual record. She further contends that 1) the ALJ's legal analysis does not apply to the District, since – as a State-operated school district – it is not governed by a "local board of education" as are districts referenced in laws authorizing the adoption of local district graduation policies, and 2) the District lacks policies and procedures specifically addressing students in her situation. She concludes that she has worked hard and suffered, "yet no one can tell [her] how it would hurt the district" to grant the requested diploma. (Petitioner's Exceptions at 1-2, quotation at 2)

In reply, the District objects to the petitioner's attempt to expand the factual record after the close of OAL proceedings in violation of *N.J.A.C.* 1:1-18.4(c), and proffers that

her arguments – both before the ALJ and on exception – "cannot overcome the controlling law and the conclusions that follow from it." The District urges adoption of the Initial Decision's grant of summary decision in its favor, additionally noting that – because the ALJ allowed the petitioner to appear at hearing despite her failure to oppose the District's motion for summary decision – the Commissioner could alternatively sustain the District's action on grounds that the petitioner failed to carry her burden of proof at hearing. (District's Reply at 1-3, quotation at 2)

Upon review and consideration, although not unsympathetic to the petitioner's circumstances, the Commissioner must concur with the ALJ that State law expressly contemplates that public school districts – including State-operated districts – may set and enforce local graduation requirements over and above the State-mandated minimum, and that, in light of the undisputed fact that the petitioner lacked the requisite number of credits to graduate from the Jersey City School District at the end of the 2006-07 school year, there is no basis on which the District may grant her a high school diploma based solely on completion of the lesser number of credits required for graduation from her school district of prior attendance.

Accordingly, for the reasons expressed therein, the Initial Decision of the OAL – granting the District's motion and dismissing the petition of appeal – is adopted as the final decision in this matter.

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 2/05/08

Date of Mailing: 2/06/08

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7848-07
Agency Dkt. No.: 178-6/07

J.A.D.

Petitioner,

v.

STATE- OPERATED DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,

Respondent.

J.A.D., pro se,

Robin T. McMahon, Esq., attorney for respondent, State-Operated District of the City of Jersey City, Hudson County (Scarinci & Hollenbeck, LLC, attorneys)

Record Closed: November 20, 2007 Decided: December 24, 2007

BEFORE **IMRE KARASZEGI, JR.**, ALJ:

STATEMENT OF THE CASE

This is an appeal by a student, J.A.D., challenging the Jersey City Board of Education's ("Board" or "District") decision not to award a state endorsed diploma to her

at the end of the 2006-2007 academic year. Petitioner, J.A.D., requests special permission to graduate. Respondent Board determined that petitioner fails to meet the district's academic requirements for receiving a diploma.

PROCEDURAL HISTORY

On June 26, 2007, petitioner filed an interim relief request with the Commissioner of Education ("Commissioner"). On August 6, 2007, Commissioner transmitted the matter to the Office of Administrative Law ("OAL") where it was filed as a contested case. I scheduled a plenary hearing for November 20, 2007. On November 1, 2007, respondent filed a motion for summary decision. Because petitioner was pro se, I allowed the parties to address any arguments regarding the summary decision motion at the plenary hearing. The record closed on November 20, 2007.

FACTUAL DISCUSSION

Many of the background facts in this matter are not in dispute. In September 2006, petitioner transferred to the Jersey City school district from the North Bergen school district as a high school student with 81 credits. The North Bergen school district requires the completion of 120 credits to graduate and the Jersey City school district requires the completion of a minimum of 140 credits to graduate. Petitioner completed 121 credits by the end of the 2006-2007 academic year after which she elected not to remain in the Jersey City school district.

J.A.D. testified that at the time of her transfer to the Jersey City school district, she had completed her 11th academic grade in the North Bergen school district. Petitioner indicated that when she transferred in September 2006, she registered to attend Henry Snyder high school in the Jersey City school district at the 12th grade level. J.A.D. affirmed that she was offered an opportunity to enroll in the alternative "Twilight" program to secure additional credits but she declined. Petitioner testified that she requested "special permission" to graduate but was denied.

Ellen Ruane, principal of Henry Snyder high school from 2002 through December 2006 and current special assistant to the District superintendent, testified that J.A.D. "did not have enough credits coming into the district" and therefore, "after review of her credits", she was considered to be at the "junior" grade level. Ruane further indicated that she was not aware of a "special permission program". Ruane conceded that although petitioner was considered a "junior", she did take "English 4 and Health 4" subjects which Ruane conceded were "typically senior class" subjects.

I **FIND** that petitioner transferred to the Jersey City school district with 81 credits in September 2006. I **FIND** that petitioner completed 121 credits by the end of the 2006-2007 academic year. I **FIND** that the Jersey City school district requires the completion of a minimum of 140 credits to graduate.

ANALYSIS AND CONCLUSIONS OF LAW

In accordance with the New Jersey Uniform Administrative Procedure Rules, N.J.A.C. 1:1-12.5, any party may move for summary decision upon all or any of the substantive issues in a case at any time after a case is deemed contested. To grant a motion for summary decision, it must be examined whether "the papers and discovery...together with the affidavits...show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b).

A motion for summary decision is similar to summary judgment found at R. 4:46-2. The motion for summary judgment "shall be served with briefs, a statement of material facts, with or without supporting affidavits." R. 4:46-2(a). "The statement of material facts shall set forth in separately numbered paragraphs a concise statement of each material fact as to which the moving party contends there is no genuine issue, together with a citation to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted." Ibid.

The Supreme Court has held that when deciding a motion for summary judgment:

[a] determination whether there exists a `genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.

Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995).]

The burden is on the moving party to exclude all reasonable doubt as to the existence of any genuine issue of material fact; and all inferences of doubt are drawn against the moving party and in favor of the non-moving party. Saldana v. DiMedio, 275 N.J.Super. 488, 494 (App. Div. 1994). Thus, the critical question is "whether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one sided that one party must prevail as a matter of law." Brill, supra, 142 N.J. at 533.

Pursuant to N.J.S.A. 18A:7C-2, authority to establish graduation requirements is vested in local boards of education. N.J.S.A. 18A:7C-4 provides as follows:

All students who meet State and local graduation requirements shall receive a State endorsed diploma; provided, however, that the Commissioner of Education shall approve any State endorsed diploma which utilizes the comprehensive assessment techniques as provided in section 3 of P.L. 1979, c. 241 (C.18A:7C-3).

The New Jersey Department of Education has adopted regulations requiring district boards of education to develop, adopt, and implement requirements for a State endorsed diploma. N.J.A.C. 6A:8-5.1 and 6A:8-5.2. Local graduation requirements set forth in these regulations must "include participation in a local program of study of not fewer than 110 credits." N.J.A.C. 6A:8-5.1. Under these same regulations, districts may adopt graduation standards requiring a student to earn more credits than the State minimum in order to receive a State endorsed diploma.

In this matter there is no genuine issue of material fact. Petitioner completed 121 credits by the end of the 2006-2007 academic year as a student in the Jersey City school district. This district requires the completion of 140 credits to graduate. Petitioner, by her own admission, does not have the 140 credits to graduate at the end of the 2006-2007 academic year from the District schools.

CONCLUSION AND ORDER

Based on the briefs and affidavits presented by the parties, and having considered the oral argument of the parties, I **CONCLUDE** that there is no genuine issue of material fact that prevents me from deciding this issue on Summary Decision.

I therefore **ORDER** that the petition be **DISMISSED** with prejudice and the District's decision be **AFFIRMED.**

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

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

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

Dec. 24, 2007
DATE

IMRE KARASZEGI, JR, ALJ

Date Received at Agency: cml 12/24/07

Mailed to Parties:

DEC 31 2007
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cml

APPENDIX

EXHIBITS

Petitioner

P-1 Letter from T.E.D. to Mrs. Linda Zpuko dated May 14, 2007

Respondent

R-1 North Bergen Board of Education school record/transcript for J.A.D. for 2005-06 school year.

R-2 North Bergen High School school record/transcript for J.A.D. for 2003-04, 2004-05 and 2005-06 school years.

WITNESSES

Petitioner

T.E.D.

J.A.D.

Respondent

Ellen Ruane

59-08

59-08+SEC

AGENCY DKT. NO. 19-1/08

AMENDED DECISION

IN THE MATTER OF CRAIG DANNELLY,	:	
BOARD OF EDUCATION OF THE BOROUGH	:	COMMISSIONER OF EDUCATION
OF TUCKERTON, OCEAN COUNTY.	:	DECISION

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the respondent, but the required disclosure statement was filed on January 21, 2008.[1]

Upon review, in light of the respondent's filing of the necessary disclosure statement prior to issuance of the Commissioner's decision in this matter, the Commissioner adopts the Commission's recommended penalty of censure, additionally admonishing the respondent for his delay in filing the requisite statement, in that such disregard of the law has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

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

IT IS SO ORDERED.[2]

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 2/19/08

Date of Mailing: 2/20/08

[1] The Commissioner was notified of this filing on February 14, 2008, subsequent to issuance of her February 5, 2008 decision directing that the respondent be suspended in accordance with the recommendation of the School Ethics Commission; hence, it is necessary to issue the within amended decision.

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

59-08

#59-08SEC

AGENCY DKT. NO. 19-1/08

IN THE MATTER OF CRAIG DANNELLY,	:	
BOARD OF EDUCATION OF THE BOROUGH	:	COMMISSIONER OF EDUCATION
OF TUCKERTON, OCEAN COUNTY.	:	DECISION

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

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

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

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 2/05/08

Date of Mailing: 2/06/08

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

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D24-07**
CRAIG DANNELLY TUCKERTON BOARD OF EDUCATION OCEAN COUNTY	:	**DECISION FOR FAILURE TO FILE DISCLOSURE STATEMENTS**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued on November 20, 2007, through regular and certified mail return receipt requested, directing Craig Dannelly, a "school official" under N.J.S.A. 18A:12-23 of the School Ethics Act, to show cause as to why the Commission should not find the school official in violation of the School Ethics Act, (Act) N.J.S.A. 18A:12-21 et seq., for failing to file personal/relative and financial disclosure statements pursuant to N.J.S.A. 18A:12-25 and 26. In its letter enclosing the OTSC, the Commission provided notification that this school official had 20 days to respond to the OTSC, that the Commission would discuss this matter at its December 18, 2007 meeting, that the school official had the right to attend the meeting, and that the school official could be found in violation of the Act and receive a penalty up to removal. The school official did not provide an answer to the Commission's OTSC and has failed to file the disclosure statements.

The school official did not appear at the Commission's meeting of December 18, 2007, at which time the Commission found probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission found that the material facts were not in dispute and, therefore, the Commission found that the school official's failure to file the disclosure statements after receipt of the OTSC constitutes a clear violation of N.J.S.A. 18A:12-25 and 26. The Commission recommended that the Commissioner of Education impose a sanction of suspension until the school official files the disclosure statements, removal if the disclosure statements are not filed within 30 days of the Commissioner's decision on penalty, and censure if the disclosure statements are filed prior to issuance of the Commissioner's decision.

ANALYSIS

N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file personal/relative and financial disclosure statements and N.J.S.A. 18A:12-26 requires each school official to file the personal/relative and financial disclosure statements with the School Ethics Commission. The deadline to file these disclosure statements was April 30, 2007 for school officials in office since January 30, 2006 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators. The School

Ethics Commission was advised by the County Superintendent that this school official did not file the disclosure statements as required by the Act. The school official has not filed the disclosure statements as of the date of this decision. The Commission finds probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission also finds that the material facts are not in dispute and, therefore, the Commission finds that the school official's failure to file the disclosure statements after receipt of the OTSC constitutes a clear violation of N.J.S.A. 18A:12-25 and 26.

DECISION/PENALTY RECOMMENDATION

Based on the foregoing, the Commission finds that Craig Dannelly violated N.J.S.A. 18A:12-25 and 26. The Commission also finds that this school official was given ample opportunity to provide the complete disclosure statements. The Commission recommends that the Commissioner of Education impose a sanction of suspension until the school official files the disclosure statements, removal if the disclosure statements are not filed within 30 days of the Commissioner's decision on penalty, and censure if the disclosure statements are filed prior to issuance of the Commissioner's decision.

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

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – D24-07

Whereas, the School Ethics Commission has considered its Order to Show Cause in this matter; and

Whereas, at its meeting of December 18, 2007, the Commission found that Craig Dannelly violated N.J.S.A. 18A:12-25 and 26; and

Whereas, at its meeting of December 18, 2007, the Commission recommended that the Commissioner of Education impose a sanction of suspension until the school official files the disclosure statements, removal if the disclosure statements are not filed within 30 days of the Commissioner's decision on penalty, and censure if the disclosure statements are filed prior to issuance of the Commissioner's decision; and

Whereas, the Commission reviewed this draft decision as prepared by its staff;

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

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on December 18, 2007.

Joanne Boyle
Executive Director

PCG/LJB/MET/ethics/financial disclosure/decisions 2007/D24-07 suspend-remove-censure

60-08

AGENCY DKT. NO. 2-1/08

IN THE MATTER OF THOMAS WYATT,	:	
FREEDOM ACADEMY CHARTER SCHOOL	:	COMMISSIONER OF EDUCATION
BOARD OF TRUSTEES, CAMDEN COUNTY.	:	DECISION

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

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

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

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 2/06/08

Date of Mailing: 2/06/08

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

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D03-07**
TOM WYATT **FREEDOM ACADEMY** **BOARD OF TRUSTEES** **CAMDEN COUNTY**	:	**DECISION FOR FAILURE TO FILE DISCLOSURE STATEMENTS**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued on November 20, 2007, through regular and certified mail return receipt requested, directing Tom Wyatt, a "school official" under N.J.S.A. 18A:12-23 of the School Ethics Act, to show cause as to why the Commission should not find the school official in violation of the School Ethics Act, (Act) N.J.S.A. 18A:12-21 et seq., for failing to file personal/relative and financial disclosure statements pursuant to N.J.S.A. 18A:12-25 and 26. In its letter enclosing the OTSC, the Commission provided notification that this school official had 20 days to respond to the OTSC, that the Commission would discuss this matter at its December 18, 2007 meeting, that the school official had the right to attend the meeting, and that the school official could be found in violation of the Act and receive a penalty up to removal. Through his attorney, Robert J. Hagerty, Esquire, the school official filed a response to the OTSC on December 5, 2007. The school official filed the disclosure statements on December 4, 2007.

The school official did not appear at the Commission's meeting of December 18, 2007, at which time the Commission found probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission also found that the material facts were not in dispute and, therefore the Commission found that the school official's failure to timely file the disclosure statements was a clear violation of N.J.S.A. 18A:12-25 and 26. The Commission recommended that the Commissioner of Education impose a sanction of reprimand.

ANALYSIS

N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file personal/relative and financial disclosure statements and N.J.S.A. 18A:12-26 requires each school official to file the personal/relative and financial disclosure statements with the School Ethics Commission. The deadline to file these disclosure statements was April 30, 2007 for school officials in office since January 30, 2006 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators. The School Ethics Commission was advised by the County Superintendent that this school official did not file the disclosure statements as required by the Act. The Commission notes that the school official filed the disclosure statements on December 4, 2007. The Commission finds probable

cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission also finds that the material facts are not in dispute and, therefore the school official's failure to timely file the disclosure statements constitutes a clear violation of N.J.S.A. 18A:12-25 and 26.

DECISION/PENALTY RECOMMENDATION

Based on the foregoing, the Commission finds that Tom Wyatt violated N.J.S.A. 18A:12-25 and 26. The Commission recommends that the Commissioner of Education impose a sanction of reprimand.

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

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – D03-07

Whereas, the School Ethics Commission has considered its Order to Show Cause in this matter; and

Whereas, at its meeting of December 18, 2007, the Commission found that Tom Wyatt violated N.J.S.A. 18A:12-25 and 26; and

Whereas, at its meeting of December 18, 2007, the Commission recommended that the Commissioner of Education impose a sanction of reprimand; and

Whereas, the Commission reviewed this draft decision as prepared by its staff;

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

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on December 18, 2007.

Joanne Boyle
Executive Director

PCG/LJB/MET/ethics/financial disclosure/decisions/D03-07 reprimand

61-08SEC

61-08

AGENCY DKT. NO. 1-1/08

IN THE MATTER OF MARK HOUCK,	:	
BOARD OF EDUCATION OF THE BOROUGH	:	COMMISSIONER OF EDUCATION
OF BERLIN, CAMDEN COUNTY.	:	DECISION

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

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

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

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 2/06/08

Date of Mailing: 2/06/08

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

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	**Docket No.: D02-07**
MARK HOUCK BERLIN BORO BOARD OF EDUCATION CAMDEN COUNTY	:	**DECISION FOR FAILURE TO FILE DISCLOSURE STATEMENTS**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued on November 20, 2007, through regular and certified mail return receipt requested, directing Mark Houck, a "school official" under N.J.S.A. 18A:12-23 of the School Ethics Act, to show cause as to why the Commission should not find the school official in violation of the School Ethics Act, (Act) N.J.S.A. 18A:12-21 et seq., for failing to file personal/relative and financial disclosure statements pursuant to N.J.S.A. 18A:12-25 and 26. In its letter enclosing the OTSC, the Commission provided notification that this school official had 20 days to respond to the OTSC, that the Commission would discuss this matter at its December 18, 2007 meeting, that the school official had the right to attend the meeting, and that the school official could be found in violation of the Act and receive a penalty up to removal. The school official filed the disclosure statements on December 10, 2007.

The school official did not appear at the Commission's meeting of December 18, 2007, at which time the Commission found probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission also found that the material facts were not in dispute and, therefore the Commission found that the school official's failure to timely file the disclosure statements was a clear violation of N.J.S.A. 18A:12-25 and 26. The Commission recommended that the Commissioner of Education impose a sanction of reprimand.

ANALYSIS

N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file personal/relative and financial disclosure statements and N.J.S.A. 18A:12-26 requires each school official to file the personal/relative and financial disclosure statements with the School Ethics Commission. The deadline to file these disclosure statements was April 30, 2007 for school officials in office since January 30, 2006 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators. The School Ethics Commission was advised by the County Superintendent that this school official did not file the disclosure statements as required by the Act. The Commission notes that the school official filed the disclosure statements on December 10, 2007. The Commission finds probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The

Commission also finds that the material facts are not in dispute and, therefore the school official's failure to timely file the disclosure statements constitutes a clear violation of N.J.S.A. 18A:12-25 and 26.

DECISION/PENALTY RECOMMENDATION

Based on the foregoing, the Commission finds that Mark Houck violated N.J.S.A. 18A:12-25 and 26. The Commission recommends that the Commissioner of Education impose a sanction of reprimand.

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

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – D02-07

Whereas, the School Ethics Commission has considered its Order to Show Cause in this matter; and

Whereas, at its meeting of December 18, 2007, the Commission found that Mark Houck violated N.J.S.A. 18A:12-25 and 26; and

Whereas, at its meeting of December 18, 2007, the Commission recommended that the Commissioner of Education impose a sanction of reprimand; and

Whereas, the Commission reviewed this draft decision as prepared by its staff;

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

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on December 18, 2007.

Joanne Boyle
Executive Director

PCG/LJB/MET/ethics/financial disclosure/decision reprimand template

63-08

63-08SEC

AGENCY DKT. NO. 4-1/08

IN THE MATTER OF DWIGHT MOXIE,	:	
FREEDOM ACADEMY CHARTER SCHOOL	:	COMMISSIONER OF EDUCATION
BOARD OF TRUSTEES, CAMDEN COUNTY.	:	DECISION

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

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

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

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 2/07/08

Date of Mailing: 2/07/08

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

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	**Docket No.: D05-07**
DWIGHT MOXIE FREEDOM ACADEMY BOARD OF TRUSTEES CAMDEN COUNTY	:	**DECISION FOR FAILURE TO FILE DISCLOSURE STATEMENTS**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued on November 20, 2007, through regular and certified mail return receipt requested, directing Dwight Moxie, a "school official" under N.J.S.A. 18A:12-23 of the School Ethics Act, to show cause as to why the Commission should not find the school official in violation of the School Ethics Act, (Act) N.J.S.A. 18A:12-21 et seq., for failing to file personal/relative and financial disclosure statements pursuant to N.J.S.A. 18A:12-25 and 26. In its letter enclosing the OTSC, the Commission provided notification that this school official had 20 days to respond to the OTSC, that the Commission would discuss this matter at its December 18, 2007 meeting, that the school official had the right to attend the meeting, and that the school official could be found in violation of the Act and receive a penalty up to removal. Through his attorney, Robert J. Hagerty, Esquire, the school official filed a response to the OTSC on December 5, 2007. The school official filed the disclosure statements on December 4, 2007.

The school official did not appear at the Commission's meeting of December 18, 2007, at which time the Commission found probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission also found that the material facts were not in dispute and, therefore the Commission found that the school official's failure to timely file the disclosure statements was a clear violation of N.J.S.A. 18A:12-25 and 26. The Commission recommended that the Commissioner of Education impose a sanction of reprimand.

ANALYSIS

N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file personal/relative and financial disclosure statements and N.J.S.A. 18A:12-26 requires each school official to file the personal/relative and financial disclosure statements with the School Ethics Commission. The deadline to file these disclosure statements was April 30, 2007 for school officials in office since January 30, 2006 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators. The School Ethics Commission was advised by the County Superintendent that this school official did not file the disclosure statements as required by the Act. The Commission notes that the school official filed the disclosure statements on December 4, 2007. The Commission finds probable

cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission also finds that the material facts are not in dispute and, therefore the school official's failure to timely file the disclosure statements constitutes a clear violation of N.J.S.A. 18A:12-25 and 26.

DECISION/PENALTY RECOMMENDATION

Based on the foregoing, the Commission finds that Dwight Moxie violated N.J.S.A. 18A:12-25 and 26. The Commission recommends that the Commissioner of Education impose a sanction of reprimand.

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

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – D05-07

Whereas, the School Ethics Commission has considered its Order to Show Cause in this matter; and

Whereas, at its meeting of December 18, 2007, the Commission found that Dwight Moxie violated N.J.S.A. 18A:12-25 and 26; and

Whereas, at its meeting of December 18, 2007, the Commission recommended that the Commissioner of Education impose a sanction of reprimand; and

Whereas, the Commission reviewed this draft decision as prepared by its staff;

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

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on December 18, 2007.

Joanne Boyle
Executive Director

PCG/LJB/MET/ethics/financial disclosure/decisions/D05-07 reprimand

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

JON S. CORZINE
Governor

LUCILLE E. DAVY
Commissioner

February 7, 2008

Ms. Joanne Boyle, Executive Director
Office of the School Ethics Commission
New Jersey State Department of Education
100 Riverview Executive Plaza
P.O. Box 500
Trenton, NJ 08625-0500

Ralph J. Hagerty, Esq.
Capehart & Scatchard
8000 Midlantic Drive
Mount Laurel, NJ 08054

Dear Parties:

IN THE MATTER OF CARY JOSHI, FREEDOM ACADEMY CHARTER SCHOOL BOARD OF TRUSTEES, CAMDEN COUNTY, AGENCY DKT. NO. 3-1/08.

We are enclosing a copy of the decision of the Commissioner of Education dated February 7, 2008, in the above-captioned matter. The Commissioner's decision may be appealed to the State Board of Education pursuant to *N.J.A.C. 6A:4-1.1* et seq.

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

Very truly yours,

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

MKD/kk:o/dec ltr-sec/cjoshi
Enclosure
c: Board Secretary
County Superintendent
Cynthia J. Jahn, Esq., Assist. Exec Director, NJSBA
Jones Addo, State Library

62-08SEC

AGENCY DKT. NO. 3-1/08

IN THE MATTER OF CARY JOSHI,	:	
FREEDOM ACADEMY CHARTER SCHOOL	:	COMMISSIONER OF EDUCATION
BOARD OF TRUSTEES, CAMDEN COUNTY.	:	DECISION

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

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

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

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 2/07/08

Date of Mailing: 2/07/08

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

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D04-07**
CARY JOSHI **FREEDOM ACADEMY** **BOARD OF TRUSTEES** **CAMDEN COUNTY**	:	**DECISION FOR FAILURE TO FILE DISCLOSURE STATEMENTS**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued on November 20, 2007, through regular and certified mail return receipt requested, directing Cary Joshi, a "school official" under N.J.S.A. 18A:12-23 of the School Ethics Act, to show cause as to why the Commission should not find the school official in violation of the School Ethics Act, (Act) N.J.S.A. 18A:12-21 et seq., for failing to file personal/relative and financial disclosure statements pursuant to N.J.S.A. 18A:12-25 and 26. In its letter enclosing the OTSC, the Commission provided notification that this school official had 20 days to respond to the OTSC, that the Commission would discuss this matter at its December 18, 2007 meeting, that the school official had the right to attend the meeting, and that the school official could be found in violation of the Act and receive a penalty up to removal. Through his attorney, Robert J. Hagerty, Esquire, the school official filed a response to the OTSC on December 5, 2007. The school official filed the disclosure statements on December 4, 2007.

The school official did not appear at the Commission's meeting of December 18, 2007, at which time the Commission found probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission also found that the material facts were not in dispute and, therefore the Commission found that the school official's failure to timely file the disclosure statements was a clear violation of N.J.S.A. 18A:12-25 and 26. The Commission recommended that the Commissioner of Education impose a sanction of reprimand.

ANALYSIS

N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file personal/relative and financial disclosure statements and N.J.S.A. 18A:12-26 requires each school official to file the personal/relative and financial disclosure statements with the School Ethics Commission. The deadline to file these disclosure statements was April 30, 2007 for school officials in office since January 30, 2006 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators. The School Ethics Commission was advised by the County Superintendent that this school official did not file the disclosure statements as required by the Act. The Commission notes that the school official filed the disclosure statements on December 4, 2007. The Commission finds probable

cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission also finds that the material facts are not in dispute and, therefore the school official's failure to timely file the disclosure statements constitutes a clear violation of N.J.S.A. 18A:12-25 and 26.

DECISION/PENALTY RECOMMENDATION

Based on the foregoing, the Commission finds that Cary Joshi violated N.J.S.A. 18A:12-25 and 26. The Commission recommends that the Commissioner of Education impose a sanction of reprimand.

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

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – D04-07

Whereas, the School Ethics Commission has considered its Order to Show Cause in this matter; and

Whereas, at its meeting of December 18, 2007, the Commission found that Cary Joshi violated N.J.S.A. 18A:12-25 and 26; and

Whereas, at its meeting of December 18, 2007, the Commission recommended that the Commissioner of Education impose a sanction of reprimand; and

Whereas, the Commission reviewed this draft decision as prepared by its staff;

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

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on December 18, 2007.

Joanne Boyle
Executive Director

PCG/LJB/MET/ethics/financial disclosure/decisions/D04-07 reprimand

64-08

64-08SEC

AGENCY DKT. NO. 17-1/08

IN THE MATTER OF KAREN MOROS,	:	
BOARD OF EDUCATION OF THE BOROUGH	:	COMMISSIONER OF EDUCATION
OF NETCONG, MORRIS COUNTY.	:	DECISION

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

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

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

IT IS SO ORDERED.*

Lucille E Day

COMMISSIONER OF EDUCATION

Date of Decision: 2/07/08

Date of Mailing: 2/07/08

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

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D22-07**
KAREN MOROS **NETCONG** **BOARD OF EDUCATION** **MORRIS COUNTY**	:	**DECISION FOR FAILURE TO FILE DISCLOSURE STATEMENTS**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued on November 20, 2007, through regular and certified mail return receipt requested, directing Karen Moros, a "school official" under N.J.S.A. 18A:12-23 of the School Ethics Act, to show cause as to why the Commission should not find the school official in violation of the School Ethics Act, (Act) N.J.S.A. 18A:12-21 et seq., for failing to file personal/relative and financial disclosure statements pursuant to N.J.S.A. 18A:12-25 and 26. In its letter enclosing the OTSC, the Commission provided notification that this school official had 20 days to respond to the OTSC, that the Commission would discuss this matter at its December 18, 2007 meeting, that the school official had the right to attend the meeting, and that the school official could be found in violation of the Act and receive a penalty up to removal. The school official filed the completed disclosure statements on December 6, 2007.

The school official did not appear at the Commission's meeting of December 18, 2007, at which time the Commission found probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission also found that the material facts were not in dispute and, therefore the Commission found that the school official's failure to timely file the disclosure statements was a clear violation of N.J.S.A. 18A:12-25 and 26. The Commission recommended that the Commissioner of Education impose a sanction of reprimand.

ANALYSIS

N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file personal/relative and financial disclosure statements and N.J.S.A. 18A:12-26 requires each school official to file the personal/relative and financial disclosure statements with the School Ethics Commission. The deadline to file these disclosure statements was April 30, 2007 for school officials in office since January 30, 2006 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators. The School Ethics Commission was advised by the County Superintendent that this school official did not file the disclosure statements as required by the Act. The Commission notes that the school official filed the disclosure statements on December 6, 2007. The Commission finds probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The

Commission also finds that the material facts are not in dispute and, therefore the school official's failure to timely file the disclosure statements constitutes a clear violation of N.J.S.A. 18A:12-25 and 26.

DECISION/PENALTY RECOMMENDATION

Based on the foregoing, the Commission finds that Karen Moros violated N.J.S.A. 18A:12-25 and 26. The Commission recommends that the Commissioner of Education impose a sanction of reprimand.

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

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – D22-07

Whereas, the School Ethics Commission has considered its Order to Show Cause in this matter; and

Whereas, at its meeting of December 18, 2007, the Commission found that Karen Moros violated N.J.S.A. 18A:12-25 and 26; and

Whereas, at its meeting of December 18, 2007, the Commission recommended that the Commissioner of Education impose a sanction of reprimand; and

Whereas, the Commission reviewed this draft decision as prepared by its staff;

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

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on December 18, 2007.

Joanne Boyle
Executive Director

PCG/LJB/MET/ethics/financial disclosure/decisions/D22-07 reprimand

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

JON S. CORZINE
Governor

LUCILLE E. DAVY
Commissioner

February 7, 2008

Ms. Joanne Boyle, Executive Director
Office of the School Ethics Commission
New Jersey State Department of Education
100 Riverview Executive Plaza
P.O. Box 500
Trenton, NJ 08625-0500

Mr. John Arbolino
7 Koclas Drive
Netcong, NJ 07857

Dear Parties:

IN THE MATTER OF JOHN ARBOLINO, BOARD OF EDUCATION OF THE BOROUGH OF NETCONG, MORRIS COUNTY, AGENCY DKT. NO. 16-1/08

We are enclosing a copy of the decision of the Commissioner of Education dated February 7, 2008, in the above-captioned matter. The Commissioner's decision may be appealed to the State Board of Education pursuant to *N.J.A.C. 6A:4-1.1* et seq.

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

Very truly yours,

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

MKD/kk:o/dec ltr-sec/jarbolino
Enclosure
c: Board Secretary
County Superintendent
Cynthia J. Jahn, Esq., Assist. Exec Director, NJSBA
Jones Addo, State Library

65-08SEC

AGENCY DKT. NO. 16-1/08

IN THE MATTER OF JOHN ARBOLINO,	:	
BOARD OF EDUCATION OF THE BOROUGH	:	COMMISSIONER OF EDUCATION
OF NETCONG, MORRIS COUNTY.	:	DECISION

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

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

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

IT IS SO ORDERED.*

Lucille Davy

COMMISSIONER OF EDUCATION

Date of Decision: 2/07/08

Date of Mailing: 2/07/08

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

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	**Docket No.: D21-07**
JOHN ARBOLINO NETCONG BOARD OF EDUCATION MORRIS COUNTY	:	**DECISION FOR FAILURE TO FILE DISCLOSURE STATEMENTS**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued on November 20, 2007, through regular and certified mail return receipt requested, directing John Arbolino, a "school official" under N.J.S.A. 18A:12-23 of the School Ethics Act, to show cause as to why the Commission should not find the school official in violation of the School Ethics Act, (Act) N.J.S.A. 18A:12-21 et seq., for failing to file personal/relative and financial disclosure statements pursuant to N.J.S.A. 18A:12-25 and 26. In its letter enclosing the OTSC, the Commission provided notification that this school official had 20 days to respond to the OTSC, that the Commission would discuss this matter at its December 18, 2007 meeting, that the school official had the right to attend the meeting, and that the school official could be found in violation of the Act and receive a penalty up to removal. The school official filed the completed disclosure statements on November 27, 2007.

The school official did not appear at the Commission's meeting of December 18, 2007, at which time the Commission found probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission also found that the material facts were not in dispute and, therefore the Commission found that the school official's failure to timely file the disclosure statements was a clear violation of N.J.S.A. 18A:12-25 and 26. The Commission recommended that the Commissioner of Education impose a sanction of reprimand.

ANALYSIS

N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file personal/relative and financial disclosure statements and N.J.S.A. 18A:12-26 requires each school official to file the personal/relative and financial disclosure statements with the School Ethics Commission. The deadline to file these disclosure statements was April 30, 2007 for school officials in office since January 30, 2006 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators. The School Ethics Commission was advised by the County Superintendent that this school official did not file the disclosure statements as required by the Act. The Commission notes that the school official filed the disclosure statements on November 27, 2007. The Commission finds probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The

Commission also finds that the material facts are not in dispute and, therefore the school official's failure to timely file the disclosure statements constitutes a clear violation of N.J.S.A. 18A:12-25 and 26.

DECISION/PENALTY RECOMMENDATION

Based on the foregoing, the Commission finds that John Arbolino violated N.J.S.A. 18A:12-25 and 26. The Commission recommends that the Commissioner of Education impose a sanction of reprimand.

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

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – D21-07

Whereas, the School Ethics Commission has considered its Order to Show Cause in this matter; and

Whereas, at its meeting of December 18, 2007, the Commission found that John Arbolino violated N.J.S.A. 18A:12-25 and 26; and

Whereas, at its meeting of December 18, 2007, the Commission recommended that the Commissioner of Education impose a sanction of reprimand; and

Whereas, the Commission reviewed this draft decision as prepared by its staff;

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

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on December 18, 2007.

Joanne Boyle
Executive Director

PCG/LJB/MET/ethics/financial disclosure/decisions/D21-07 reprimand

67-08

S.T. on behalf of minor child, K.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a residency appeal on behalf of her daughter, K.T., who was enrolled as a kindergarten student in the Hamilton Township School District in September 2006. The respondent sought reimbursement of tuition for the period of K.T.'s alleged ineligible attendance. Petitioner failed to appear for three hearing dates in August, September and November 2007; ex parte proofs were presented by the respondent at a hearing on November 21, 2007.

The ALJ found that: petitioner failed to prosecute her appeal, leaving no basis to consider overturning the residency determination of the respondent Board; respondent's proofs as to ineligibility and tuition rate were convincing and satisfy its burden of proof for the counterclaim. The ALJ concluded that petitioner must pay the respondent tuition in the amount of $9,443 for the period of ineligible attendance.

The Commissioner concurred with the ALJ, adopted the Initial Decision as the final decision in this matter, ordered petitioner to compensate the Board for tuition owed, and dismissed the petition.

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

February 7, 2008

OAL DKT. NO. EDU 4822-07
AGENCY DKT. NO. 168-6/07

S.T. on behalf of minor child, K.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. In the Initial Decision, the Administrative Law Judge (ALJ) advises that the petitioner failed to appear at the November 20, 2007 hearing scheduled in this case – notwithstanding the two notices that had been sent to her at the address listed in her petition. Respondent did appear at the hearing and submitted proofs, *e.g.,* Exhibit R-7, supporting its claim for tuition.[1]

Having received no explanation from the petitioner for her failure to appear at the hearing, the ALJ recommends dismissal of the petition and the granting of respondent's counterclaim for tuition. He has returned the file to the Commissioner pursuant to *N.J.A.C.* 1:1-14.4 – along with copies of the notifications that were sent to the parties by the OAL regarding the November 30, 2007 hearing date.[2]

[1] The Commissioner does not have a transcript of the November 20, 2007,*ex parte* hearing.

[2] On page 2 of the ALJ's decision, it states that notices of the hearings were sent to both the address in Hamilton which was set forth in S.T.'s petition and the address in Trenton which respondent contends is S.T.'s actual residence. Upon examination of the file, the Commissioner notes that there is no record of notices being sent to the Trenton address.

No exceptions have been filed by petitioner during the period of time allowed under *N.J.A.C.* 1:1-18.4(a).

The Commissioner consequently adopts the Initial Decision as the final decision in this case – recommending dismissal of the petition with prejudice and awarding respondent tuition in the amount of $9,443.00 as requested in its counter-claim.

IT IS SO ORDERED. [3]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 2/07/08

Date of Mailing: 2/07/08

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4822-07
AGENCY DKT. NO. 168-6/07

S.T., ON BEHALF OF MINOR CHILD,
K.T.,
Petitioner,
v.
BOARD OF EDUCATION OF THE
TOWNSHIP OF HAMILTON,
MERCER COUNTY,
Respondent.

No appearance by or for petitioner

Dennis M. DeSantis, Esq., for respondent (Destribats, Campbell, DeSantis, Magee & Staub, attorneys)

Record Closed: January 3, 2008 Decided: January 7, 2008

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

S.T. appeals the Hamilton Township Board of Education's determination that her daughter, K.T., is not entitled to a free public education in the Hamilton Township School District because she is not domiciled in the district. The Board has filed a counterclaim seeking S.T.'s payment of tuition for the number of days K.T. attended school in the district.

The Board notified S.T. of its determination on June 7, 2007, and S.T. filed her petition of appeal directly with the Commissioner of Education on June 18, 2007. The Board filed its answer and counterclaim on June 27, 2007, and the matter was then transmitted to the Office of Administrative Law for determination as a contested case on June 28, 2007.

The hearing was scheduled for August 29, 2007, at which time S.T. failed to appear. However, when the Board raised the possibility that S.T. might not have received notice because there had been a fire at her purported Hamilton Township address, the matter was adjourned and rescheduled for September 18, 2007. Although notice of the rescheduled hearing was sent not only to the Hamilton address, but to a Trenton address as well, S.T. failed to appear. At that time, the matter was given a peremptory hearing date of November 20, 2007, but notwithstanding adequate notice, S.T. once again failed to appear.

Given the fact that the Board had, with its answer to S.T.'s petition, filed a counterclaim seeking S.T.'s payment of tuition for the number of days K.T. had attended school in the district, an ex parte hearing was held and concluded. Although the record remained open to allow S.T. an opportunity to explain her non-appearance by the close of the next business day, no such explanation was received and the record closed November 21, 2007. The record was reopened on January 3, 2008, in order to determine whether S.T. had filed a petition of appeal with or requested an opportunity to appear before the Board and, if so, whether the Board had taken any formal action. The record was closed later that same day upon receipt of the requested information.

On September 6, 2006, S.T. enrolled her five-year-old daughter, K.T., at the Langtree Elementary School in Hamilton Township. At that time, S.T. filled out a pupil enrollment form listing K.T.'s address as "1010 Silver Ct., Hamilton Sq., NJ 08690" and her address as "1010 Silver Ct., Trenton, NJ 08690." She also signed an affidavit in which she stated that she and her children[1] were living with her cousin, Danielle

[1] S.T.'s two other children, Ki.T. and G.B., were later voluntarily withdrawn from the school district.

Kornegay, and that the children were not residing with her in the school district for the purpose of receiving a free education. Ms. Kornegay, in turn, signed a host family affidavit in which she stated that S.T. and her children were permanently domiciled at her home.

Testifying on behalf of the school district was Albert Offredo, who has been an investigator for the Board's Central Registration Office for the past thirteen years. Prior to taking this position he served as a Hamilton Township police officer for twenty-five years, working as a detective – and conducting numerous surveillances – for eleven of those years.

On Monday, May 14, 2007, Offredo was assigned to investigate whether K.T. was domiciled in the school district. He began his investigation the following day, Tuesday, May 15, 2007, conducting surveillance of the residence at 1010 Silver Court between 7:45 a.m. and 9:00 a.m. When he did not see anyone leave the house, he called the Langtree School and was informed that K.T. was in attendance.

On Wednesday, May 16, 2007, Offredo conducted surveillance of a house at 96 Klagg Avenue, Trenton, that S.T. had listed as her prior residence. Offredo arrived at approximately 7:30 a.m. and approximately one hour later, at 8:35 a.m., he saw an adult female and young child get into a green Dodge van and drive straight to the Langtree School. The young child was subsequently identified by school authorities as K.T. Further investigation disclosed that the van was registered to K.T.'s father, L.T.

On Thursday, May 17, 2007, Offredo returned to 1010 Silver Court and waited from 8:00 a.m. to 9:00 a.m. for the adult female and child to emerge. When he did not see anyone leave the house, he called the Langtree School and was advised that K.T. was in attendance.

Offredo conducted a second surveillance later that same day at the Langtree School. At approximately 3:30 p.m., he watched K.T. get into the green Dodge van, which was being driven by an adult female, and then followed the van from the school to

96 Klagg Avenue, where the adult female and K.T. exited the vehicle and entered the residence.

On Monday, May 21, 2007, Offredo arrived at 96 Klagg Avenue at 7:40 a.m. At approximately 8:30 a.m., he watched the adult female and K.T. leave in the green Dodge van and followed them to the Langtree School, where K.T. exited the van and entered the school.

On Tuesday, May 22, 2007, Offredo returned to 1010 Silver Court and waited from 8:00 a.m. to 9:00 a.m. for the adult female and K.T. to emerge. When they did not emerge by 9:00 a.m., he called the Langtree School and was advised that K.T. was in attendance.

Later that same day, at approximately 3:15 p.m., Offredo watched as K.T. exited the school and got into the green Dodge van. He followed the van through the streets of Hamilton Township and Trenton, arriving at 96 Klagg Avenue at approximately 3:40 p.m. At that time he observed the adult female and K.T. enter the residence and, after waiting an additional twenty minutes, terminated the surveillance at 4:00 p.m.

On Thursday, May 24, 2007, Offredo arrived at 96 Klagg Avenue at 7:30 a.m. At approximately 8:36 a.m., the adult female and K.T. left in the green Dodge van and drove directly to the Langtree School, arriving at 8:50 a.m. K.T. exited the van and entered the school. Offredo repeated this surveillance on Tuesday, May 29, and Wednesday, May 30, 2007, with the same result.

Offredo conducted his eleventh and final surveillance the afternoon of May 30. At 3:32 p.m., K.T. was picked up by an adult female driving a Toyota Corolla. Offredo followed the vehicle through the streets of Hamilton Township and Trenton to 96 Klagg Avenue, where K.T. exited the car and entered the house. Further investigation disclosed that the Corolla was registered to Danielle Kornegay.

By letter dated June 7, 2007, and sent to both addresses (Exhibits R-5 and R-6), John E. Conner, the Board's attendance/residency officer, advised S.T. that K.T. had

been found to be ineligible to attend the Hamilton Township schools because she was not domiciled within the school district. In this letter, Mr. Conner further advised S.T. that

> [i]f an appeal is filed with the Commissioner and the applicant does not sustain the burden of demonstrating entitlement to attend the schools of the district, or the applicant abandons the appeal through withdrawal, failure to prosecute or any means other than settlement, the applicant may be assessed, by order of the Commissioner, enforceable in Superior Court, tuition for any period of ineligible attendance, including the initial 21 day period[2] and the period during the which the appeal was pending before the Commissioner.

Approximately two weeks later, on June 19, 2007, Mr. Conner sent S.T. a second letter (R-7) notifying her that since her "application did not support [her] claim for enrollment," she was being assessed residence tuition for K.T.'s attendance at the school district's Langtree School from September 5, 2007 to June 18, 2007. Since tuition is calculated on the basis of 1/180 of the school district's total annual per pupil cost of $9,443, or $52.46 per day, and K.T. was enrolled in the district for all 180 days, S.T. was directed to pay the district the total amount of $9,443.

When a party fails to appear for a hearing despite having received adequate notice of the proceedings, the appearing party may ask the administrative law judge for permission to proceed through the presentation of ex parte proofs. If, after holding the matter for one day, the judge does not receive from the absent party an explanation for the failure to appear, and the circumstances require a decision on the merits, the judge may then issue an initial decision on the merits based on the ex parte proofs presented. N.J.A.C. 1:1-14.4(c). New Jersey Real Estate Commission v. Grennor, 92 N.J.A.R. 2d (REC) 29. Since S.T. failed to submit an explanation for her absences on the three scheduled days of hearing, I **CONCLUDE** that the Board is entitled to an initial decision on the merits based on the proofs presented at hearing.

[2] Among other things, N.J.S.A. 18A:38-1 provides that a student shall not be removed from school during the 21-day period in which a resident may contest a board of education's decision.

The issue in this matter is whether K.T. was entitled to a free education under N.J.S.A. 18A:38-1, which provides that public schools shall be free to persons over five and under twenty years of age who are "domiciled within the school district." See V.R. o/b/o A.R. v. Hamburg Bd. of Educ., 2 N.J.A.R. 283, 287 (Educ. 1980), aff'd, State Bd., 1981 S.L.D. 1533, rev'd on other grounds, sub nom Rabinowitz v. New Jersey State Bd. of Educ., 550 F. Supp. 481 (D.N.J. 1982) (New Jersey requires local domicile, as opposed to mere residence, in order for a student to receive a free education).

Generally speaking, domicile is the place of a person's abode where he or she has the present intention of remaining and to which, if absent, he or she intends to return. Mercadante v. City of Paterson, 111 N.J. Super. 35, 39 (Ch. Div. 1970), aff'd, 58 N.J. 112 (1971). A person may have multiple residences, but only one domicile at a time; as such, the residence may coincide with domicile, but does not alone determine domicile. State v. Benny, 20 N.J. 238, 251 (1955).

"In a strict legal sense, the domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving." In re Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991) (quoting Kurilla v. Roth, 132 N.J.L. 213, 215 (Sup. Ct. 1944)); see also Mercadante, supra, 111 N.J. *Super.* at 39. Thus, domicile is what is regarded as an individual's true and permanent home. In re Jaffe, 74 N.J. 86, 90-91 (1977).

The question of domicile is one of fact and must be determined on a case-by-case basis. Lea v. Lea, 18 N.J. 1, 7 (1955). And in the present matter, there is absolutely no evidence that S.T. established even so much as a residence, much less a domicile, in Hamilton Township. Stated another way, the undisputed evidence establishes that S.T. and K.T. were domiciled in the City of Trenton throughout the period of time K.T. attended school in Hamilton Township school district.

Mr. Offredo credibly testified that he conducted three random surveillances of 1010 Silver Court in Hamilton Township without ever seeing K.T. leave the residence in the morning to go to school. On the other hand, he conducted five random

surveillances at 96 Klagg Avenue in Trenton and on each occasion saw K.T. leave the house and be driven to school in a green Dodge van registered to her father. What is more, he also conducted three random surveillances of the Langtree School and on each occasion saw K.T. leave school and be driven to 96 Klagg Avenue; twice in the green Dodge van and once in a Toyota Corolla registered to Danielle Kornegay.

After careful consideration of the record before me, I **FIND** that S.T. and K.T. were at all relevant times residents of and domiciled in Trenton, and therefore **CONCLUDE** that K.T. was not entitled to a free public education in the Hamilton Township school district during the 2006-2007 school year.

Under N.J.S.A. 18A:38-1(b)(2), a board of education is entitled to recover tuition from the parent of a child found ineligible to attend a school in its district. In such cases, "[t]uition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance... ." Ibid. Here, it is undisputed and I therefore **FIND** that the school district's total annual per pupil cost for the 2006-2007 school year was $9,443.00 and that K.T. attended the Langtree School for the entire school year. Accordingly, I **CONCLUDE** that S.T. should be assessed tuition costs in that amount.

Based upon the foregoing, it is **ORDERED** that S.T.'s petition of appeal should be and is hereby **DISMISSED WITH PREJUDICE**. And it is further **ORDERED** that the Board's counterclaim for recovery of tuition costs associated with K.T.'s attendance at the Langtree School in the Hamilton Township school district during the 2006-2007 school year in the amount of $9,443.00 be and is hereby **GRANTED**.

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

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

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

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

January 7, 2008
DATE

ISRAEL D. DUBIN, ALJ

Date Received at Agency:

January 8, 2008

Mailed to Parties:

JAN 10 2008
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

IDD/cmo

APPENDIX

WITNESSES

For Petitioner:

None

For Respondent:

Albert Offredo

EXHIBITS

For Petitioner:

None

For Respondent:

R-1 Pupil Enrollment Form
R-2 Affidavit – Host Family Domiciled in Hamilton Township
R-3 Affidavit – Parents Residing with Host Family
R-4 Investigative Report
R-5 Ineligibility Letter sent to Hamilton Township Address
R-6 Ineligibility Letter sent to Trenton Address
R-7 Tuition Reimbursement Letter

68-08

AGENCY DKT. NO. 20-1/08

IN THE MATTER OF JEREMIAH GRACE, :

BOARD OF EDUCATION OF THE : COMMISSIONER OF EDUCATION

CITY OF ELIZABETH, UNION COUNTY. : DECISION

The record of this matter and the decision of the School Ethics Commission (Commission) – forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 solely for review of the Commission's recommended penalty – have been reviewed, as have exceptions filed by the respondent pursuant to *N.J.A.C.* 1:6C-18.3.

In his exceptions, the respondent reiterates his arguments before the Commission as to why he should not be penalized for failing to file the requisite statement in a timely manner, noting that: 1) his omission was unintended and due to lack of prior experience and familiarity with the requirements of public office; 2) the public interest was not harmed because he, in fact, had no conflicting interest to report; and 3) he regrets his oversight and has taken steps to ensure that it does not recur.

Upon review, the Commissioner concurs with the penalty recommended by the Commission and admonishes the respondent for failure to timely file the requisite statement, in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials. While the Commissioner appreciates the respondent's good intentions, the fact remains that the Commission found a violation to have occurred, and the Commissioner cannot disagree that a penalty is warranted even where the violation resulted from oversight rather than deliberate disregard of the law.[1]

[1] The Commissioner notes that reprimand is the least of the penalties available for imposition under the School Ethics Act.

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

IT IS SO ORDERED. [2]

COMMISSIONER OF EDUCATION

Date of Decision: 2/11/08

Date of Mailing: 2/11/08

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

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	**Docket No.: D25-07**
JEREMIAH GRACE ELIZABETH BOARD OF EDUCATION UNION COUNTY	:	**DECISION FOR FAILURE TO FILE DISCLOSURE STATEMENTS**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued on November 20, 2007, through regular and certified mail return receipt requested, directing Jeremiah Grace, a "school official" under N.J.S.A. 18A:12-23 of the School Ethics Act, to show cause as to why the Commission should not find the school official in violation of the School Ethics Act, (Act) N.J.S.A. 18A:12-21 et seq., for failing to file personal/relative and financial disclosure statements pursuant to N.J.S.A. 18A:12-25 and 26. In its letter enclosing the OTSC, the Commission provided notification that this school official had 20 days to respond to the OTSC, that the Commission would discuss this matter at its December 18, 2007 meeting, that the school official had the right to attend the meeting, and that the school official could be found in violation of the Act and receive a penalty up to removal. Through his attorney, John W. Bartlett, Esquire, the school official provided an answer to the Commission and filed the disclosure statements on December 17, 2007.

The school official did not appear at the Commission's meeting of December 18, 2007, at which time the Commission found probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission also found that the material facts were not in dispute and, therefore the Commission found that the school official's failure to timely file the disclosure statements was a clear violation of N.J.S.A. 18A:12-25 and 26. The Commission recommended that the Commissioner of Education impose a sanction of reprimand.

ANALYSIS

N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file personal/relative and financial disclosure statements and N.J.S.A. 18A:12-26 requires each school official to file the personal/relative and financial disclosure statements with the School Ethics Commission. The deadline to file these disclosure statements was April 30, 2007 for school officials in office since January 30, 2006 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators. The School Ethics Commission was advised by the County Superintendent that this school official did not file the disclosure statements as required by the Act. The Commission notes that the school official filed an answer to the OTSC and filed the disclosure statements on December 17, 2007.

The Commission finds probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission also finds that the material facts are not in dispute and, therefore the school official's failure to timely file the disclosure statements constitutes a clear violation of N.J.S.A. 18A:12-25 and 26.

DECISION/PENALTY RECOMMENDATION

Based on the foregoing, the Commission finds that Jeremiah Grace violated N.J.S.A. 18A:12-25 and 26. The Commission recommends that the Commissioner of Education impose a sanction of reprimand.

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

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – D25-07

Whereas, the School Ethics Commission has considered its Order to Show Cause in this matter; and

Whereas, at its meeting of December 18, 2007, the Commission found that Jeremiah Grace violated N.J.S.A. 18A:12-25 and 26; and

Whereas, at its meeting of December 18, 2007, the Commission recommended that the Commissioner of Education impose a sanction of reprimand; and

Whereas, the Commission reviewed this draft decision as prepared by its staff;

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

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on December 18, 2007.

Joanne Boyle
Executive Director

PCG/LJB/MET/ethics/financial disclosure/decisions 2007/D25-07 reprimand

69-08

AGENCY DKT. NO. 18-1/08

IN THE MATTER OF JACQUELINE STIVALA, BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the decision of the School Ethics Commission (Commission) – forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 solely for review of the Commission's recommended penalty – have been reviewed, as have comments filed by the respondent pursuant to *N.J.A.C.* 1:6C-18.3.

In her comments, the respondent does not take exception to the decision of the Commission. Rather, she notes that she filed the requisite statement incorrectly due to distraction caused by a recent personal loss, but rectified her error by refiling upon receiving the Commission's Order to Show Cause and now seeks to ensure that she is in full compliance.

Upon review, the Commissioner concurs with the penalty recommended by the Commission and admonishes the respondent for failure to file the requisite statement in a timely manner – such delay having resulted in a waste of administrative and adjudicative time by local, county and State education officials. While the Commissioner appreciates the respondent's circumstances and good intentions, the fact remains that the Commission found a violation to have occurred, and the Commissioner cannot disagree that a penalty is warranted in light of school officials' obligation – regardless of personal difficulties – to comply with the law while they are holding office.[1]

[1] The Commissioner notes that reprimand is the least of the penalties available for imposition under the School Ethics Act.

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

IT IS SO ORDERED. [2]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 2/11/08

Date of Mailing: 2/11/08

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

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	**Docket No.: D23-07**
JACQUELINE STIVALA PEQUANNOCK TOWNSHIP BOARD OF EDUCATION MONMOUTH COUNTY	:	**DECISION FOR FAILURE TO FILE DISCLOSURE STATEMENTS**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued on November 20, 2007, through regular and certified mail return receipt requested, directing Jacqueline Stivala, a "school official" under N.J.S.A. 18A:12-23 of the School Ethics Act, to show cause as to why the Commission should not find the school official in violation of the School Ethics Act, (Act) N.J.S.A. 18A:12-21 et seq., for failing to file personal/relative and financial disclosure statements pursuant to N.J.S.A. 18A:12-25 and 26. In its letter enclosing the OTSC, the Commission provided notification that this school official had 20 days to respond to the OTSC, that the Commission would discuss this matter at its December 18, 2007 meeting, that the school official had the right to attend the meeting, and that the school official could be found in violation of the Act and receive a penalty up to removal. The school official filed the disclosure statements on December 14, 2007.

The school official did not appear at the Commission's meeting of December 18, 2007, at which time the Commission found probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission also found that the material facts were not in dispute and, therefore the Commission found that the school official's failure to timely file the disclosure statements was a clear violation of N.J.S.A. 18A:12-25 and 26. The Commission recommended that the Commissioner of Education impose a sanction of reprimand.

ANALYSIS

N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file personal/relative and financial disclosure statements and N.J.S.A. 18A:12-26 requires each school official to file the personal/relative and financial disclosure statements with the School Ethics Commission. The deadline to file these disclosure statements was April 30, 2007 for school officials in office since January 30, 2006 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators. The School Ethics Commission was advised by the County Superintendent that this school official did not file the disclosure statements as required by the Act. The Commission notes that the school official filed the disclosure statements on December 14, 2007. The Commission finds probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The

Commission also finds that the material facts are not in dispute and, therefore the school official's failure to timely file the disclosure statements constitutes a clear violation of N.J.S.A. 18A:12-25 and 26.

DECISION/PENALTY RECOMMENDATION

Based on the foregoing, the Commission finds that Jacqueline Stivala violated N.J.S.A. 18A:12-25 and 26. The Commission recommends that the Commissioner of Education impose a sanction of reprimand.

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

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – D23-07

Whereas, the School Ethics Commission has considered its Order to Show Cause in this matter; and

Whereas, at its meeting of December 18, 2007, the Commission found that Jacqueline Stivala violated N.J.S.A. 18A:12-25 and 26; and

Whereas, at its meeting of December 18, 2007, the Commission recommended that the Commissioner of Education impose a sanction of reprimand; and

Whereas, the Commission reviewed this draft decision as prepared by its staff;

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

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on December 18, 2007.

_____

Joanne Boyle
Executive Director

PCG/LJB/MET/ethics/financial disclosure/decisions 2007/D23-07 reprimand

70-08

OAL DKT. NO. EDU 217-07
AGENCY DKT. NO. 459-12/06

IN THE MATTER OF THE TENURE	:	
HEARING OF YAMIRA RAMIREZ,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
TRENTON, MERCER COUNTY.	:	

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

Upon review, the Commissioner is satisfied that the proposed agreement is consistent with established standards governing settlement of tenure matters. *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846; *N.J.A.C.* 6A:3-5.6.

Accordingly, the settlement is hereby approved and the tenure matter dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 2/13/08

Date of Mailing: 2/13/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 217-07
AGENCY DKT. NO. 459-12/06

IN THE MATTER OF THE TENURE HEARING OF YAMIRA RAMIREZ, SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY

Thomas W. Sumners, Jr., Esq., for petitioner, School District of the City of Trenton (Sumners George, attorneys)

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

Record Closed: December 24, 2007 Decided: January 2, 2008

BEFORE **SOLOMON A. METZGER**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on January 12, 2007, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

1/2/08
DATE

SOLOMON A. METZGER, ALJ

Date Received at Agency:

JAN 4 2008
DATE

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cad

SETTLEMENT AGREEMENT

In the Matter of the Tenure Hearing
of Yamira Ramirez
Trenton Board of Education

This ***SETTLEMENT AGREEMENT*** ("Agreement") is made between the Petitioner, Board of Education of the City of Trenton ("Board"), and the Respondent, Yamira Ramirez ("Ramirez").

WHEREAS, the Board filed tenure charges with the Commissioner of Education, Agency Docket No. 459-12/06, OAL Docket No. EDUTH 217-07S ("tenure proceeding"), in which Ramirez was charged with engaging in conduct unbecoming of a Board employee, specifically, poor attendance, tardiness, leaving work early without signing out, failure to call in absences, making false entries in the sign in/sign out book, and poor work performance; and

WHEREAS, Ramirez denies that she left work early, failed to call her in absences, made false entries in the sign in/sign out book, performed her work poorly; and

WHEREAS, Ramirez asserts that her absences and tardiness were justified because of personal and family illnesses; and

WHEREAS, one day of the tenure proceedings have been completed with presentation of some of the Board's evidence and Ramirez has not had the opportunity to present her evidence; and

WHEREAS, the Board and Ramirez ("the Parties") feel it is in the best interest of all involved and all issues related to the tenure proceeding be settled allowing for the expeditious resolution of this matter saving both Parties the cost and uncertainty of continued litigation;

NOW, THEREFORE, in consideration of the covenants and mutual promises contained herein, it is hereby agreed as follows:

1. The Parties agree that Ramirez will not receive back pay for the one hundred twenty (120) days for the period of suspension which occurred between December 19, 2006 and April 18, 2007 in accordance with *N.J.S.A.* 18A:25-6;

2. The Board agrees to dismiss the tenure charges against Ramirez;

3. Ramirez agrees to submit a letter of resignation effective December 31, 2007;

4. The Parties agree and covenant that neither party, nor any person, organization, or other entity on their behalf will file any charge, claim, lawsuit against any Party based upon the fact that the Board filed tenure charges or that Ramirez defended those charges;

5. The Parties recognize that each of them has had input into the drafting of this Agreement and agree that if there should arise a dispute as to its terms, this Agreement shall not be construed against either party based upon the identity of its drafters;

6. The Parties understand that this Agreement and its validity is contingent upon the approval of Administrative Law Judge Solomon Metzger and the Commissioner of Education, and that if any terms of this Agreement are rejected, this Agreement shall be deemed null and void, and in such event, neither Parties' position in relation to the tenure charge shall be prejudiced and the matter shall be returned to the Office of Administrative Law for a hearing in relation to the tenure proceeding, and that in such event, the Parties may again attempt to settle the matter in a manner which is satisfactory to Administrative Law Judge Solomon Metzger and the Commissioner of Education.

7. The Parties request that the tenure hearing be held in abeyance in order to obtain the approval of this Agreement by Administrative Law Judge Solomon Metzger and the Commissioner of Education, and in the event that approval is not obtained by the proposed effective date of Ramirez' resignation, but is later approved, Ramirez is not entitled to salary payments during the pendency of obtaining approval of this Agreement after December 31, 2007 (the proposed effective date of Ramirez' resignation);

8. The Parties acknowledge that this Agreement is based upon their analysis and understanding of the evidence which was presented at the hearing to date and would be presented should the hearing continue, and that in the event that this Agreement is not approved and the hearing is reconvened, neither this Agreement or anything in this Agreement shall be admissible in evidence;

9. In settling this matter, the Parties acknowledge that they are waiving their rights to a hearing before the Office of Administrative Law and the right to file exceptions to the Commissioner of Education as well as appeals in accordance with state law;

10. The Parties further acknowledge and agree to the terms of this Agreement and are satisfied with the legal representation that they have received in this matter;

11. The Parties warrant that this Agreement is entered into voluntarily, without any duress, or without any other promises or agreements not expressed herein, and with the understanding that neither Party is compelled to do so, and that by entering into this Agreement, each Party waives their right to a hearing and disposition on the merits of the charges;

12. Ramirez has approved the terms of this Settlement Agreement as acknowledged by her signature below;

13. The Board has approved the terms of this Agreement by a roll call majority vote and acknowledged by the execution of this Agreement by the Board President.

APPROVED:

Joyce M. Kersey

Joyce M. Kersey, President
Trenton Board of Education

Sworn and subscribed to before me
this 13th day of November, 2007

Thomas W. Sumners

Thomas W. Sumners, Jr., Esq.
Attorney at Law, State of New Jersey

Yamira Ramirez, Respondent

Sworn and subscribed to before me
this 20th day of December, 2007

Michael T. Barrett, Esq.
Attorney at Law, State of New Jersey

71-08

CENTRAL JERSEY SOUTH OFFICIALS ASSOCIATION,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	
RESPONDENT.	:	
	:	

SYNOPSIS

The Central Jersey South Officials Association (CJSOA) filed a Petition of Appeal seeking reversal of the final decision of the New Jersey Interscholastic Athletic Association (NJSIAA) denying its application for certification as an NJSIAA-approved basketball officials' association. The CJSOA contended that NJSIAA's decision was made on a basis (determination of need) lacking authorization in law and without according CJSOA its right to due process. NJSIAA countered that the denial was consistent with applicable NJSIAA rules and represented a lawful discretionary determination of the Association's Executive Committee.

The Commissioner upheld the NJSIAA's decision and dismissed the appeal, finding that: NJSIAA did not engage in improper rulemaking; CJSOA's application received fair and proper consideration; NJSIAA did not act in an arbitrary, capricious or unreasonable manner in denying CJSOA's application; and CJSOA was not denied due process in this matter.

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

February 13, 2008

AGENCY DKT. NO. 239-8/07

CENTRAL JERSEY SOUTH OFFICIALS ASSOCIATION,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	
RESPONDENT.	:	
	:	

For Petitioner, Richard D. Cordry, Esq. (George T. Kotch, P.C.)

For Respondent, Steven P. Goodell, Esq. (Herbert, Van Ness, Cayci & Goodell)

This matter came before the Commissioner of Education on August 24, 2007, through the filing of a petition of appeal by the Central Jersey South Officials Association (CJSOA). In its petition, the CJSOA sought reversal of the final decision of the New Jersey State Interscholastic Athletic Association (NJSIAA) denying its application to become a "certified chapter of the NJSIAA," contending that the NJSIAA made this determination without authorization in law and without according the CJSOA its right to due process. Following the CJSOA's correction of technical deficiencies in its petition, submission of the record on appeal, and receipt of the NJSIAA's Answer to the Petition, the parties were directed to proceed with briefing in accordance with *N.J.A.C.* 6A:3-7.3. The CJSOA's brief was duly submitted, and the record before the Commissioner closed on November 2, 2007, upon timely filing of the NJSIAA's responsive brief.

OPERATIVE FACTS

1. On January 25, 2007, CJSOA legal counsel and founding member George T. Kotch, Esq. wrote to NJSIAA Assistant Director Larry White applying for certification of the CJSOA as an NJSIAA-approved "basketball chapter" beginning with the 2007-08 school year. He represented that CJSOA's assignor (Mr. Anthony Celentano) had previously learned from Mr. White that "there was not a formal document but the procedure for 'Approval of Officials Chapter' was outlined in the official's handbook, page one (1), and that was the beginning of the process." (Record on Appeal, Item 3)

2. The 2006-07 NJSIAA Handbook (at 115) includes a chapter entitled "NJSIAA Minimum Requirements for Review of Officials' Chapters," which is replicated in the official's handbook (at 1). That chapter in its entirety states as follows:

> 1. The chapter must provide evidence of officiating experience of its membership, noting league, conference, or levels of competition and years of service.
> 2. The chapter must provide a list of their (*sic*) duly elected officers and membership.
> 3. The chapter must provide a copy of their (*sic*) Constitution and Bylaws for review by the NJSIAA.
> 4. The chapter must agree to grant the NJSIAA the final authority for testing, training, and evaluating procedures adopted by the chapter.
> 5. The chapter must provide an outline of their (*sic*) testing, training, and evaluating procedures for certification of prospective and present members. All members must pass an annual written examination, as approved by the NJSIAA.
> 6. The chapter must agree to comply with all the provisions of the Constitution, Bylaws, and Rules and Regulations of the NJSIAA; decisions of the Executive Committee of the NJSIAA; and the tenets of agreements effected by the Officials' Councils and the NJSIAA.
> 7. The Executive Committee may approve the certification of officials and/or officials' chapters in all sports; and the minimum requirements for testing, training and evaluating all officials.

3. Subsequent to its initial communication and in accordance with the understanding set forth at No. 1 above, the CJSOA provided the

NJSIAA with: a roster of its members, noting their years of experience and highest level of officiating; a listing of schools, leagues and special events to which the CJSOA had provided services; the CJSOA constitution and bylaws; a list of CJSOA officers; and the CJSOA's application form outlining the training/qualification process for membership in the CJSOA. (Record on Appeal, Items 5 through 8)

4. In a series of subsequent communications between CJSOA officials and NJSIAA Assistant Director White, the latter identified additional information needed before the application could be considered; the former provided what they believed to be responsive submissions. (Record on Appeal, Items 9 through 13 and 18)

5. On May 4, 2007, NJSIAA Assistant Director White wrote to the member schools of its Colonial Valley Conference (CVC) and Burlington County Scholastic League (BCSL), advising them of the CJSOA's application, and requesting that they complete and return by May 18, 2007 an accompanying survey so as to enable the NJSIAA to determine if there was a need for a new NJSIAA-affiliated basketball officials' association. In making this request, Mr. White referenced an unnamed 1995 decision of the Commissioner of Education upholding NJSIAA's determination not to approve a new basketball association because, among other reasons, insufficient need had been demonstrated. (Record on Appeal, Item 16) The CJSOA contends that it had no prior knowledge of this survey. (Petition of Appeal, ¶7)

6. On May 8, 2007, the CJSOA president wrote to the recipients of the NJSIAA survey, objecting to the manner in which the NJSIAA characterized the CJSOA's application and offering its own perspective to the surveyed schools. (NJSIAA's Reply Brief at 6, citing to Record on Appeal, Item 19)

7. Twenty-two (22) survey responses were received (Record on Appeal, Item 17), representing all member schools in Mercer County and 11 out of 19 member schools in Burlington County. (NJSIAA's Reply Brief at 5)

8. On May 21, 2007, Assistant Director White wrote to CJSOA Assignor Celentano to advise him that NJSIAA staff would be recommending against Executive Committee approval of the CJSOA's application at the committee meeting to be held on June 6, 2007, which the CJSOA was invited to attend for purposes of addressing the committee and answering any questions it might have; by copy of the letter, representatives of NJSIAA's currently affiliated basketball officials' associations serving Mercer and Burlington counties

(Central Jersey Board 193 [Board 193] and Camden Board 34 [Board 34]) were also invited to appear. The reasons given by Mr. White for his recommendation included: the lack of need for an additional basketball officials' association; survey results indicating that member schools were happy with existing services; a roster of CJSOA members that was significantly less substantial than represented (107), due to a large number of cadets (23) and several officials (51) who currently belonged to an existing association that did not permit dual membership; and satisfaction with the current arrangement on the part of the four schools served by the CJSOA's assignor. (Record on Appeal, Item 2) The CJSOA contends that this communication was "the very first time" it was informed that review of its application would be based on a demonstration of need. (Petition of Appeal, ¶9)

9. On June 6, 2007, the NJSIAA Executive Committee met as scheduled. Representatives of the CJSOA – including its legal counsel, president and assignor – appeared before the committee and spoke in favor of the CJSOA's application, countering adverse arguments and additionally requesting an adjournment on grounds that they did not have sufficient time in which to respond to the NJSIAA's requirement for a showing of need as indicated in Assistant Director White's May 21 letter. Representatives of Board 193 and Board 34 stated their view that current arrangements were satisfactory to them and to the NJSIAA's member schools, and expressed concern about the quality and impact of a third organization; NJSIAA Assistant Director White and the Board 193 representative also expressed concern about a significant portion of the current CJSOA membership being a "break-off" or "splinter" group of Board 193 – individuals utilized by the CJSOA assignor, who had failed in a bid to become the assignor for Board 193 – rather than a new group of officials. (The Board 193 representative additionally raised a question about whether many of CJSOA's purported "members" had even agreed to be represented as such.) Following presentations, inquiry and debate, the committee was not persuaded by the CJSOA's request for a continuance, and voted 23-6 (with one abstention) to deny the application. (Record on Appeal, Item 1) The instant appeal then ensued, the CJSOA's petition having been filed on August 24, 2007.

THE CJSOA'S POSITION ON APPEAL

The CJSOA first challenges the validity of the NJSIAA's reliance on a showing of need, contending that nothing in the NJSIAA's authorizing statute (*N.J.S.A.* 18A:11-3) or in the NJSIAA Constitution and Bylaws requires – or even

identifies – that such a showing must be made in order for an officials' organization to be recognized as a chapter of the NJSIAA. (Petitioner's Brief at 3-5) According to the CJSOA, the NJSIAA treated the "need" standard as though it were a rule – which it *cannot* be because it was not published and filed with the Secretary of State as required by the New Jersey Supreme Court in precedent cited within *Merry Heart Nursing & Conv. Home v. Dougherty*, 131 *N.J. Super.* 412 (1974), at 418. (*Id.* at 5) Moreover, the CJSOA continues, the survey used by the NJSIAA to ascertain need was not even a useful instrument for this purpose, in that it failed to provide critical information about the CJSOA and stated neither the CJSOA's reasons for seeking NJSIAA chapter certification nor the benefits that would result from such certification. As a consequence, according to the CJSOA, the survey responses constituted "not a bench mark showing of a lack of a need (*sic*), but...rather a lackluster confirmation that the school districts were okay with the services that they had received thus far." (*Id.* at 5)

The CJSOA further contends that its due process rights were violated by the NJSIAA, first in the association's failure to inform CJSOA that a showing of need would be required for its application to be approved, and then in failing to allow the CJSOA an opportunity to obtain evidence once the "need" standard was made apparent. Asserting that it is fundamental to due process for a rule to be known to those to whom it applies – and for affected individuals/organizations to have a reasonable opportunity to timely respond to the rule's application – the CJSOA notes that it was not informed of the "need" standard until five months after it filed its initial application and that there were only 16 days between Assistant Director White's May 21, 2007 letter and the Executive Committee meeting of June 6, 2007. (Petitioner's Brief at 6-7)

To remedy these deficiencies, the CJSOA concludes, the Commissioner must either overturn the decision of the NJSIAA and grant the CJSOA's application, or send the application back to the NJSIAA Executive Committee for a new determination after the CJSOA has been given sufficient time to gather evidence demonstrating the need for an additional officials' association. (Petitioner's Brief at 7)

THE NJSIAA'S POSITION ON APPEAL

By way of background, the NJSIAA's brief instructs as follows: One of the NJSIAA's chief tasks – originating from the requirement in its Constitution for uniformity in the arrangements and control of high school athletic contests – is to see that such contests are appropriately officiated, thus requiring it to ensure that there are a sufficient number of competent, trained officials in each sport in each region of the state. The NJSIAA achieves this end by entering into standard three-year contracts ("affiliation agreements") with independent associations of officials in particular sports, which must at a minimum meet the requirements established by NJSIAA regulations (Handbook at 115; Officials' Handbook at 1). Once an officials' association enters an affiliation agreement with the NJSIAA, its members can be hired during the term of the agreement as independent contractors by NJSIAA member schools to officiate varsity interscholastic athletic competitions, and either party may terminate the agreement on six months' notice.[1] In accordance with the afore-cited NJSIAA regulation, the decision to enter into an affiliation agreement with a particular officials' association is left to the discretion of the Executive Committee. The committee will typically decline to so enter if there is no

[1] The NJSIAA notes that members of unaffiliated officials' associations are still free to provide referees and umpires for forms of competition other than high school varsity, such as recreation leagues, summer leagues, and middle school, college and university competitions.

need for an officials' association in a given area or if recognizing a new association would cause problems with currently contracted associations – as occurred in 1995 when the committee determined not to enter into an agreement with an applicant basketball officials' association, in a decision upheld by the Commissioner. *New Jersey Basketball Officials' Association v. NJSIAA*, decided August 24, 1995 (Record on Appeal, Item 15) (NJSIAA's Reply Brief at 2-4)

With particular respect to the CJSOA application, the NJSIAA states that it currently has affiliation agreements with two officials' associations covering the Mercer-Burlington County region: 1) Central Jersey Board 193, which covers high school basketball games in Mercer and recreational games in Burlington, has "a full complement of officials" and has "no problem providing officials for NJSIAA member schools;" and 2) Camden Board 34, which provides officials for contests in Camden, Salem, Gloucester and Burlington Counties and is likewise "fully staffed," with "no problem providing basketball officials to schools in Burlington County" – for which it has 92 registered officials. (NJSIAA's Reply Brief at 4-5) The NJSIAA further opines that: 1) based on the results of the survey indicated under Operative Facts above (page 2, No. 3), the officiating needs of its member schools in the region are being met and there are no problems with the existing associations; 2) although the CJSOA assignor – who in March 2006 unsuccessfully sought to be elected assignor for Board 193 – is utilized by four high schools in Northern Burlington County, he assigns to those games officials who are members of affiliated officials' associations, such as Boards 193 and 34; and 3) fifty-one officials listed on the roster of CJSOA are actually members of Board 193, which prohibits dual membership. (*Id.* at 5-6)

In response to the CJSOA's arguments on appeal, the NJSIAA counters that it is not a State agency and its rules and regulations are not required to be promulgated pursuant to the Administrative Procedure Act, citing *B.C. v. Bd. of Ed. of the Cumberland Regional School District*, 220 *N.J. Super.* 214, 235 (App. Div 1987); rather they have been approved by the Commissioner of Education pursuant to *N.J.S.A.* 18A:11-3. (NJSIAA's Reply Brief at 2, 9). The regulation at issue,[2] the NJSIAA contends, is therefore fully valid, and under it (at ¶7), the NJSIAA Executive Committee is clearly vested with the discretion to approve, or not approve the certification of officials' chapters meeting the stated (at ¶1-6) minimum requirements for consideration. The existence of these threshold requirements, the NJSIAA continues, does not preclude the committee from considering other relevant factors, provided it does so in a reasonable manner – as the Commissioner expressly found it to have done in *New Jersey Basketball Officials' Association, supra.* According to the NJSIAA, the decision to accept or reject an application is, in effect, a decision on whether or not to enter into a contract with an association, which has no "right" to be recognized by the NJSIAA notwithstanding that it qualifies for consideration. Moreover, the NJSIAA states, to the extent that the CJSOA takes issue with the survey of affected schools conducted by the NJSIAA, the results were more than sufficient to inform the Executive Committee that member schools were satisfied with the status quo; more importantly, the survey results were but one factor in the committee's decision. (NJSIAA's Reply Brief at 8-10, referencing Record on Appeal, Items 1-2)

[2] Quoted in full under Operative Facts above, page 2, No. 2.

The NJSIAA further counters that it did, in fact, provide the CJSOA with all of the due process to which it was entitled. Even though the CJSOA had no protectable right at stake, the NJSIAA asserts, the NJSIAA accorded it both advance notice and opportunity to be heard by the decision-making body – the two fundamental elements of due process. (Citing *Jamgochian v. New Jersey State Parole Board,* 394 *N.J. Super.* 517, 533 (App. Div. 2007), itself citing *Goss v. Lopez*, 419 *U.S.* 565, 579 (1975).) The NJSIAA points out that the CJSOA was aware in early May that NJSIAA staff were surveying member schools to determine the need for an additional affiliate association; in fact, the CJSOA contacted those same schools on May 8 on its own behalf in response to the survey. The NJSIAA also observes that written notice of the NJSIAA staff's recommendation to the Executive Committee was mailed to the CJSOA on May 21, sixteen days prior to the committee meeting; there, at a hearing recorded and transcribed by a certified court reporter, the CJSOA was represented by counsel and had the opportunity, prior to the committee's consideration and vote, to present argument – including lengthy statements by its president and assignor – as well as cross examine witnesses. To the extent that the CJSOA contends that 16 days was insufficient time for it to prepare a showing of need, the NJSIAA asserts, such time frame was more than adequate to enable the CJSOA to prepare a presentation appropriate for an executive hearing – particularly where the CJSOA had notice of NJSIAA staff concerns, and of a survey intended to gauge need – at least a month before the June 6 meeting.[3] (NJSIAA's Reply Brief at 10-12)

[3] By way of illustrative example, the NJSIAA contrasts the 16 days accorded here with the 10-day periods associated with its own Controversies Committee when functioning in a quasi-judicial capacity, and with applications for development under the Municipal Land Use Law (*N.J.S.A.* 40:55D-12).

DETERMINATION

Upon careful review and consideration, the Commissioner determines to uphold the decision of the NJSIAA and dismiss the CJSOA's appeal.

The NJSIAA is a voluntary association of public and nonpublic schools, organized pursuant to *N.J.S.A.* 18A:11-3, to oversee athletics for its member schools in accordance with a constitution, bylaws, rules and regulations approved by the Commissioner of Education and adopted annually by member schools, for which they become school policy enforceable by the NJSIAA.

It is well-established that the Commissioner's scope of review in matters involving NJSIAA determinations is appellate in nature. *N.J.S.A.* 18A:11-3; *Board of Education of the City of Camden v. NJSIAA*, 92 *N.J.A.R.* 2d (EDU) 182, 188. That is, the Commissioner may not overturn an action by the NJSIAA in applying its rules, absent a demonstration by the petitioner that the Association applied such rules in a patently arbitrary, capricious or unreasonable manner. *B.C. v. Cumberland Regional School District*, 220 *N.J. Super.* 214, 231-232 (App. Div. 1987); *Kopera v. West Orange Board of Education*, 60 *N.J. Super.* 288, 297 (App. Div. 1960). Nor may the Commissioner substitute her own judgment for that of the NJSIAA, even if she were to decide differently in a *de novo* hearing, where due process has been provided and where there is adequate basis for the decision reached by the NJSIAA committee. *Dam Jin Koh and Hong Jun Kim v. NJSIAA*, 1987 *S.L.D.* 259; *see, also, N.J.A.C.* 6A:3-7.4(a).

Moreover, this standard has been codified to provide clear notice to the public and regulated parties:[4]

> 1. If the NJSIAA has granted a petitioner due process and its decision is supported by sufficient credible evidence in the record as a whole, the Commissioner shall not substitute his ***judgment for that of the NJSIAA, even if the Commissioner might judge otherwise in a *de novo* review.
>
> 2. The Commissioner shall not overturn NJSIAA's application of its own rules absent a demonstration by the petitioner that such rules were applied in an arbitrary, capricious, or unreasonable manner. *N.J.A.C.* 6A:3-7.5(a).

Additionally, the New Jersey courts have spoken as to the narrow scope of "arbitrary, capricious, or unreasonable" in the context of challenges such as that herein:

> In the law, "arbitrary" and "capricious" means having no rational basis. *** Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.*** (citations omitted) *Bayshore Sew. Co. v. Dep't of Envt. Protection*, 122 *N.J. Super.* 184, 199-200 (Ch. Div. 1973), *aff'd* 131 *N.J. Super.* 37 (App. Div. 1974).

Thus, petitioners bringing claims against the NJSIAA bear a heavy burden, and, considering the record of this matter in light of the prescribed standard of review, the Commissioner cannot find that the CJSOA has met such burden herein.

Initially, the NJSIAA cannot be found to have engaged in improper rulemaking as alleged by the CJSOA, since the NJSIAA is not a State agency and its governing rules and regulations are not subject to the requirements of the Administrative Procedure Act. *N.J.S.A.* 18A:11-3. Similarly unpersuasive is the CJSOA's claim that the NJSIAA unfairly applied a standard that was not reflected in published rules with which

[4] *See* 31 *N.J.R.* 4173(a) and 32 *N.J.R.* 1177(a).

the CJSOA fully complied. By their own terms, the rules in question do not establish standards for NJSIAA *approval* of officials' associations, but merely delineate the minimum level of organizational information and evidence of willingness to submit to NJSIAA governance that an applicant association must provide to the committee in order to be eligible for *consideration*. The decision to approve an application, or not, is expressly left to the discretion of the Executive Committee, exercise of which the rules do not circumscribe in any way – thus allowing for evaluation of each individual application on a case-by-case basis in light of its unique character and particular attendant circumstances, subject only to the proviso that approval may not be denied arbitrarily or for unlawful reasons. In the present instance, the CJSOA's application did, in fact, receive the consideration to which it was entitled by virtue of passing the regulatory threshold, and the Commissioner can find nothing unreasonable or unlawful in the NJSIAA's subsequent evaluation of the application or its decision to deny approval, as reflected in both the staff recommendation to the Executive Committee and the deliberations of the committee itself.

Finally, the Commissioner must reject the CJSOA's central contention that it was denied due process in this matter. Nothing in law requires the NJSIAA to limit the discretion of its Executive Committee by codifying specific parameters for approval of officials' associations, and applicants for such approval have no cause for complaint where they have received reasonable notice of the basis for their review and opportunity to be heard before a decision is made on their application. In the present instance, the record belies the CJSOA's claims that it was surprised by and unprepared for the NJSIAA's consideration of need as a factor in evaluating its application: At least as

early as May 4, 2007, through its survey of potentially affected schools, the NJSIAA placed the CJSOA on notice that it was considering whether there was, in fact, a need for creation of a new basketball officials' association; indeed, the CJSOA's own May 8, 2007 counter-memorandum to the surveyed schools recognized this purpose by providing what its president believed to be the clarifying and amplifying information necessary to convince survey respondents that, among other things, its application did, indeed, fill such a need.[5] Finally, even if it were true – which it is not – that the NJSIAA gave no indication that need would be a consideration until Assistant Director White wrote to the CJSOA on May 21, 2007 advising of his recommendation to the Executive Committee, the 16 days between that letter and the committee meeting on June 6, 2007 were entirely sufficient for the CJSOA to prepare a presentation countering the NJSIAA staff recommendation and challenging the anticipated opposition of existing associations, bearing in mind that the process for approval of an officials' association application is an executive review – not an adjudicative proceeding based on an adversarial evidentiary hearing. Indeed, the transcript of the committee meeting (Record on Appeal, Item 1) shows the CJSOA to have made just such a presentation, particularly through the extended and comprehensive arguments of its president and assignor – both of whom not only addressed opposing recommendations, but also proffered additional considerations of their own.

[5] To the extent that the CJSOA deems the NJSIAA survey instrument deficient as a tool for evaluating need, any such perceived deficiency was effectively remedied by the CJSOA's own communication with the surveyed schools. Similarly, to the extent that the CJSOA believes the survey was not sufficiently widely disseminated, as it argued before the Executive Committee (Record on Appeal, Item 1 at 10), it had ample time to register that complaint with the NJSIAA or make contact of its own, as it did with respect to the surveyed schools.

Accordingly, the Commissioner having found that the CJSOA was afforded the due process to which it was entitled and that the NJSIAA's decision denying approval of the CJSOA's application for certification was neither unreasonable nor contrary to law, the NJSIAA's decision is upheld and the petition of appeal dismissed.[6]

IT IS SO ORDERED.[7]

COMMISSIONER OF EDUCATION

Date of Decision: 2/13/08

Date of Mailing: 2/13/08

[6] The Commissioner also dismisses NJSIAA Assistant Director Larry White as an individual respondent in this matter, since, as noted by the NJSIAA (Reply Brief at 12), Mr. White functioned solely as a staff member of the NJSIAA, whose executive body ultimately made the decision under appeal.

[7] This decision, as the final decision of the State administrative agency, may be appealed to the Superior Court. *N.J.S.A.* 18A:11-3, *N.J.A.C.* 6A:3-7.5.

75-08

DORIAN GIORGIO,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner – a tenured assistant principal employed by respondent in a twelve-month administrative position – appealed the district's withholding of her salary increment for the 2005-2006 school year. Petitioner contended that the Board violated the provisions of *N.J.S.A.* 18A:29-14 when it withheld her increment after the commencement of petitioner's work year and without prior notice of intent to withhold the increment. Petitioner filed a request for arbitration alleging that the increment withholding was disciplinary and without cause; respondent filed a petition with the New Jersey Public Employment Relations Commission claiming that the increment withholding was evaluative and not disciplinary, and therefore not subject to arbitration; arbitration was consequently stayed. Respondent asserts that this dispute is strictly procedural, and the petition should have been filed within ninety days of the Board's action denying petitioner her increment, but was not.

The ALJ found, *inter alia*, that: the petition was timely filed pursuant to *N.J.S.A.* 34:13A-27d; the petitioner's school year coincides with the District's fiscal year, which begins on July 1; collective bargaining incremental increases in District administrative salaries for the 2005-2006 school year commenced on July 1, 2005; petitioner's salary increment had already vested by the time the respondent Board acted to withhold it; respondent's action reduced petitioner's compensation, which is not permitted absent the filing of tenure charges. The ALJ granted petitioner's motion for summary decision in her favor.

The Commissioner adopted the Initial Decision as the final decision in this matter, amplifying the ALJ's discussion of *N.J.S.A.* 34:13A-27d and additionally citing *Henry Pruitt et al. v. Board of Education of the City of Englewood, Bergen County* with respect to withholding the increments of twelve-month employees.

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

February 19, 2008

OAL DKT. NO. EDU 8136-06
AGENCY DKT. NO. 292-8/06

DORIAN GIORGIO,	:	
PETITIONER,	:	
		COMMISSIONER OF EDUCATION
V.	:	
		DECISION
BOARD OF EDUCATION OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions by the Board of Education (Board) were untimely filed and, consequently, are not considered herein.[1]

Upon review, the Commissioner concurs with the Administrative Law Judge (ALJ) that: 1) the petitioner's appeal was timely filed, and 2) the Board of Education's (Board) action to withhold the petitioner's increment cannot be sustained.

With respect to the timeliness of the appeal, the Commissioner agrees with the ALJ that *N.J.S.A.* 34:13A-27d works to ensure that a teaching staff member who sought arbitration in the belief that the withholding of his or her increment constituted discipline – and then had such arbitration enjoined when a dispute arose as to the nature of the withholding – would not be precluded by operation of the 90-day rule (*N.J.A.C.* 6A:3-1.3(i)) from subsequent appeal to the Commissioner.

[1] Pursuant to *N.J.A.C.* 1:1-18.4, exceptions are due 13 days from the date the Initial Decision was mailed to the parties, on January 10, 2008 in the present instance. Although the Board's exceptions bear a face date of January 23, 2008, they were prepared for mailing on January 24, 2008, sent to the Commissioner by Federal Express Priority Overnight on Friday, January 25, 2008, and did not arrive at the Department until Monday, January 28, 2008. On February 1, 2008, the petitioner filed a timely reply to the Board's exceptions notwithstanding their late submission.

Viewing *N.J.S.A.* 34:13A-27d in its larger context, the statutory framework clearly envisions that this provision will be triggered any time a dispute arises as to whether a teaching staff member's increment withholding is disciplinary in nature. *N.J.S.A.* 34:13A-26 establishes that:

> Disputes involving the withholding of an employee's increment by an employer for predominately disciplinary reasons shall be subject to the grievance procedures established pursuant to law and shall be subject to the provisions of section 8 of this act [*N.J.S.A.* 34:13A-29, binding arbitration as final step].

N.J.S.A. 34:13A-27 continues:

> a. If there is a dispute as to whether a transfer of an employee between work sites or withholding of an increment of a teaching staff member is disciplinary, the commission shall determine whether the basis for the transfer or withholding is predominantly disciplinary.
>
> b. If the commission determines that the basis for a transfer is predominately disciplinary, the commission shall have the authority to take reasonable action to effectuate the purposes of this act.
>
> c. If the commission determines that the basis for an increment withholding is predominately disciplinary, the dispute shall be resolved through the grievance procedures established pursuant to law and shall be subject to the provisions of section 8 of this act.
>
> d. If a dispute involving the reason for the withholding of a teaching staff member's increment is submitted to the commission pursuant to subsection a. of this section, and the commission determines that the reason for the increment withholding relates predominately to the evaluation of a teaching staff member's teaching performance, the teaching staff member may file a petition of appeal pursuant to *N.J.S.A.*18A:6-9 and *N.J.S.A.*18A:29-14, and the petition shall be deemed to be timely if filed within 90 days of notice of the commission's decision, or of the final judicial decision in any appeal from the decision of the commission, whichever date is later.

In the present instance, the petitioner sought arbitration on the posture that her increment was withheld for disciplinary reasons, and it was the Board's own responsive action – filing a petition with the Public Employment Relations Commission contending that the withholding was evaluative rather than disciplinary, so that arbitration should be enjoined – that

created a dispute subject to the provisions of paragraph a. of *N.J.S.A.* 34:13A-27, so as concomitantly to trigger application of paragraph d. in the event the commission concurred with the Board's position. Therefore, as found by the ALJ, the petition of appeal in this matter cannot be held untimely filed and must be considered on its merits notwithstanding that it challenges the Board's action on procedural rather than substantive grounds.

With respect to the challenged action itself, the Commissioner must concur with the ALJ that – once the petitioner's increment vested on July 1, 2005, as it did based on her status as a twelve-month employee governed by applicable collective bargaining agreement and Board salary policy provisions – the plain language of statute prohibited reduction of her salary absent the filing of tenure charges; therefore, the Board's July 12, 2005 increment withholding action cannot stand. *Henry Pruitt et al. v. Board of Education of the City of Englewood, Bergen County*, Commissioner of Education Decision No. 262-93, decided October 25, 1993; affirmed with clarification, State Board of Education Decision No. 67-93, decided August 2, 1995.

Accordingly, for the reasons expressed therein, as amplified above, the Initial Decision of the OAL – granting the petitioner's motion for summary decision in her favor – is adopted as the final decision in this matter.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 2/19/08

Date of Mailing: 2/19/08

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
(On Cross-Motions for Summary Decision)
OAL DKT. NO. EDU 8136-06
AGENCY DKT. NO. 292-8/06

DORIAN GIORGIO,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY,
Respondent.

David Nash, Esq., for petitioner

A. Paul Kienzle, Jr., Esq., for respondent (Casarow, Kienzle & Raczenbek, attorneys)

Record Closed: December 20, 2007 Decided: January 3, 2008

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appealed respondent's action withholding her incremental salary increase. The petitioner requested a fair hearing and the matter was transmitted to the

OAL on October 6, 2006, to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The parties filed cross motions for summary decision. Oral argument was held on August 21, 2007, and supplemental briefs were submitted thereafter. On December 20, 2007, limited testimony was taken from respondent's Business Administrator. The record closed on December 20, 2007.

FINDINGS OF FACT

The facts in this case are not in dispute. They are as follows.

Petitioner Giorgio (hereinafter referred to as "petitioner") is a tenured teaching staff member employed by the respondent, Bridgeton Board of Education (hereinafter referred to as "respondent or Board"). Petitioner currently serves, and at all times relevant herein including the 2004-05 school year and the 2005-06 school year, has served as Assistant Principal at Bridgeton High School for the Bridgeton School District. Petitioner serves, and has served during all relevant times set forth herein, as a twelve month administrator.

On or about June 29, 2005, petitioner met with High School Principal Irving Marshall and received her annual evaluation, which was signed by Principal Irving Marshall. Within the evaluation document is a section wherein the evaluator indicates if he is recommending the withholding of an increment. Principal Marshall did not recommend withholding petitioner's increment.

On July 12, 2005, the Bridgeton Board of Education voted to withhold petitioner's increment for the 2005-06 school year. Petitioner received no prior notice of the intent of the Board to act to consider withholding her increment at the July 12, 2005, meeting.

On or about July 13, 2005, petitioner received notice form the Superintendent of Schools, Dr. Victor Gilson, that the Bridgeton Board of Education had acted on July 12, 2005, to withhold her increment. Petitioner received no notice prior to July 13, 2005, that the respondent intended to withhold her increment.

Petitioner is a member of the Association of Bridgeton Administrators (ABA). A collective bargaining agreement for the ABA was in effect covering the period July 1, 2003, through June 30, 2006, at the time the Board acted to withhold petitioner's increment on July 12, 2005.

In accordance with the collective bargaining agreement between the Bridgeton Board of Education and the ABA, petitioner was on Step 5 of the Salary Guide for the HIGH SCHOOL ASSISTANT PRINCIPAL – 12 MONTH salary guide, and received a salary of $85,170 for the 2004-05 school year. Step 6 of the Salary Guide for the HIGH SCHOOL ASSISTANT PRINCIPAL – 12 MONTH provided for a salary of $89,541 for the 2005-06 school year.

Nicole M. Schoener, Business Administrator for the Bridgeton District, submitted a certification wherein she stated that she "added" the increment to each administrator's salary on July 15. The administrators received their 2005-2006 increments with that paycheck. Schoener subsequently provided testimony clarifying this statement. Schoener testified that July 15 was the date of the paycheck. Administrators at Bridgeton were paid bimonthly. The July 15 paycheck covered the period July 1 through July 15.

Petitioner was paid a salary of $85,170 by respondent for the 2005-06 school year, which was the same salary that petitioner received for the 2004-05 school year.

On August 3, 2005, the ABA filed a grievance on behalf of Dorian Giorgio contending that her increment withholding was disciplinary. The grievance was denied by the Superintendent on August 9, 2005, and then on appeal denied by the Bridgeton Board of Education on October 11, 2005.

On November 7, 2005, petitioner filed a request for arbitration pursuant to Article III – Grievance Procedure of the Collective Bargaining Agreement between the Bridgeton Board of Education and the Association of Bridgeton Administrators alleging

that the increment withholding was disciplinary and was without cause. On January 11, 2006, the Bridgeton Board of Education filed a petition with the New Jersey Public Employment Relations Commission claiming that the increment withholding was evaluative and not disciplinary and was therefore not subject to arbitration. In consequence, the arbitration was stayed.

On June 29, 2006, the New Jersey Public Employment Relations Commission rendered its decision and concluded that the increment withholding was not disciplinary in nature. As a result, arbitration was permanently enjoined.

On August 22, 2006, pursuant to N.J.S.A. 34:13A-27 and N.J.S.A. 18A:29-14, petitioner filed a petition with the Commissioner of Education challenging the increment withholding as being untimely.

CONCLUSIONS OF LAW

I. THE TIMELINESS OF THE PETITION

Respondent asserts that the petition was not timely filed. Respondent argues that the dispute before me is procedural only, and that as such, the petition should have been filed within ninety days of the Board's action denying petitioner her increment.

Respondent notes that petitioner initially filed for arbitration under the grievance procedure contained in the collective bargaining agreement. Respondent sought successfully to enjoin arbitration through the Public Employment Relations Commission (PERC). Only after PERC ruled did petitioner file this petition before the Commissioner, relying upon N.J.S.A. 34:13A-27d.

Respondent's position is premised upon its reading of N.J.S.A. 34:13A-27d. That statute states in pertinent part:

> d. If a dispute involving *the reason* for the withholding of a teaching staff member's increment is submitted to the

> commission pursuant to subsection a. of this section, and the commission determines that the reason for the increment withholding relates predominately to the evaluation of a teaching staff member's teaching performance, the teaching staff member may file a petition of appeal pursuant to N.J.S. 18A:6-9 and N.J.S. 18A:29-14, and the petition shall be deemed to be timely if filed within 90 days of notice of the commission's decision, or of the final judicial decision in any appeal from the decision of the commission, whichever date is later.
>
> (Emphasis added)

Respondent argues that in order to qualify for under N.J.S.A. 34:13A-27d, the petition must address the "reason" for the withholding of the increment. In other words, the petition must allege a substantive argument, not merely a procedural argument.

Petitioner's counsel candidly agreed that petitioner's argument before me is procedural only. Petitioner does not assert that the withholding of the increment was unwarranted. Petitioner's counsel stated that to sustain that position, petitioner would be required to show that the Board's action was arbitrary and capricious. Petitioner's counsel conceded that petitioner could not sustain that burden. Accordingly, petitioner herein makes only a procedural argument, namely, that the Board acted out of time and is barred from withholding her increment.

Respondent urges that because the petition does not address the substantive issue, it is not protected by N.J.S.A. 34:13A-27d. Respondent asserts that because the issue is solely procedural, it should have been raised within ninety days of the Board's action, simultaneous with the demand for arbitration.

Petitioner's counsel argued that the demand for arbitration did in fact address the merits of the case, and that no other action could be taken until the question of arbitration was disposed of. He stated that the standard of proof before the arbitrator was lower, making it feasible to argue the substantive issue. He also noted that petitioner was and remains prepared to arbitrate the substantive issue, and has only

been prevented from doing so by the Board's action that resulted in the enjoining of arbitration by PERC.

I have reviewed the demand for arbitration, P-1, and I **FIND** that the demand for arbitration does in fact address the substantive issue. Further, I am satisfied that the purpose and intent of N.J.S.A. 34:13A-27d was to provide a mechanism whereby a petitioner could seek arbitration and, should arbitration be enjoined, not find himself time barred from pursuing a remedy before the Commissioner.

Accordingly, respondent's motion for summary decision on grounds of untimeliness is **DENIED.**

II. THE TIMELINESS OF THE BOARD'S ACTION

Petitioner argues that the Board's action withholding petitioner's increment was untimely. The Board acted on July 12, 2005. Petitioner urges that because she is an assistant principal, and therefore a twelve month employee, her school year began on July 1, 2005. She states that the Board was barred from withholding her increment once the new school year had begun.

Petitioner cites a series of cases that stand for the proposition that a Board of Education must act prior to the commencement of the new school year if it seeks to withhold an increment. Petitioner cites the language of Newark Teachers Union v. Bd. of Ed. Of Newark, OAL DKT. EDU 9836-83 (April 26, 2984), modified by Comm'r of Ed. (June 13, 1984), wherein the Commissioner held:

> That as a matter of fundamental fairness board action to withhold an increment must be made prior to the date the ten-month period of service commences. Therefore, this would require board action prior to September 1 of the school year involved. Although actual service may not commence until the first day of school, September 1, nonetheless, is the date upon which a staff member's salary entitlement commences for the ten-month period of service, September to June. (At page 14 of the slip opinion.)

> Consequently, it is the determination of the Commissioner that a school board must act prior to September 1 of a given school year to withhold the increment of a staff member whose period of service is September to June.

See also In the Matter of Board of Ed. Of Northern Highlands Regional H.S. v. Martin, (unreported Appellate Decision, March 13, 1979 having Docket No. A-2119-70). Also see School Law Decision in the same matter, 1979 SLD 853; Charles Gersie v. Board of Ed. Of the City of Clifton, 1972 SLD 462; In the Matter of George Montgomery v. Board of Ed. Of the City of Irvington, OAL Docket No.: EDU 12289-95 (January 4, 2000) aff'd Commissioner (February 15, 2000) <http://lawlibrary.rutgers.edu/oal/search.html>; Sutton and Sheridan v. Board of Ed. Of the City of Orange, OAL Docket No. EDU 7873-85 and EDU 7845-85 (consolidated).

While each of these cases stands for the proposition that the Board must act prior to the start of the new school year, each of those cases deals with a ten month employee whose work year began when the school year commenced on September 1. None considers the issue of how this rule affects a twelve month employee such as petitioner.

This matter turns on the question of when petitioner's school year starts. Petitioner argues that the year begins July 1. She points to several factors that favor her interpretation. By law, the school's fiscal year begins on July 1 and ends on June 30. Additionally, the collective bargaining agreement between respondent Board and petitioner's union ran from July 1, 2003 through June 30, 2006 (P-2).

Respondent counters that the academic year commences September 1, with the opening of school. Respondent points out that the Commissioner in Newark Teachers Union v. Bd. of Ed. Of Newark, supra, utilized the academic year as the benchmark for delineating the deadline for withholding of a ten month employee's increment.

Logic would dictate that respondent is correct. Although the petitioner works twelve months of the year, I take official notice that the bulk of an assistant principal's work is done during the time school is in session. Certainly the absence of the student body from the school renders July and August months when the duties of an administrator are reduced.

Further, upholding petitioner's argument would place a greater burden on the administrative staff. The evaluation process in this case was completed on June 29. I again take official notice that during late May and June, New Jersey schools are dominated by frenetic activity, including final examinations, step-up ceremonies and graduations, and the various and sundry tasks necessary to the closing out of the school year. If the Board must act on administrative increments prior to June 30, the administrative staff will be burdened with yet another job, completing administrative evaluations, during this time of turmoil.

Finally, petitioner seeks to prevail here on a technicality. She does not contend that the increment was arbitrarily and capriciously withheld; she argues only that the Board acted too late. In short, petitioner does not dispute that the withholding of her increment was meritorious; rather, she contends that she should be allowed to avoid the consequences of her conduct because the Board's action was untimely.

Based upon the PERC decision, the Board's action is by definition remedial. Where is the justice in allowing petitioner to evade such remedial action that might improve her performance to the benefit of the students she oversees?

Logic and equity dictate that respondent should prevail in this matter. Unfortunately, the law says otherwise.

The parties have stipulated that petitioner is a tenured assistant principal. Respondent's business administrator has certified that she "added" the increments to the administrative staff's salaries on July 15, 2005. Although that statement appears to place the accrual of the increment subsequent to the Board's action of July 12, the

business administrator clarified the situation when she testified that the July 15 paycheck covered the period July 1 through July 15, 2005.

Given those facts, it is clear that the incremental increase in salary commenced on July 1, 2005. Consequently, by the time the Board took action on July 12, petitioner's increment had already vested. The Board's action did not forestall the awarding of the increment; instead, the Board's action reduced petitioner's compensation.

N.J.S.A. 8A:6-10 states in pertinent part:

> No person shall be dismissed or reduced in compensation,
>
> (a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state, or
>
> * * *
>
> except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

Because petitioner is tenured, once her increment vested on July 1, the Board could not "withhold" it. The Board's action of July 12, 2005, constitutes a reduction in petitioner's compensation. Such a reduction is not permitted absent the filing of tenure charges. Newark Teachers Union v. Bd. of Ed. Of Newark, supra; Massaro v. Board of Education of Bergenfeld, Bergen County, Hearing Examiner's Report (Jan. 28, 1981), rejected, Comm'r (Dec. 4, 1981), affirmed, St. Bd. (June 2, 1982.

Nothing before me indicates that the legislature intended this result when it enacted N.J.S.A. 18A:29-14 and N.J.S.A. 18A:6-10. Both the statutory scheme and the subsequent case law appear to have been structured to address ten month employees. But at the same time, nothing before me tends to show that the legislature did not intend this result. Consequently, the plain language of the statute prohibits the reduction of petitioner's salary through the withholding of the increment without the filing of tenure charges. Since no such charges were filed in this matter, petitioner's motion for summary decision must be **GRANTED,** and respondent's motion for summary decision must be **DENIED.**

ORDER

I **ORDER** that petitioner's motion for summary decision be **GRANTED.**

I **ORDER** that respondent's motion for summary decision be **DENIED.**

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

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

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

January 3, 2008
DATE

Bruce M. Gorman
BRUCE M. GORMAN, ALJ

Date Received at Agency:

JAN 10 2008
DATE

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/sd

77-08

#77-08

OAL DKT. NO. EDU 711-07
AGENCY DKT. NO. 14-1/07

K.K. on behalf of minor child L.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 2/19/08

Date of Mailing: 2/20/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 711-07

AGENCY DKT. NO. 14-1/07

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

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BRUNSWICK, MIDDLESEX COUNTY,

Respondent.

Shelley L. Stangler, Esq., for petitioner

Anthony B. Vignuolo, Esq., for respondent (Borrus, Goldin, Foley, Vignuolo, Hyman, Stahl, and Clarkin, attorneys)

Record Closed: January 7, 2008 Decided: January 8, 2008

BEFORE **DONALD J. STEIN**, ALJ:

This matter was transmitted to the Office of Administrative Law on February 21, 2007, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

January 8, 2008
DATE

DONALD J. STEIN, ALJ

Date Received at Agency:

JAN 11 2008
DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

bdt

BORRUS, GOLDIN, FOLEY, VIGNUOLO, HYMAN & STAHL
A Professional Corporation
2875 U.S. Highway #1
P.O. Box 7463
North Brunswick, New Jersey 08902
(732) 422-1000
Attorneys for Respondent

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

Petitioner KENNETH KEYTE, on behalf of minor child, LK vs. Respondent NORTH BRUNSWICK TOWNSHIP BOARD OF EDUCATION	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY DOCKET NO. 14-1/07 Civil Action STIPULATION OF SETTLEMENT

This matter being brought before the Honorable Donald I. Stein and it appearing that the parties have amicably adjusted their dispute, it is hereby stipulated and agreed as follows:

1. That the Respondent shall expunge the record of suspension of L.K. so that there is no indication in the Respondent's records that disciplinary action occurred or was instituted.

2. That the Respondent shall advise its employees that the disciplinary record of L.K. has been expunged and that they are not to advise any other Respondent employee or third party of any prior disciplinary action or suspension.

3. That the Respondent shall provide L.K. with the opportunity to retake the final exam for 11th grade English. L.K. shall have access to or be provided with relevent textbooks for preparation and may retake the exam at an agreed upon date. The results of the retaken exam shall be used to replace L.K.'s third and fourth quarter marking periods in 11th grade English and her final grade for the year shall then be recalculated to include the results of the retaken exam.

4. That except as provided herein, the within matter is hereby dismissed with prejudice and

without costs. The parties hereby release each other from all claims they may have against the other arising out of the subject matter of the Petition filed herein.

DONALD J. STEIN, A.L.J.

THE UNDERSIGNED HEREBY
APPROVE OF THE WITHIN
STIPULATION OF SETTLEMENT

SHELLEY STANGLER, ESQ.
Attorney for Petitioner

BORRUS, GOLDIN, FOLEY, VIGNUOLO,
HYMAN & STAHL, P.C.
Attorneys for Respondent

ANTHONY B. VIGNUOLO, ESQ.

K:\ABV\WP51\NOBRUNS\Keyte-Stipulation of Settlement.wpd

Kenneth Keyte, f/n/g of Lindsey Keyte

Dr. Brian Zychowski on Behalf of
North Brunswick Board of Education

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Attorneys for Respondent

Petitioner KENNETH KEYTE, on behalf of minor child, LK vs. Respondent NORTH BRUNSWICK TOWNSHIP BOARD OF EDUCATION	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY EDU 11-07 DOCKET NO. 14-1/07 Civil Action STIPULATION OF SETTLEMENT

This matter being brought before the Honorable Donald I. Stein and it appearing that the parties have amicably adjusted their dispute, it is hereby stipulated and agreed as follows:

1. That the Respondent shall expunge the record of suspension of L.K. so that there is no indication in the Respondent's records that disciplinary action occurred or was instituted.

2. That the Respondent shall advise its employees that the disciplinary record of L.K. has been expunged and that they are not to advise any other Respondent employee or third party of any prior disciplinary action or suspension.

3. That the Respondent shall provide L.K. with the opportunity to retake the final exam for 11th grade English. L.K. shall have access to or be provided with relevent textbooks for preparation and may retake the exam at an agreed upon date. The results of the retaken exam shall be used to replace L.K.'s third and fourth quarter marking periods in 11th grade English and her final grade for the year shall then be recalculated to include the results of the retaken exam.

4. That except as provided herein, the within matter is hereby dismissed with prejudice and

without costs. The parties hereby release each other from all claims they may have against the other arising out of the subject matter of the Petition filed herein.

DONALD J. STEIN, A.L.J.

THE UNDERSIGNED HEREBY APPROVE OF THE WITHIN STIPULATION OF SETTLEMENT

SHELLEY STANGLER, ESQ.
Attorney for Petitioner

BORRUS, GOLDIN, FOLEY, VIGNUOLO, HYMAN & STAHL, P.C.
Attorneys for Respondent

ANTHONY B. VIGNUOLO, ESQ.

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Kenneth Keyte, f/n/g of Lindsey Keyte

Dr. Brian Zychowski on Behalf of
North Brunswick Board of Education

78-08

#78-08R

OAL DKT. NO. EDU 11777-07
(EDU 3757-07 ON REMAND)
AGENCY DKT. NO. 84-3/07

IN THE MATTER OF THE TENURE :		
HEARING OF ADAM AQUILINA,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION ON REMAND
ELIZABETH, UNION COUNTY.	:	

The Initial Decision on Remand of the Office of Administrative Law (OAL), the parties' revised settlement agreement, and the record of this matter have been reviewed,* mindful of the Commissioner's October 31, 2007 determination that the prior settlement agreement recommended for adoption by the Administrative Law Judge failed to adequately address the standards of *In re Cardonick,* 1990 *S.L.D.* 842, 846, decided by the Commissioner of Education April 7, 1982, *aff'd.* State Board April 6, 1983, and *N.J.A.C.* 6A:3-5.6(a), which are required in the review of tenure matters. Specifically, the Commissioner directed that – due to the nature of the charges – if this matter was to be settled without adjudication, there must be a detailed explication on the record as to why the charges cannot be pursued.

Upon review of the revised agreement and record on remand, the Commissioner approves the settlement terms, since she finds that they now comport with the *Cardonick* standards necessary in the review of settlements in tenure matters. The Commissioner adopts the settlement as the final decision in this matter, which is hereby dismissed, subject to compliance with the terms of the settlement. A copy of this decision will be transmitted to the State Board of Examiners for action as that body deems appropriate.

IT IS SO ORDERED.

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 2/19/08

Date of Mailing: 2/20/08

* It is noted that the record of this matter includes a transcript of the proceedings on remand conducted at the OAL on December 11, 2007.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT

OAL DKT. NO. EDU 11777-07
Agency Dkt. No.: 84/3/07

ON REMAND

OAL DKT. NO. EDU 3757-07
Agency Dkt. No. 431-07

IN THE MATTER OF THE TENURE HEARING OF ADAM AQUILINA, SCHOOL DISTRICT OF THE CITY OF ELIZABETH, UNION COUNTY.

Karen A. Murray, Esq., for petitioner
(Murray & Murray, attorneys)

Sanford R. Oxfeld, Esq., for respondent
(Oxfeld Cohen, P.C., attorneys)

Record Closed: December 11, 2007 Decided: January 7, 2008

BEFORE **IMRE KARASZEGI, JR.**, ALJ:

On March 15, 2007, the Elizabeth Board of Education ("Board") certified tenure charges of conduct unbecoming and insubordination against respondent Adam Aquilina under the provisions of the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et. seq. The Board suspended respondent without pay effective March 15, 2007, pursuant to N.J.S.A. 18A:6-14.

The Board accused respondent of the following: engaging in an inappropriate, intimate relationship by making multiple cellular telephone calls to a student; nurturing inappropriate relationships with students; providing

transportation to students in his personal vehicle; being alone with female students in a locked classroom. Aquilina has consistently denied the charges.

The Commissioner of Education ("Commissioner") acknowledged receipt of the certified tenure charges on March 22, 2007. After receipt of respondent's answer on March 28, 2007, it transmitted the matter to the Office of Administrative Law ("OAL") for hearing on April 10, 2007.

The matter was scheduled for a hearing as OAL Docket EDU03757-07 on August 7, 2007 at which time both parties agreed to a proposed settlement subject to Board approval. On September 20, 2007, The Board approved the settlement terms and forwarded it to me on October 2, 2007. On this date, I issued an Initial Decision/Settlement in which I concluded that the agreement met the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved by the Commissioner. On October 31, 2007, the Commissioner rejected the Initial Decision/Settlement and remanded the matter for further proceedings in order that a "better explication on the record" be provided by the parties as to why the tenure charges cannot be pursued. A hearing on the remanded case, now referenced as OAL Docket EDU11777-07, was then held on December 11, 2007.

Based upon a review of the record, as well as the proposed settlement agreement and Board resolution attached hereto, and the representation of the parties on the record of this matter, I make the following **FINDINGS:**

1. The nature of the charges has been documented by the submission of a Statement of Charges and Certificate of Determination.

2. The parties have expressed that the settlement of the matter reflects a determination by the Board that a hearing in this matter would be protracted and costly. Litigation of the charges would lead to the

disruption of the Board's educational program due to the great amount of time lost by administrators, teaching staff members and other personnel who would be required to testify to the various incidents that led to the filing of the tenure charges.

3. If a hearing becomes necessary, numerous school administrators, teachers and former students would be called to testify. The alleged student victim, who was eighteen years of age during the 2005-2006 academic year, would need to be located. The allegations, none of which indicate any physical sexual contact between the respondent and students, pertain to events and/or observations dating back approximately three years. The parties are not aware of the alleged student victim's whereabouts or the location of many of the potential witnesses who would need to be called to provide testimony to substantiate the charges against respondent. Additionally, the respondent no longer resides in New Jersey.

4. The parties to the matter have consented to the terms of the Settlement Agreement as evidenced on the record and as evidenced by the signatures of the parties and/or their authorized representatives on the written settlement agreement. At a meeting held on September 20, 2007, the Board authorized the settlement memorialized in the attached Settlement Agreement.

5. From the Board's viewpoint, the outcome under the settlement will be as good or better than could be achieved if it prevailed after a lengthy or costly tenure battle. The respondent teacher would be removed from its employ. In addition, approximately $100,000 – $200,000 in legal costs for one tenure hearing would significantly impact the Board's entire legal budget for the 2007-2008 academic year of $ 750,000.00. Money spent on litigation costs would be put to better use for the children of Elizabeth.

6. Before entering this agreement, Aquilina fully understood his rights and had adequate opportunity to consult with legal counsel. In particular, Aquilina acknowledged his understanding that the Commissioner may refer this matter to the State Board of Examiners for such action regarding his teaching certificate as it deems appropriate.

7. The parties have shown that the settlement of the matter is in the public interest. The terms of the agreement will satisfy the reasonable objectives of the Board and will avoid the necessity of expensive and time-consuming litigation. As indicated above, the parties have provided further explanation on the record as to why the charges could not be pursued.

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

I therefore **CONCLUDE** that this Settlement Agreement meets the requirements of N.J.A.C. 6A:3-5.6 and that approval of same is in the public interest. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

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

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

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

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

Jan. 7, 2008
DATE

IMRE KARASZEGI, ALJ

Date Received at Agency: 1-10-08

Mailed to Parties:
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

JAN 10 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

cml

APPENDIX

WITNESSES

Petitioner

Harold Kennedy

Respondent

None

EXHIBITS

Petitioner

None

Respondent

None

OCT 0 2 2007

SETTLEMENT AGREEMENT

This Agreement is made this _____ day of _____, 2007, by and between Adam Aquilina (hereinafter "Aquilina"), who resides at 13 Georgetown Drive, Manalapan, New Jersey 07726, and the Board of Education, with its principal offices located at 500 North Broad Street, Elizabeth, New Jersey 07207 (hereinafter the "Board").

WITNESSETH:

WHEREAS, Aquilina is currently employed as a tenured teaching staff member; and,

WHEREAS, Aquilina and the Board are parties to a proceeding with caption and docket No. as follows: In the Matter of the Tenure Hearing of Adam Aquilina, School District of the City of Elizabeth, Agency Docket No. 84-3/07, OAL Docket No. EDUTH 03757-2007N; and;

WHEREAS, after the completion of discovery and in view of the extensive anticipated costs of litigating this case for an Abbott District, the Board is agreeable to the dismissal of the tenure charges, subject to the conditions set forth in this Agreement;

WHEREAS, both the Board and Aquilina desire to enter into a Settlement Agreement stipulating the terms of his separation from all employment with the Board, together with the release of all his tenure and seniority rights as an employee of the Board, as well as providing for the exchange of General Releases of any and all claims which the parties may have against the other arising from Aquilina's employment or otherwise;

WHEREAS, the terms of settlement take into account the public interest, as well as the fact that the litigation of this action, and anticipated appeals thereafter, have caused and will continue to cause disruption to the educational programs in the Elizabeth School District due to

the absence of administrators, teachers and students who have or will hereafter have to testify at hearings, and that the Board and Aquilina have incurred and will continue to incur substantial financial costs to continue this litigation;

NOW THEREFORE, in consideration of the mutual promises of the parties and in exchange for the consideration more particularly noted below, it is hereby agreed:

1. The Board agrees that the Tenure Charges in this matter bearing Agency Dkt. No. 84-3/07, OAL Dkt. No. EDUTH 03757-2007N shall be dismissed, with prejudice, subject to the approval of this Agreement by the Office of Administrative Law and the Commissioner of Education.

2. The Board shall pay to Aquilina the amount of salary that it withheld from Aquilina pursuant to N.J.S.A. 18a: 6-14, which sum is stipulated to be the gross amount of Eighteen Thousand Five Hundred Thirty-Two and Forty cents ($18,532.40). The aforesaid amount shall be paid net of normal payroll deductions for State and Federal income taxes and pension contributions. Additionally, the net monies shall be paid to Aquilina within thirty (30) days of the approval of this Agreement by the New Jersey Commissioner of Education.

3. Aquilina agrees to sign an irrevocable letter of resignation from all employment with the Board, effective at the close of business on November 30, 2007. The resignation letter shall be in the form annexed hereto as Exhibit A. The letter of resignation shall be null and void if the terms of the Separation of Employment Agreement are not met. The resignation is otherwise irrevocable. The Board waives all statutory or contractual claims for notification of Aquilina's resignation.

4. The Board shall publicly approve and accept the resignation of Aquilina at its next regularly scheduled meeting, which resignation shall be effective the close of business on

November 30, 2007.

5. The Board shall restore the salary, adjustment and longevity increment(s) that it withheld from Aquilina for the 2006-2007 school year, which gross sum is stipulated to be Two Thousand Seven Hundred Twenty-Five Dollars ($2,725.00). The gross sum of $2,725.00 shall be paid to Aquilina for the increment amount that was to have been paid to him in the 2006-2007 school year. The aforesaid amount shall be paid net of normal payroll deductions for State and Federal income taxes and pension contributions. Additionally, the sum of $2,725.00 shall be paid to Aquilina within ten (10) days of the approval of this Agreement by the New Jersey Commissioner of Education. The Board shall further undertake to amend its payroll records and pension reports to the N.J. Division of Pensions so that Aquilina's salary for the 2006-2007 school year is Forty-Nine Thousand Fifty-Six Dollars ($49,056.00).

6. The Board shall restore the prorated salary, adjustment and longevity increment(s) that it withheld from Aquilina for the 2007-2008 school year, which gross sum is stipulated to be Three Thousand Four Hundred Seventy-Five Dollars ($3,475.00). Subject to the terms of Paragraph 5 the Board shall amend its payroll records and pension reports to the N.J. Division of Pensions so that Aquilina's salary for the 2007-2008 school year is established to be a gross amount of Fifty-Two Thousand Five Hundred Thirty-One Dollars ($52,531). Aquilina shall receive a prorated amount of his salary for Sept. - Nov. 30, 2007.

7. Through and until November 30, 2007, the Board shall continue to provide Aquilina all the insurance coverage(s) that it is presently providing to Aquilina under the plan(s) applicable to teaching staff members employed by the Board.

8. Upon the termination of Aquilina's employment on November 30, 2007 and consistent with his rights under the Consolidated Omnibus Reconciliation Act of 1986 ("COBRA"), Aquilina shall be able to purchase, at his own cost and expense, the insurance coverage presently provided to other teaching staff members employed by the Board.

9. Aquilina waives any and all rights to tenure, seniority, recall or reinstatement as of the effective date of his resignation. It is understood and agreed that Aquilina shall not, as of the effective date of his resignation, receive any other compensation or benefits or emoluments of employment except as otherwise provided in this Settlement Agreement.

10. In consideration of the above, Aquilina agrees for himself and his heirs, successors and assigns, to release irrevocably and unconditionally, and discharges the Board, its members past, present and future; welfare and/or pension plans; trustees, officers, supervisors, employees, students, and agents of the Board ("Releasees"), past, present and future; of and from any debts, obligations, claim, demands, judgements, claims for attorneys' fees, claims seeking employment or reemployment with the Board, claims for contributions and/or in tort, contract, by statute, or on any other basis, whether in law or in equity, which he, or his estate, might otherwise have or have had. This release includes but is not limited to claims under Title VII of the Civil Rights Act of 1964, The Civil Rights Act of 1866, The Civil Rights Act of 1991, The Age of Discrimination in Employment Act of 1967, The Americans with Disabilities Act of 1990, The Employment Retirement Income Security Act of 1974, The Vietnam Era Veterans Readjustment Assistance Act of 1974, The New Jersey Law Against Discrimination, The New Jersey Conscientious Employee Protection Act, the New Jersey Employer-Employee Relations Act, the New Jersey Workers' Compensation Act, and all Federal, State and Local law claims,

whether statutory or common law, for defamation, libel, tortious interference, wrongful discharge, harassment, or for discrimination on the basis of race, color, sex, religion, national origin, age, handicap or disability, sexual orientation, veteran's status, or marital status or on any other prohibited basis, or any other claim arising out of or related to his employment or his termination from employment with the Board.

11. The Board, its members, agents, servants and employees ("Releasees") agree to release irrevocably and unconditionally, and discharge Aquilina from any and all claims which it may have against Aquilina. It specifically releases Aquilina from any and all claims arising out of the employment relationship, including but not limited to any cause of action pursuable before any state or federal court or agency (including the filing and/or certification of tenure charges under the N.J. Tenure Employees' Hearing Law.

12. The Board and Aquilina agree that Aquilina shall be provided a mutually convenient opportunity to obtain whatever personal belongings of his remain within the school district, as well as to return any district materials that Aquilina has in his possession.

13. The parties acknowledge that this Settlement Agreement shall be submitted to the Office of Administrative Law and to the Commissioner of Education for review and approval, and that the terms of the Agreement are expressly made subject to and contingent upon such review and approval by each of said agencies. In the event that either the Office of Administrative Law and/or Commission of Education disapproves and/or rejects any of the terms contained herein, this Settlement Agreement shall be null and void and shall not be evidential or used by any party in any proceeding involving any party to this Settlement

Agreement. In addition, each of the parties shall return to the same position(s) which they help prior to this Settlement Agreement, and all rights are reserved in that event.

14. Aquilina acknowledges that, notwithstanding the parties entry into this Settlement Agreement, he has been made aware that the Commissioner of Education may nonetheless refer the matter to the New Jersey State Board of Examiners for such action regarding his teaching certificate as it deems appropriate.

15. Nothing in this Settlement Agreement or the Releases set forth above shall preclude either party from bringing an action to enforce performance of any term of this Agreement should there be a default in performance.

16. The parties expressly agree that they shall act in good faith to ensure implementation of this Settlement Agreement.

17. The parties acknowledge that each has had the opportunity to consult with an attorney or a representative of their own choosing prior to signing this Settlement Agreement and that each signs this Settlement Agreement freely and voluntarily and without coercion or duress. The parties further acknowledge that they fully understand the duties and obligations enumerated herein and has been informed of their legal rights and obligations.

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

19. Upon ratification of this Agreement, the Board authorizes its President and Secretary to execute the same on its behalf.

20. All terms of this Settlement Agreement are deemed material. This document may

not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

21. This Separation of Employment Agreement incorporates and settles all claims and disputes which may exist between Aquilina and the Board arising from his employement or otherwise. Further, this Settlement Agreement incorporates the complete financial obligation of the Board with regard to its employment relationship with Aquilina and Aquilina's separation from employment.

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

Witness
Dated: 9-25-07

Adam Aquilina
Dated: 9-25-07

Harold B. Kennedy, Jr.
Board Secretary/School Business Admin.
Dated: 9/27/07

Armando Da Silva, Board President
Dated: 9/27/07

Exhibit A

ADAM AQUILINA

13 Georgetown Drive
Manalapan, New Jersey 07726

9-19, 2007

Armando Da Silva, Board President
Elizabeth Board of Education
500 North Broad Street
Elizabeth, New Jersey 07207

Re: Letter of Resignation

Dear Mr. Da Silva:

Pursuant to the terms of the Settlement Agreement between the Elizabeth Board of Education and myself, I hereby submit my irrevocable resignation from the position of Teacher, effective the close of business on November 30, 2007, or on the date the Commissioner approves the settlement, whichever is later.

Sincerely,

Adam Aquilina

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O
P
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BOARD OF EDUCATION

RESOLUTION

WHEREAS, counsel for the Elizabeth Board of Education and Adam Aquilina have negotiated a resolution of the following case: In the Matter of the Tenure Hearing of Adam Aquilina, School District of the City of Elizabeth, Agency Dkt. No. 04-3/07, OAL Dkt. No. EDUTH 03757-2007N; and,

WHEREAS, in the interest of cost efficiency and judicial economy, and in lieu of a hearing, the parties have agreed to resolve the above-referenced case, with prejudice;

NOW, THEREFORE, BE IT RESOLVED, that the Board hereby accepts the Confidential Settlement Agreement on file with the School Business Administrator/Board Secretary; and,

BE IT FURTHER RESOLVED, the Board hereby accepts the resignation of Adam Aquilina, to be effective November 30, 2007, or the date the Commissioner of Education approves the Settlement, whichever is later.

Elizabeth, New Jersey

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD SEPTEMBER 20, 2007

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary

79-08

#79-08SEC

IN THE MATTER OF ETHYLENE GRIMSLEY, :

ROSELLE BOARD OF EDUCATION, :

UNION COUNTY. :

:

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

The School Ethics Commission determined that respondent – a former member of the Roselle Board of Education – violated the Code of Ethics for School Board Members, *N.J.S.A.* 18A:12-24.1(e) and (i), by confronting the Superintendent of Schools after a board meeting on March 1, 2004, during which the Board had voted to approve the Superintendent's contract.

The Commissioner – whose jurisdiction is limited to reviewing the Commission's recommended sanction – found that the Commission's recommended penalty of censure is the appropriate penalty in this matter. Accordingly, the Commissioner ordered that the respondent be censured as a school official found to have violated the School Ethics Act.

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

February 19, 2008

AGENCY DKT. NO. 36-1/08

IN THE MATTER OF ETHYLENE GRIMSLEY, :	COMMISSIONER OF EDUCATION
ROSELLE BOARD OF EDUCATION, :	DECISION
UNION COUNTY. :	
:	

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

This matter comes before the Commissioner to impose a sanction upon Ethylene Grimsley, former member of the Roselle Board of Education, based upon findings of fact and conclusions of law by the Commission that respondent violated *N.J.S.A.* 18A:12-24.1(e) and (i) of the Code of Ethics for School Board Members when she confronted the Superintendent of Schools at the conclusion of the March 1, 2004 board meeting.

Upon issuance of the decision of the Commission, respondent was provided 13 days from the mailing of such decision to file written comments on the recommended penalty for the Commissioner's consideration. Respondent's comments – dated February 6, 2008 and postmarked February 14, 2008 – were untimely and, therefore, are not considered herein.

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

Therefore, this decision is restricted solely to a review of the Commission's recommended penalty.

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

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

IT IS SO ORDERED.*

Lucille E. Davy
COMMISSIONER OF EDUCATION

Date of Decision: 2/19/08

Date of Mailing: 2/20/08

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

IN THE MATTER OF ETHYLENE GRIMSLEY	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**Docket No. C21-04**
ROSELLE BOARD OF EDUCATION *UNION COUNTY*	:	**DECISION**

PROCEDURAL HISTORY

This matter arises from a complaint filed on April 5, 2004, by Anthony Esposito, a member of the Roselle Board of Education (Board), alleging that Ethylene Grimsley, also a member of the Board, violated the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq. The respondent specifically alleged that the complainant violated N.J.S.A. 18A:12-24.1(e) and (i) when she confronted the Superintendent at the conclusion of the March 1, 2004 board meeting. The respondent filed an answer denying that she violated the Act and asked the Commission to find the complaint frivolous and impose sanctions.

The Commission invited, but did not require, the parties to attend its July 27, 2004 meeting. The parties were advised of their right to bring counsel and witnesses. The complainant and the respondent attended the hearing and testified before the Commission. During the testimony, the parties revealed that the Superintendent had brought assault charges against the respondent in municipal court. Thus, at the conclusion of the testimony, the Commission determined that, pursuant to N.J.S.A. 18A:12-32, which prohibits the Commission from acting on any matter actually pending in a court of law of this State, it could not proceed with a decision. During the public portion of the July 27, 2004 meeting, the Commission voted to hold the matter in abeyance until such time as the municipal court matter was resolved.

On December 8, 2004, the respondent's attorney, Kathleen Smallwood Johnson, Esq., notified the Commission that the municipal charges had been dropped. The parties were then notified that the matter would be placed on the Commission's agenda for its January 2005 meeting; however, the January 2005 meeting was cancelled due to snow. Therefore, at its February 2005 meeting, the Commission determined that probable cause existed to credit the allegation that the respondent violated N.J.S.A. 18A:12-24.1(i) of the Code of Ethics for School Board Members. The Commission also voted to find that the material facts were in dispute with regard to the allegations on which it found probable cause. The Commission voted to send the matter to the Office of Administrative Law (OAL) for a hearing in accordance N.J.S.A. 18A:12-29(b). However, the matter was never sent to the OAL.[1]

On August 2, 2007, the Commission notified the complainant that his complaint had not been sent to the OAL. The Commission informed the complainant that its

[1] It is unclear why the matter was never transmitted to the OAL for a hearing in accordance with N.J.S.A. 18A:12-29(b).

process for conducting a hearing for complaints such as this one, that allege a violation of only the Code of Ethics for School Board Members, had changed. The complainant was notified that, if he still wished to proceed with the complaint, the Commission would hold a *de novo* hearing in accordance with N.J.A.C. 1:1, to determine if a violation of the Code of Ethics for School Board Members had occurred, and, if it determined that a violation had occurred, it will then determine what sanction to recommend to the Commissioner of Education. The complainant informed the Commission that he wished to proceed with the complaint.

Thereafter, the parties were notified that the matter was rescheduled for December 18, 2007. The complainant attended the meeting; the respondent did not. Testimony was heard, as set forth below. During the public portion of the meeting, and recognizing that the December 18, 2007 hearing was *de novo,* the Commission voted to find that the respondent violated N.J.S.A. 18A:12-24.1(e) and (i), and voted to recommend a penalty of censure. The Commission also found that the complaint was not frivolous.

THE PLEADINGS

The complainant asserts that he witnessed the respondent, Ms. Grimsley, assault the Superintendent, Ms. Darlene Roberto, at the conclusion of the March 1, 2004 hearing. The complainant alleges that Ms. Grimsley's verbal abuse and hostile actions caused the Superintendent to fear imminent bodily harm. The complainant contends that Ms. Grimsley pushed her way toward Ms. Roberto while Mr. Aubourg, a board member, escorted Ms. Roberto to her car so that she could leave the scene. He further alleges that the actions of Ms. Grimsley, according to the complainant, were totally unprofessional, lacked proper decorum, and violated the expected standards of a public official. He alleges that this behavior was a violation of N.J.S.A. 18A:12-24.1(e) and (i). (Complaint at page 1)

In her answer, Ms. Grimsley denies the allegations in the complaint, and attributes the allegations to the fact that she was selected as Board President. Ms. Grimsley affirms that she did not assault the Superintendent. Rather, she avers that at the March 1, 2004 meeting, the Board considered an extension of the Superintendent's contract and/or a salary increase for her. The respondent states, "The Superintendent and certain members of the Board, including the Complainant herein, disagreed with my rationale that prior to voting on the issue of the Superintendent's contract we should evaluate her performance." (Answer at page 1, paragraph 3) The respondent argues that her reasons for requesting an evaluation were supported in law.

The respondent further affirms:

> Aside from making various comments on the record, the Superintendent approached me after the meeting to express her disdain for my position. She did so in a threatening manner causing me to fear that she would physically

> assault me in retaliation for the manner in which I voted and the statements that I made on the record. At no time did I assault her or threaten her. Nor did I ever intend to do so. (Id. at paragraph 4)

As to the complainant's allegation that she violated N.J.S.A. 18A:12-24.1(e), the respondent reasons that her "suggestion during the vote that sparked this Complaint was a general statement of the law that the Board must follow." (Answer at page 2, paragraph 6) The respondent further contends that the complainant fails to allege any facts that would demonstrate that she made personal promises or took private action that may compromise the Board. Rather, she asserts that "[t]he exchanges between the Superintendent and myself did not have any affect on the Board." (Id.)

As to the complainant's allegation that she violated N.J.S.A. 18A:12-24.1(i), she asserts that the complainant fails to allege any facts that would demonstrate that she failed to support and protect any of the Board's employees in properly performing their duties. In this connection, the respondent argues,

> I do not believe that the Commissioner of Education would interpret the instigation of a verbal assault upon a Board member by a superintendent as a '...proper performance of their duties.' Nor does that provision require a Board member to refrain from responding while under such a verbal attack which could lead to physical assault upon the Board Member. (Id. at paragraph 7)

In support of her position, the respondent attaches documentation to show that the Board approved a merit increase for the Superintendent on March 1, 2004.

EVIDENCE

In his testimony, at the December 18, 2007 meeting, Mr. Esposito expressed his concern that this matter was not properly transmitted to the OAL after the probable cause hearing. He stated that he believed the respondent assaulted the Superintendent and that such conduct violated N.J.S.A. 18A:12-24.1(e) and (i). Mr. Esposito acknowledged that the Board was in the process of considering a pay increase for Darlene Roberto. He attested that Ms. Grimsley did not want to approve a pay increase for the Superintendent; the Board, however, did approve the increase. He further stated that at the end of the meeting, as the Board members were leaving the building, the respondent "snapped." The complainant testified that Ms. Grimsley "went into a rage and went after Darlene Roberto in a very threatening manner." Mr. Esposito testified that Ms. Grimsley was holding some books, which she threw to the ground and she confronted the Superintendent, calling her a liar. The complainant acknowledges that the Superintendent filed charges in municipal court which were later withdrawn. Additionally, since that time, the Superintendent has resigned from her position with the Board. The complainant referred in his testimony to statements that were made by the

Superintendent, himself and other Board members to the Roselle Police Department following this incident.[2] He attests that these statements establish that an assault occurred.

Mr. Esposito testified that once the Board made its decision to approve the Superintendent's pay increase, no further action should have been taken by the respondent. He asserted that this event was unsettling and the incident altered the momentum of the board. He testified that under Ms. Roberto's leadership, the Board was able to accomplish some necessary building expansion, thereby reducing classroom sizes and improving education. Because Ms. Roberto has since left the district, he regrets that she did not have the opportunity to see the fruits of her labor.

The record includes the following sworn statements provided to the Roselle Police Department:[3]

(1) A statement provided by Darlene M. Roberto, Superintendent dated March 4, 2004 indicating that after the March 1 Board meeting, she was leaving the Board of Education building when she was approached by Ms. Grimsley. The two exchanged words about the Superintendent's contract. Ms. Roberto stated, in relevant part:

> I was about to get in my car, [Ms. Grimsley] yelled "wait a minute" and slammed my car door closed. She took all the papers in her hands and slammed them down on the ground and said "I've had enough of this [expletive]! Don't you [expletive] blame me for --" and then I don't remember what she said. Her hands were flying in my face and she was just about nose-to-nose with me. She was saying "this is [expletive] and we're going to setting [sic] this right now." I think this is where Cecilia came over and tried to get in between us and then Ethylene pushed Cecelia out of the way with her hands. She just pushed Cecilia very hard with both hands. She was very loud, Cecelia came back to try and restrain her and she pushed Cecelia again. Cecilia told me to get in my car but I couldn't. Then Toni Burrell and Yves pulled up in their cars, saw what was going on and jumped out of their cars. Yves went to help Cecelia hold Grimsley back. As I attempted to get in my car, Grimsley broke loose and she came at me again in a physically aggressive manner. At that point, it took Esposito, Aubourg, and Ricks to hold her back for me to get in my car. I got in my car and locked the door. She

[2] The record indicates that Ms. Roberto submitted these statements to the Commission for its consideration. Later, the complainant requested copies which were simultaneously forwarded to him and to the respondent.

[3] Throughout the police statements, the name of the respondent and some of the witnesses are misspelled. The citations herein are as they appear in the statements, with these misspellings.

> broke loose from them and came right up to my car. I pulled off, I floored it. I kept backing away when she first came at me. (Roberto Statement at page 3)

Lastly, Ms. Roberto reported feeling that her safety was jeopardized and as such, she would not stay in her office later than 4 pm. (Id. at 4) She also indicated she was fearful of repercussions. (Id. at 5)

(2) A statement provided by Mr. Yves Aubourg, member of the Roselle Board of Education, on March 4, 2004 indicated that after the meeting, he was talking to some of the Board members and they were out in the parking lot. Mr. Aubourg stated, in relevant part:

> I heard a melee going on and I saw Toni got out of her car and go towards the melee. Then I got out of my car. Right in front of Darlene's car were a lot of papers, in front of the driver's side tire. I could see Darlene with her arms crossed in front of her and Mrs. Grimsley going after her. Mrs. Grimsely was saying "I'm [expletive] tired of people saying I hate you. I need to talk to you!" Cecelia was trying to stop Mrs. Grimsley from going after Darlene. I got in between them and told Darlene to get in her car and get out of here. As I took her to her car, I realized that my car was blocking her. When I got back to my car to let her out, I heard Mrs. Grimsley say to her, "You're [expletive] lucky that I didn't tell the community that you were drunk at the convention". Then Darlene rolled down her window but I didn't hear what she said. As she pulled out, Mrs. Grimsley threw a bottle of water at her car. (Aubourg Statement at page 3)

(3) A statement provided by J. Alan McGarry, member of the Roselle Board of Education, on March 8, 2004 indicated that after the meeting, six our seven people walked out at once, *i.e.*, himself, Ms. Grimsley, Cecilia Ricks, Toni Burrill, Anthony Esposito and Yves Aubourg. Mr. McGarry states Ms. Grimsley attempted to have a conversation with Ms. Roberto about her contract, but Ms. Roberto indicated that she had no intention of discussing it and put up her hand to so indicate. Mr. McGarry stated that Ms. Roberto then opened her car door and was attempting to get in. Mr. McGarry reported, in relevant part:

> Ethylene's voice got louder and Darlene told her she did not want to discuss it. At that point Ethylene threw her papers down and slammed Darlene's car door shut and then put her body between Darlene and the door. Ethylene stated "I'm sick of this", and that is all I can recall. Darlene started backing up. She wanted to put some

> distance between her and Ethylene and then Cecelia Ricks can [sic] from around the car and just placed herself between the two women. Ms. Grimsley pushed Ms. Ricks aside in an attempt to get closer to Ms. Roberto several times. Then Ms. Burrill arrived and the two positioned themselves between Ms. Roberto and Ms. Grimsley. (McGarry Statement at page 3)

Mr. McGarry further stated that Ms. Roberto was eventually able to get to her car and leave. He stated, "Ethylene then yelled something to Ms. Roberto about not telling anybody about her inappropriate behavior at the convention. Ms. Roberto rolled down her window and yelled something back and stated she didn't tell anybody about Ethylene embezzling money from the school board. Then Ethylene then swung her water bottle at Ms. Roberto's car." (Id. at page 4)

(4) A statement provided by Cecelia Ricks, member of the Roselle Board of Education, on March 9, 2004 affirmed that after the Board meeting on March 1, 2004, all nine members left together, along with the Superintendent. Ms. Ricks stated that Ms. Grimsley said something to Ms. Roberto when leaving; Ms Roberto responded "I don't want to hear it, I know you don't like me." Further accusations followed; Ms. Ricks stated that "At this point Ethylene was enraged as Darlene attempted to get into her mini-van. Ethylene threw her papers on the ground and slammed the superintendent's door closed. Darlene backed up about 5 feet and at this point I was behind Ethelyne and stepped between the two." (Ricks Statement at page 2) She stated that she came between the two women because she thought Ms. Grimsley was going to attack Ms. Roberto, and she wanted to prevent her from doing so. Ms. Ricks reported that she got "shoved aside" by Ms. Grimsley "so that she could continue charging Darlene." (Id.) Ms. Ricks further stated, in relevant part:

> I again ran in front of the two of them and Yves Auborg had pulled up at this point and I looked at him and requested he get out of the car to help me. I motioned for him to get out of the car but he was unaware I was asking him for help. He got out of the car when he saw me being pushed a second time. Yves got out, Toni Burrill and I surrounded Ethelyne and I yelled for Darlene to get into her car and get out of here. When Darlene started to move towards her vehicle, Yves went over and blocked her body with his, so she could safely get into her car. Then he realized his car was blocking hers so he moved his vehicle and Darlene proceeded out of the driveway. Before she could get out Ethelyne was still yelling at her. (Id. at pages 3 and 4)

Ms. Ricks stated that Ms. Grimsley yelled "I didn't tell anybody you were drunk" and Darlene rolled down her window and said "I didn't tell anybody you embezzled money."

Ms. Ricks states that when Ms. Roberto began to drive away, Ms. Grimsley swung her water bottle at the car, but it did not hit the car. (Id. at page 4)

(5) A statement provided by Anthony Esposito, member of the Roselle Board of Education, on March 10, 2004 indicated that after the meeting on March 1, he left with some Board members. He reported, in relevant part:

> I was walking to my car and got into my car. I saw Ms. Grimsley and Ms. Roberto arguing and it seemed like Ms. Grimsley was getting rather close to Ms. Roberto. I pulled my car around and got out of the car and Ms. Roberto said to Ethelyne, "I don't have to take this, I don't have to listen to this, I'm going home." Ethelyne kept saying "you are always lying on me, always lying on me." Ms. Roberto was under the impression that Ms. Grimsley was out all over town discussing her contract, cause Ethelyne kept saying "it's not you, it's the process, it's the process". Darlene stated "it is you, you don't like me, and whatever I try to get done, you block it". Ms. Grimsley kept saying you keep lying on me. Ms. Roberto opened her driver's side door and Ms. Grimsley threw all her books and things on the ground and as Ms. Roberto tried to get into her car, Ethelyne slammed the car door shut and went at her. Ms. Roberto backed up and Ethelyne kept pushing towards Ms. Roberto in a threatening manner. At this point, Ms. Burrill and Ms. Ricks intervened and tried to calm Ethelyne down. Ms. Grimsley was trying to push Ms. Ricks and Ms. Burrill off her to get to Ms. Roberto. (Esposito Statement at pages 2-3)

Mr. Esposito further reported that during the incident, he was out of his car and close by, but he was not going to intervene because Ms. Burrill and Ms. Ricks were already there. (Id. at page 3) As to what happened when Ms. Roberto pulled away, Mr. Esposito affirmed that Ms. Grimsley stated she never told anybody that Ms. Roberto was drunk at one of the conventions and Ms. Roberto replied "I didn't tell anybody that you took $900.00 from the Board". Mr. Esposito said that Ms. Grimsley held a water bottle in her hand as if she was going to throw it, but she did not. (Id. at page 4)

(6) A statement provided by Toni Burrill, member of the Roselle Board of Education, on March 16, 2004 indicated that after the meeting on March 1, 2004, she stopped briefly to speak with other Board members and proceeded to her car. She reported that she started her car and made a turn to leave the parking lot; she pulled over to say good bye and realized that Ms. Grimsley was yelling. Ms. Burrill also stated, in relevant part:

> I saw Cecelia step between Ethelyne and Darlene. I jumped out of the car and ran over and at that point

> Ethelyne had slammed her papers down to the ground and she was screaming something "I'm sick and tired of people saying I said things that I didn't say, I didn't say that". Darlene had gone to open her car while Ethelyne was yelling and she slammed Darlene's car shut. Ethelyne kept getting closer to Cecelia and she grabbed her and shoved her for the purpose of getting her out of the way so she could get to Darlene. Ethelyne shoved Cecelia at least three times because Cecelia was trying to be a body blocker between the two of them. Yves saw what was going on and got out of his car to come to the assistance of Darlene and Cecelia. (Burrill Statement at pages 3-4)

Ms. Burrill reports that there was then an exchange of words between herself and Ms. Grimsley. Thereafter, Mr. Aubourg escorted Ms. Roberto to her car and told her to drive away. She continues,

> Darlene was inside her car pulling out and Cecelia was behind me. I was close to Darlene's car. Ethelyne yelled to Darlene "I didn't tell anybody about you [sic] behavior in Atlantic City" and Darlene replied, "And I didn't tell anybody about you embezzling money.["] Ethelyne had a water bottle in her hand and turn [sic] around and tried to hit Darlene with the bottle in the car and again I questioned what she was doing and told her she was completely out of control. I then left after Darlene pulled away." (Id. at page 4)

FINDINGS OF FACT

The Commission found the following facts based on the pleadings, testimony and documents on the record.

1. On March 1, 2004, the complainant and respondent were members of the Board of Education of Roselle. The respondent is no longer a Board member.

2. On March 1, 2004, the date of the incident Ms. Roberto was the Superintendent; however, she no longer works for the district.

3. Following a Board meeting on March 1, 2004, the complainant, respondent and fellow members of the Board exited the building to the parking lot.

4. In the parking lot the respondent and Ms. Roberto exchanged words concerning the Superintendent's contract which had just been the subject of a Board vote; this exchange became heated and intense.

5. When Ms. Roberto attempted to get into her car, respondent prevented her from doing so.

6. Specifically, the respondent threw her papers to the ground, slammed Ms. Roberto's car door closed, and blocked Ms. Roberto's entry to her car.

7. Ms. Cecilia Ricks, a Board member, placed herself between Ms. Roberto and the respondent in an attempt to prevent the respondent from physically assaulting Ms. Roberto.

8. Ms. Grimsley twice pushed Ms. Ricks aside to get to Ms. Roberto. It was only with the assistance of fellow Board members that Ms. Roberto was able to get into her car and drive away.

9. Upon driving away, Ms. Grimsley yelled to Ms. Roberto that she had not told anyone that Ms. Roberto was drunk at a convention.

ANALYSIS

The Commission initially notes that, pursuant to N.J.S.A. 18A:12-29, the complainant bears the burden of factually proving any violations of the Code of Ethics for School Board Members. The complainant contends that the respondent violated N.J.S.A. 18A:12-24.1(e), which provides:

> I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.

Pursuant to N.J.A.C. 6A:28-7.1, "private action" is defined as action taken by a member of a district board of education or a member of a charter school board of trustees that is beyond the scope of the duties and responsibilities of a member of a district board of education or a member of a charter school board of trustees. Here, there is no dispute on the record that the Board approved Ms. Roberto's merit increase at its March 1, 2004 meeting. To the extent there was any objection to this action, once the vote was taken, it was not appropriate for the respondent to unilaterally engage in further discussion with Ms. Roberto about the contract, as she did upon exiting the building, let alone to engage in a heated exchange. Moreover, there can be no doubt that respondent's physical intervention between Ms. Roberto and her car in the parking lot, respondent's pushing aside of another board member, and respondent's parting words to Ms. Roberto as she drove away, constituted private action *significantly* beyond the scope of her duties as a Board member.

As to whether private action of this kind "may compromise the board," the Commission finds that it does. In so finding, the Commission notes that Ms. Roberto reported that because of this incident she was fearful for her safety and afraid to stay at work beyond 4:00 p.m. Additionally, five board members gave statements under oath to

the Roselle Police Department which clearly establish that the respondent's conduct was inappropriate, unprofessional and extreme. It is not unreasonable to expect that when a Superintendent and five Board members are so affected by an event, there can be consequences for the district's operations. Indeed, Mr. Esposito testified that he believed this incident altered the momentum of the district. Thus, while there is no evidence on this record proving a causal connection between this incident and Ms. Roberto's departure, the Commission notes that it is only necessary to determine that Ms. Grimsley's conduct was such that it *may* compromise the board. Accordingly, the Commission finds that the complainant has demonstrated that the respondent violated N.J.S.A. 18A:12-24.1(e) of the Code of Ethics for School Board Members.

The complainant further contends that respondent's conduct violated N.J.S.A. 18A:12-24.1(i), which establishes a board member's obligation to support and protect school personnel in the proper performance of their duties. Here, the Commission again finds that the respondent's physical intervention between Ms. Roberto and her car in the parking lot, together with her pushing aside another board member in order to get to Ms. Roberto, sufficiently demonstrate that she was acting contrary to her duty in N.J.S.A. 18A:12-24.1(i). That the respondent exacerbated these physical actions with accusations about the Superintendent being drunk at a convention demonstrates an aggression that is completely antithetical to her duty as a Board member. Accordingly, the Commission finds that the complainant has demonstrated that the respondent violated N.J.S.A. 18A:12-24.1(i) of the Code of Ethics for School Board Members.

DECISION

For the reasons expressed above, the Commission finds that Ethylene Grimsley violated N.J.S.A. 18A:12-24.1(e) and (i) of the Code of Ethics for School Board Members.

REQUEST FOR SANCTIONS

At its December 18, 2007 meeting, the Commission considered the respondent's request that the Commission find that the complaint was frivolous and impose sanctions pursuant to N.J.S.A. 18A:12-29(e). The Commission notes that it can find no evidence which might show that the complainant filed the complaint in bad faith solely for the purpose of harassment, delay or malicious injury. To the contrary, as noted above, the Superintendent and four other Board members offered corroborating statements as to the respondent's behavior on March 1, 2004. The Commission also has no information to suggest that the complainant should have known that the complaint was without any reasonable basis in law or equity or that it could not be supported by a good faith argument for an extension, modification or reversal of existing law. The Commission's finding of a violation shows that the complaint was reasonably based in law. For the foregoing reasons, the Commission finds that the complaint is not frivolous and denies the respondent's request for sanctions against the complainant.

PENALTY

The Commission recommends that the Commissioner of Education impose a penalty of censure. In so doing, the Commission finds instructive the matter entitled I/M/O Charles Fischer, C30-03. Therein, the Commission found the Board member in violation of N.J.S.A. 18A:12-24.1(e) and (i) when he contacted the complainant, a business office employee, at her home on Friday evening to obtain copies of reports which he said he needed for a meeting on Sunday. The Board member admitted to raising his voice at the complainant, albeit that he claimed it was in response to her yelling, rather than out of anger. The Commission determined that when the respondent requested that the complainant return to the office to obtain the information he was seeking, such conduct was private action that may compromise the Board. The Commission noted that if the respondent was dissatisfied with the complainant's responses, he should have hung up and called the Superintendent, rather than raise his voice at a Board employee. Moreover, the respondent's insistence that the complainant provide the reports, together with his request that she return to work to obtain them, were not supportive of her as an employee performing her duties. In Fischer, the Commission recommended a penalty of reprimand. In the instant matter, the record is clear that the respondent's conduct toward the Superintendent after the meeting of March 1, 2004 was more intense, more aggressive and indeed more flagrant than the respondent's conduct in Fischer. As noted above, however, the respondent is no longer a Board member. Therefore, the Commission is constrained to recommend a penalty other than suspension or removal.

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

Paul C. Garbarini

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C21-04

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

Whereas, at its meeting of December 18, 2007, the Commission found that Ethylene Grimsley violated N.J.S.A. 18A:12-24.1(e) and (i) of the Code of Ethics for School Board Members and recommended that the Commissioner of Education impose a sanction of censure; and

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

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution was duly adopted by the School Ethics Commission at its public meeting on January 22, 2008.

Joanne Boyle
Executive Director

PCG/JB/decisions/C21-04

82-08

#82-08R/S

OAL DKT. NO. HDY 5207-07, OAL DKT. NO. EDU 11968-07 (CONSOLIDATED)
(EDU 3809-07 ON REMAND)
AGENCY DKT. NO. AHU 07-153, AGENCY DKT. NO. 78-3/07

RECORD SEALED

DEPARTMENT OF CHILDREN AND FAMILIES – INSTITUTIONAL ABUSE INVESTIGATION UNIT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
A.S.,	:	DECISION
RESPONDENT,	:	
AND		
IN THE MATTER OF THE TENURE HEARING OF A.S., JR., SCHOOL DISTRICT OF THE CITY OF ELIZABETH, UNION COUNTY.	:	

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

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) – for the reasons set forth in his decision – that respondent's unilateral retirement, effective December 20, 2007, renders the instant tenure charges moot. The Commissioner further agrees that pursuant to *N.J.A.C.* 6A:9-17(a)(1), the District's chief school administrator is responsible for advising the State Board of Examiners of respondent's retirement and the charges that had been certified against him.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the instant tenure charges are dismissed as moot. The Board's chief administrator is hereby directed to comply forthwith with his/her obligation pursuant to *N.J.A.C.* 6A:9-17(a)(1).

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 2/19/08

Date of Mailing: 2/21/08

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INIITIAL DECISION

ON REMAND

OAL DKT. NO. EDU 11968-07

AGENCY DKT. NO. 78-3/07

OAL DKT. NO.EDU 03809-07

RECORD SEALED

IN THE MATTER OF THE TENURE HEARING OF A.S., JR., SCHOOL DISTRICT OF THE CITY OF ELIZABETH, UNION COUNTY,

and

DEPARTMENT OF CHILDREN AND FAMILIES/INSTITUTIONAL ABUSE INVESTIGATION UNIT,

Petitioner,

v.

A.S.,

Respondent.

OAL DKT. NO. HDY 05207-07

AGENCY DKT. NO. AHU# 07-153

Karen A. Murray, Esq., for petitioner, the Board of Education (The Murray Law Firm, attorneys)

Michael T. Barrett, Esq., for respondent A.S., for Tenure matter (Bergman & Barrett, attorneys)

Record Closed: January 2, 2008 Decided: January 10, 2008

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

This matter is on remand from the Commissioner of Education Decision dated November 13, 2007. Respondent A.S. had challenged a finding of substantiated physical abuse by the Institutional Abuse Investigation Unit (IAIU) of Department of Children and Families (DCF). A.S. had denied that he committed physical abuse and sought to have his name removed from the Central Registry. See, N.J.S.A. 9:6-8.11 and N.J.S.A. 10:129A-3.4(c). Also, the School District of the City of Elizabeth (Board) had charged tenured teacher A.S. with unbecoming conduct for physical abuse of two children and sought his removal under N.J.S.A. 18A:6-10 et seq.

DCF transmitted its matter to the Office of Administrative Law (OAL) on May 4, 2007, under Docket No. HDY 05207-07. The Commissioner of Education had previously transmitted its matter to the OAL under Docket No. EDU 03809-07.

The circumstances which gave rise to the Tenure charges were allegations that teacher A.S. engaged in corporal punishment by punching a student in the chest and slapping him across is face on February 16, 2005 and by slapping another student across his face on February 24, 2004.

At the commencement of the hearing on July 23, 2007, the parties engaged in extensive settlement discussions which led to a proposed settlement agreement subject to Board approval the terms of which were placed on the record. On September 27, 2007, the Board submitted a fully executed Settlement Agreement and Board Resolution accepting the settlement.

The settlement agreement also resolved the matter involving DCF, whereby DCF agreed to modify the finding of "substantiated" child abuse against A.S. to "not

substantiated" and to remove his name from the State's Child Abuse Registry. Since, by the acknowledgement of its counsel, DCF had already approved that part of the settlement pertinent to it, there was no basis to follow the predominant interest order requiring that an initial decision be submitted to DCF before submission to the Commissioner.

I submitted an Initial Decision Settlement on October 4, 2007, concluding that the settlement was in the public interest. In her Order of Remand of November 13, 2007, the Commissioner indicated that the charges filed against A.S. were ..."such that the Commissioner cannot approve a settlement that leaves the Board's allegations unadjudicated unless she can be certain that respondent will no longer be able to work in New Jersey schools or present himself for any type of employment – in New Jersey or elsewhere – as an educator duly licensed by the State." Although she did not preclude the possibility of settlement, she rejected the Initial Decision and directed instead that the matter be remanded for such further proceedings as are necessary to address the concerns expressed in her Order of Remand or to proceed to plenary hearing.

I then scheduled the plenary hearing to resume on December 11, 2007. Prior to that date, and consequently prior to any adjudication of the tenure charges, and without the submission of any newly proposed settlement agreement, counsel for the Board advised that the Board had been notified by letter that A.S. was retiring from his tenured position effective December 20, 2007. On January 2, 2008, counsel submitted a letter on behalf of the Board withdrawing its tenure charges against A.S. as he retired on December 20, 2007. Attached to that submission was a December 14, 2007, letter to the Board from A.S. advising as follows: "Due to forty years of service and job related disabilities I am forced to retire. My retirement will become effective on December 20, 2007." A copy of the letters of the Board and A.S. are attached. No other claims by either party were presented to me. Both parties have asserted that the unilateral retirement has rendered the tenure charges moot.

The issue is whether the pending tenure charges should be dismissed as moot in light of the unilateral retirement of A.S.

LEGAL DISCUSSION

N.J.A.C. 6A:3-5.6 addresses the withdrawal, settlement or mooting of tenure charges. Section (a) deals with a withdrawal or settlement of tenure charges and provides that, "once tenure charges are certified to the Commissioner, such charges may be withdrawn or settled only with the Commissioner's approval." That regulation necessitates that certain requirements must be satisfied in order to secure the approval of the Commissioner. The parties here no longer seek the approval of the Commissioner of a settlement between them, and the Board does not seek a unilateral withdrawal of the charges. Instead, the Board seeks to withdraw the charges it previously filed on the grounds of mootness in light of A.S.'s December 20, 2007 retirement.

Section (d) of N.J.A.C. 6A:3-5.6 focuses on the current posture of this matter – namely that A.S. has unilaterally retired from his tenured position.

> Where tenure proceedings are concluded prior to adjudication because the charged party has unilaterally resigned or retired, the Commissioner may refer the matter to the State Board of Examiners for action against the charged party's certificate as it deems appropriate, prior to the conclusion of tenure charges as set forth in N.J.A.C. 6A:9-17.4

N.J.A.C. 6A:9-17.4 provides that the chief school administrator of a district shall notify the Board of Examiners when a tenured teaching staff member who is accused of unbecoming conduct resigns from his position. Additionally, Section (b) requires that, if the Board of Examiners issues an order to show cause based on the information that the school district provided about the certificate holder, it shall be the responsibility of

the reporting school district to cooperate with the Board of Examiners in any proceeding arising from the order to show cause.

In view of A.S.'s retirement, I **CONCLUDE** that this matter is moot. An issue is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy and where the conflict between the parties has become merely hypothetical. In re Conroy, 190 N.J. Super. 453, 458 (App. Div. 1983); In the Matter of Saez, EDU 11306-05, Initial Decision, (February 22, 2006), adopted, Comm'r (April 4, 2006) http://lawlibrary.rutgers.edu/oal/search.html; Barshatsky v. Freehold Regional High School District Bd. of Educ., 95 N.J.A.R. 2d (EDU) 73. The Commissioner will ordinarily not review questions which become academic before the issuance of a decision out of reluctance to render a legal decision in the abstract and a desire to conserve administrative resources. Saez, supra and Henry v. Bd. of Educ. of the City of Wildwood, 1975 S.L.D. 1, 3.

N.J.A.C. 6A:3-5.6(a) specifically requires that tenure charges may be withdrawn or settled only with the Commissioner's approval, and then only upon consideration of certain factors. N.J.A.C. 6A:3-5.6(d) however does not require the Commissioner's review of the status of tenure proceedings not yet adjudicated when the individual, as here, resigns or retires. In considering the plain language of these two provisions, it is clear that pending tenure charges should be dismissed as moot when there is a unilateral resignation or retirement. In the Matter of Clothier, EDU 9526-00, Initial Decision, (January 31, 2001), adopted, Comm'r (March 19, 2001) http://lawlibrary.rutgers.edu/oal/search.html. The Saez matter was procedurally similar to the present case. The parties originally reached a settlement, which the administrative law judge approved in an initial decision. The Commissioner however rejected the settlement and remanded the matter for further proceedings. Prior to the resumption of the hearing, Saez unilaterally resigned. Under those circumstances the Commissioner agreed that Saez' resignation from his tenured position rendered the

controversy moot and did not consider the factors required in a settlement or withdrawal situation under N.J.A.C. 6A:3-5.6(a).

ORDER

It is hereby **ORDERED** that the tenure charges certified by the School District of the City of Elizabeth against A.S. be dismissed as moot; and

It is further **ORDERED** that the School District of the City of Elizabeth report the conduct alleged in the tenure charges to the State Board of Examiners pursuant to N.J.A.C. 6A:9-17.4.

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

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

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

January 10, 2008
DATE

Jesse H. Strauss
JESSE H. STRAUSS, ALJ

Date Received at Agency: 1/10/08

Mailed to Parties:
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

JAN 11 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

id

THE MURRAY LAW FIRM, LLC

KAREN A. MURRAY*

*MEMBER OF N.Y AND D.C BARS
**MEMBER OF PA BAR

3 REVMONT DRIVE, SUITE 318
SHREWSBURY, NEW JERSEY 07702-4362
(732) 389-1010

FAX NO. (732) 389-3232
kam@mm-esqs.com

ANITRA R. PRICE-THOMAS **

January 2, 2008

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW
2008 JAN -4 A 9:25

VIA FACSIMILE AND U.S. MAIL
Honorable Jesse H. Strauss, A.L.J.
State of New Jersey
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

RE: In the Matter of the Tenure Hearing of Arthur Sabatino, Jr., School District of the City of Elizabeth, Union County,
OAL Dkt. No. 03809-07
Agency Dkt. No. 78-3/07
-and-
DCF/IAIU v. A.S.,
OAL Dkt. No. HDY 05207-07
Agency Dkt. No. 07-153
Our File No. 30,484R

Dear Judge Strauss:

The Elizabeth Board of Education would like to withdraw its Tenure Charge case initiated against Arthur Sabatino as he retired on December 20, 2007 (see enclosed letter). Please advise if anything further is required from the Board at this point in time.

Very truly yours,

THE MURRAY LAW FIRM, LLC

KAREN A. MURRAY

KAM/ap
Enc.
cc: Harold E. Kennedy, Jr., Board Secretary/School Bus. Admin. (w/out enc.)
Aida Garcia, Asst. Superintendent for HR (w/out enc.)
Kirk C. Nelson, Jr., Esquire (w/out enc.)
Michael Barrett, Esquire (w/out enc.)

Arthur J. Sabatino, Jr.
819 Greenwich Lane
Union, New Jersey 07083
908-964-7870

2008 JAN -4 A 9:25
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

December,14, 2007

Elizabeth Board of Education
500 North Broad Street
Elizabeth, New Jersey 07202

To the Members of the Elizabeth Board of Education:

Due to forty years of service and job related disabilities I am forced to retire. My retirement will become effective on 12/20/07.

Arthur J. Sabatino, Jr.

83-08

#83-08

OAL DKT. NO EDU 5723-05
AGENCY DKT. NO. 99-5/05

IN THE MATTER OF THE TENURE	:	
HEARING OF CINDY WILJHELM,	:	
SCHOOL DISTRICT OF MORRIS,	:	COMMISSIONER OF EDUCATION
MORRIS COUNTY.	:	DECISION
	:	

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

Upon review, the Commissioner determines to accept the parties' settlement agreement as – in light of respondent's September 20, 2006 resignation from the District– she cannot compel the Board to proceed with adjudication of the tenure charges, notwithstanding her concerns about unresolved allegations of theft of musical instruments from a district school.*

Accordingly, the settlement is approved and the tenure matter dismissed, subject to compliance with the terms of the settlement. This matter is hereby referred to the State Board of Examiners for action pursuant to *N.J.A.C.*6A:9-17.1 *et seq.* as it deems appropriate.

IT IS SO ORDERED.

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 2/19/08

Date of Mailing: 2/21/08

* The Commissioner notes that there is evidence on record supporting these allegations, despite the fact that the criminal charge against respondent was dismissed subsequent to respondent's successful completion of the Pre-Trial Intervention Program.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 05723-05

AGENCY DKT. NO. 99-5/05

IN THE MATTER OF THE TENURE HEARING OF CINDY WILJHELM, SCHOOL DISTRICT OF MORRIS, MORRIS COUNTY.

James M. McCreedy, Esq., for petitioner School District of Morris (Wiley, Malehorn, Sirota & Raynes, attorneys)

Mary Frances Palisano, Esq., for respondent Cindy Wiljhelm (Law Offices of Alan L. Zegas, attorney)

Record Closed: December 20, 2007 Decided: January 14, 2008

BEFORE **MUMTAZ BARI-BROWN,** ALJ:

The School District of Morris, Morris County (Board or District) filed tenure charges against respondent Cindy Wiljhelm, a teaching staff member, and recommended dismissal for reasons of incapacity, unbecoming conduct and other just cause. Respondent denied the alleged criminal wrongdoing.

On December 5, 2007, the parties presented sufficient evidence to support a proposed settlement. The Stipulation of Settlement and Board Resolution executed by the parties is attached hereto.

Pursuant to N.J.A.C. 6A:3-5 .6(a), the Commissioner of Education must approve settlement and withdrawal of certified tenure charges. The standards established by the State Board of Education In re Cardonick,1990 S.L.D. 842, 846 must include the following: 1) the nature of the charges; 2) an explanation of the circumstances justifying the settlement or withdrawal; 3) consent of both the charged and the charging parties; 4) the charged party entered into the agreement with a full understanding of his or her rights; 5) demonstrate that the agreement is in the public interest; and 6) the teaching staff member has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible loss of certificate. N.J.A.C. 6A:3-5 .6.

Based on the relevant evidence I **FIND**:

1. The District filed charges with the Commissioner of Education against respondent, which are summarized as follows: (a) In September 2002, the District met with respondent to discuss tardiness, schedule changes and other issues; (b) In April 2003, respondent received two ratings of unacceptable on observations from the building principal for professional characteristics; (c) Respondent used District computers in violation of school policy; (d) On or about February 23, 2005, respondent was suspended without pay and criminally charged with receiving stolen property of eight musical instruments labeled Alexander Hamilton (School), valued at $6,000.00. Respondent denied all criminal charges.

(2) The parties with advice of counsel agreed to a proposed settlement and provided an explanation to justify the agreement.

(3) The parties were advised of all rights under the agreement as set forth in the Stipulation of Settlement and Board Resolution, which is attached and summarized as follows: (a) respondent shall resign from her teaching position with the District effective September 20, 2006; (b) the Board shall dismiss the tenure charges pending approval of the agreement by the OAL and Commissioner of Education; (c) the parties agree not to issue communications or statement to the press that disparages or encourages any action against either party; (d) the Board will provide a neutral service letter for respondent including dates of employment, positions and salary; (e) respondent "expressly understands that the Commissioner of Education may refer this matter to the State Board of Examiners for possible certificate revocation proceedings."

(4) If a hearing is necessary, the Board anticipates presenting four witnesses and respondent anticipates presenting four witnesses. Given the voluminous statements in support of the charges, a hearing will require a minimum of four days. The parties believe in good faith that the stipulation of settlement and board resolution are in the public interest.

Based upon the foregoing, I **CONCLUDE** that the Stipulation of Settlement and Board Resolution executed by petitioner School District of Morris and respondent Cindy Wiljhelm satisfies the requirements of In re Cardonick, State Board decision of April 6, 1983 (1990 School Law Decisions (S.L.D.) 842, 846): Therefore, the Stipulation of Settlement between the parties should be **APPROVED.**

It is so **ORDERED**.

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

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

January 14, 2008
DATE

MUMTAZ BARI-BROWN, ALJ

Date Received at Agency:

1-17-08

Mailed to Parties:

JAN 17 2008
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

da

LAW OFFICES OF ALAN L. ZEGAS
552 Main Street
Chatham, New Jersey 07928
(973) 701-7080
Attorneys for Respondent,
Cindy Wilhjelm

COMMISSIONER OF EDUCATION
AGENCY REFERENCE NO. 99-5/05
OFFFICE OF ADMINISTRATIVE LAW
DOCKET NO.: EDUTH 05723-2005N

IN THE MATTER OF CINDY WILHJELM	**STIPULATION OF SETTLEMENT**

WHEREAS, Cindy Wilhjelm (hereinafter "Mrs. Wilhjelm") is the respondent in the above referenced tenure hearing; and

WHEREAS, the Morris School District Board of Education (hereinafter "the Board") is the local educational authority that has filed tenure charges against Mrs. Wilhjelm; and

WHEREAS, the parties in good faith have engaged in extensive negotiations concerning this matter and the parties enter into this settlement agreement in order to reach a resolution of this matter; and

WHEREAS, the parties wish to avoid the uncertainties of litigation and the time and expense that would be incurred by a protracted hearing; and

WHEREAS, [redacted] in view of its [redacted] concerns about the case and its concern that litigation expenses could cause the expenditure of monies that otherwise could be used to support education within the District, the Board determined that it would be in the public interest to enter into settlement negotiations with Mrs. Wilhjelm; and

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WHEREAS, the parties having a desire to settle the above matter in an amicable way, hereby agree as follows:

1. Mrs. Wilhjelm resigned from her teaching position with the Board, effective September 20, 2006.

2. The Board agrees to a dismissal of the tenure charges pending in the within matter subject to the approval of the Agreement by the Office of Administrative Law and the Commissioner of Education before it becomes a legally binding document. The parties agree to produce and execute any documents and to take any action that may be required to effectuate the terms, conditions and spirit of this Agreement.

3. Except as may otherwise be required by law, each party agrees that they will not issue communications or make any statement, written or otherwise to the press that disparages, criticizes or otherwise reflects adversely on or encourages any action against either party.

4. The Board will provide a neutral service letter for Mrs. Wilhjelm, including her dates of employment, positions held in the District and most recent salary.

5. Any communication from any employer seeking to hire Mrs. Wilhjelm will be handled in the manner described in paragraph 4 above.

6. The Board will not take any affirmative action that would prejudice her rights or initiate any proceedings against Mrs. Wilhjelm's teaching certificates or pension unless required to do so by the Commissioner of Education of by the Court.

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7. Mrs. Wilhjelm and her family received full health care and dental benefits through October 25, 2006. Mrs. Wilhjelm is eligible for COBRA thereafter.

8. Ms. Wilhjelm waives any right to withdraw her resignation or sue for her position even if this agreement is not approved by the Commissioner of Education. Similarly, Ms. Wilhjelm waives any right to withdraw her resignation or sue for her

position if the Commissioner of Education requires the Board to proceed with a hearing on tenure charges.

9. Each party acknowledges that each party has received good and fair consideration for the waiver and release set forth in this Agreement and that each party shall be responsible for their own attorney's fees and any expert's costs and any other expenditures. It is expressly acknowledged that neither party is the prevailing party for any purpose, including attorneys' fees and costs.

10. This settlement constitutes the full and complete agreement of the parties and may not be changed or modified. This Agreement is binding upon the parties and their respective heirs, assigns or successors in interest. This Agreement shall be governed by and construed in accordance with New Jersey law. This Agreement shall be construed as if it were drafted by both parties contemporaneously.

11. The Board and Mrs. Wilhjelm each verify, affirm and represent that they have each had the opportunity to discuss the terms of this Agreement with counsel, that they understand its contents and are entering into this Agreement voluntarily and with a full understanding of its meaning and that they are fully satisfied with their legal representation.

12. The terms of this Agreement represent a compromise of all disputed claims between the parties and resolve all of the issues raised by the parties or that could have been raised by either party in this matter. This Agreement is not an admission by either party of any liability or the violation of any law, statute or regulation, nor shall it be cited as precedent in any future judicial or administrative proceeding, except as needed for enforcement or interpretation of specific terms. By entering into this Agreement, Mrs. Wilhjelm is not admitting guilt regarding any of the factual or legal allegations set forth in the tenure charges or in other related documents. Mrs. Wilhjelm reserves all her defenses in any future proceedings.

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13. Mrs. Wilhjelm expressly understands that the Commissioner of Education may refer this matter to the State Board of Examiners for possible certificate revocation proceedings. By entering into this Agreement, Mrs. Wilhjelm is not waiving any rights she may have to defend against such a proceeding. Ms. Wilhjelm waives any and all claims, demands, liabilities, damages, costs, expenses, actions and causes of action [redacted] that she now has [redacted] against the Board, its members, officers, agents and employees under statutory or common law, including but not limited to any claim for back pay and counsel fees. Each and every claim which Ms. Wilhjelm made or could have made in any forum, including without limitation the Office of Administrative Law, Superior Court of New Jersey or the Federal courts is hereby compromised, settled and released, and fully discharged forever, without any further liability on the part of the Board, or any of its past, present or future agents. employees, officers, directors, divisions, successors or assigns. for example, a claim may be brought for a breach and/or enforcement of this [redacted] agreement.

14. Except as may be required by law, the parties agree that the terms of the settlement shall remain confidential and agree not to discuss details of this settlement with any person.

15. This Agreement is contingent upon approval by the Morris School District Board of Education. Approval of the Agreement will be placed on the agenda of the Board of Education [redacted] meeting.

16. This agreement shall be incorporate into a Final Order of an Administrative Law Judge.

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By: Cindy Wilhjelm

Cindy Wilhjelm

Date:

By:

RESOLUTION OF THE MORRIS SCHOOL DISTRICT
BOARD OF EDUCATION

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WHEREAS the Morris School District filed tenure charges against a teacher, C.W., in the Office of Administrative Law and a proposal to resolve such matter without further litigation having been addressed in settlement conferences between the parties and with the Administrative Law Judge assigned to the case; and

WHEREAS the parties have agreed to settle the dispute at a settlement conference held in the Office of Administrative Law on December 5, 2007 before the Honorable Mumtaz Bari-Brown, ALJ; and

WHEREAS a settlement agreement having been proposed to resolve the dispute.

NOW, THEREFORE BE IT RESOLVED that upon the recommendation of the Superintendent, the Board of Education approved the attached settlement agreement and its execution on behalf of the Board by Andrew William, Director of Curriculum and Instruction, who attended the settlement conference before the Administrative Law Judge as the District's representative.

The undersigned, Board Secretary of the Morris School District Board of Education hereby certifies that the above Resolution was adopted by the Board at its properly constituted meeting of December 10, 2007 at the Lafayette Learning Center, 31 Hazel Street, Morristown, New Jersey by a majority vote of the Board.

Susan Young
Board Secretary

Dated:

84-08

#84-08

IN THE MATTER OF THE TENURE	:	
HEARING OF ELLEN TAUSSI, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP OF	:	DECISION
FAIRFIELD, ESSEX COUNTY.	:	

SYNOPSIS

Petitioning Board filed tenure charges of unbecoming conduct and insubordination against respondent, a tenured secretary, and sought her removal from employment in the Township of Fairfield School District. Respondent filed an answer to the charges, but subsequently submitted an irrevocable letter of resignation dated January 7, 2008. On January 8, 2008, the petitioning Board issued a resolution accepting respondent's resignation and withdrawing the tenure charges.

The ALJ found that the respondent resigned from her tenured employment, and holds no certificate issued by the New Jersey Department of Education. Accordingly, the ALJ concluded that the matter should be dismissed as moot.

The Commissioner concurred with the ALJ, and dismissed the petition as moot.

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

February 19, 2008

OAL DKT. NO. EDU 11415-07
AGENCY DKT. NO. 299-10/07

IN THE MATTER OF THE TENURE	:	
HEARING OF ELLEN TAUSSI, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP OF	:	DECISION
FAIRFIELD, ESSEX COUNTY.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Commissioner concurs with the Administrative Law Judge's (ALJ) determination that the irrevocable resignation of the respondent from her position with the petitioner – and the petitioner's resolution accepting same – has rendered moot the petitioner's appeal to the Commissioner requesting the respondent's removal for unbecoming conduct. No notification to the Board of Examiners is necessary under *N.J.A.C.* 6A:9-17.11, as the respondent does not a hold a certificate issued by the New Jersey Department of Education.

Accordingly, the petition is hereby dismissed as moot.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 2/19/08

Date of Mailing: 2/21/08

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION/DISMISSAL

OAL DKT. NO. EDU 11415-07

AGENCY DKT. NO. 299-10/07

IN THE MATTER OF THE TENURE HEARING OF ELLEN TAUSSI, SCHOOL DISTRICT OF THE TOWNSHIP OF FAIRFIELD, ESSEX COUNTY.

Isabel Machado, Esq., on behalf of petitioner
(Lindabury, McCormick, Estabrook & Cooper, attorneys)

Patrick P. Toscano, Jr., Esq., on behalf of respondent

Record Closed: January 15, 2008 Decided: January 15, 2008

BEFORE: **IMRE KARASZEGI, JR.**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, School District of the Township of Fairfield, Essex County ("Board"), brings charges of unbecoming conduct against respondent, Ellen Taussi ("Taussi"), a tenured administrative support staff employee, and seeks her removal. On October 15, 2007, the Board filed the following with the Department of Education: sworn tenure charges and statement of evidence, certificate of determination for filing tenure charges and proofs of service. On October 22, 2007, the respondent's answer was filed with the Department.

The Department transmitted the matter to the Office of Administrative Law ("OAL") on October 25, 2007 for a hearing as a contested case pursuant to N.J.S.A. 18A:6-11 and N.J.S.A. 52:14B-2(b). On October 29, 2007, the case was assigned to me and on October 31, 2007, a telephone conference was held in order to set forth a proposed schedule for the hearing of this matter.

On January 10, 2008, counsel for the Board provided the OAL and petitioner's counsel with the attached copy of an irrevocable letter of resignation from respondent, effective January 7, 2008, and a resolution from the Board, dated January 8, 2008, accepting respondent's resignation and withdrawing the tenure charges.

FINDING

Having reviewed the documents submitted in this matter, I **FIND** that respondent has irrevocably resigned from her public employment as an administrative support staff employee, effective January 7, 2008. I **FIND** respondent does not hold a certificate issued by the New Jersey Department of Education. I also **FIND** that the standards set forth in In the Matter of the Tenure Hearing of Frank Cardonick, 1990 S.L.D. 842, 846 and N.J.A.C. 6A:3-5.6 have been met.

CONCLUSION

Based on the foregoing, I **CONCLUDE** that the tenure charges certified by the School District of the Township of Fairfield against respondent be **DISMISSED** as moot.

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

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

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

Jan. 15, 2008
DATE

IMRE KARASZEGI, JR., ALJ

Date Received at Agency: 1-22-08

Mailed to Parties:

JAN 22 2008
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cml

Ellen Taussi
P.O. Box 11269
343 Hollywood Avenue
Fairfield, NJ 07004

(973) 464-3923 (cell) (973) 575-5071 Home (973) 808-5725 Fax

January 7, 2008

Dr. Mary Kildow
Fairfield Board of Education

Dear Dr. Kildow:

Please be advised that I will be irrevocably resigning from the School Board, effective January 7, 2008. I have filed for disability retirement, effective this date.

Ellen Taussi

Ellen Taussi

Fairfield Board of Education
Resolution

WHEREAS, on October 9, 2007, the FAIRFIELD BOARD OF EDUCATION, based upon the recommendation of the Superintendent of Schools, and upon a majority vote of the full membership, upon invoking the Doctrine of Necessity, the FAIRFIELD BOARD OF EDUCATION after full consideration in private session of the tenure charges and supporting statement of evidence filed against Ellen Taussi, and the response filed by Ellen Taussi, determined that probable cause existed to certify tenure charges filed against Ellen Taussi to the Commissioner of Education; and

WHEREAS, on October 9, 2007, the FAIRFIELD BOARD OF EDUCATION, based upon the recommendation of the Superintendent of Schools, and upon a majority vote of the full membership of the FAIRFIELD BOARD OF EDUCATION, upon the invoking the Doctrine of Necessity, after full consideration in private session of the tenure charges and supporting statement of evidence filed against Ellen Taussi, and the response filed by Ellen Taussi, that the FAIRFIELD BOARD OF EDUCATION determined that the tenure charges filed against Ellen Taussi were sufficient, if found to be true, to warrant the dismissal of Ellen Taussi from her employment by the FAIRFIELD BOARD OF EDUCATION; and

WHEREAS, Ellen Taussi's employment with the FAIRFIELD BOARD OF EDUCATION was that of administrative support staff, whereby she does not hold a certificate issued by the New Jersey Department of Education; and

WHEREAS, the FAIRFIELD BOARD OF EDUCATION filed the tenure charges with the Commissioner of Education on October 12, 2007; and

WHEREAS, the matter was transmitted to the Office of Administrative Law on October 22, 2007 for a tenure hearing pursuant to N.J.S.A. 52:14B-10.1 and is currently pending before Administrative Law Judge, Imre Karazegi, Jr., with OAL Docket No. EDU 11415-07; and

WHEREAS, Ellen Taussi has submitted an irrevocable letter of resignation effective January 7, 2008 and the FAIRFIELD BOARD OF EDUCATION has accepted said letter of resignation; and

WHEREAS, the FAIRFIELD BOARD OF EDUCATION finds (1) said resignation renders the pending tenure charges moot as the matter of her continued employment is no longer contested; (2) Ellen Taussi has submitted her resignation under the advice of counsel, Patrick Toscano, Esq., and has resigned with a full understanding of her rights; and (3) a withdrawal of the tenure charges is in the public interest;

BE IT RESOLVED that the FAIRFIELD BOARD OF EDUCATION, in accordance with N.J.A.C. 6A:3-5.6(a), hereby proposes and requests the withdrawal of the tenure charges previously certified and filed against Ellen Taussi with the Commissioner of Education and transmitted to the Office of Administrative Law.

Moved by: Mr. Pat Freda, seconded by Mr. Alan Pierce
Roll Call Vote: Mr. Cafone: Aye; Mr. Freda: Aye; Mr. Pierce: Aye; and Mr. Patierno: Aye - resolution carries.
Board Member Absent: Mrs. Sandra Costa, President

Thomas Patierno
Mr. Thomas E. Patierno, Vice President

Attest: William Stepka
Mr. William Stepka - Board Secretary/BA (interim)
Resolution introduced and carried on Tuesday, January 8, 2008.

85-08

#85-08

OAL DKT. NO EDU 2212-07
AGENCY DKT. NO. 69-3/07

IN THE MATTER OF THE TENURE	:	
HEARING OF GEORGE C. LANGLEY,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
BRIDGETON, CUMBERLAND COUNTY.	:	

The record of this matter, the parties' proposed "Settlement Agreement, Approved Leave of Absence and Resignation," and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon such review, the Commissioner cannot accept the proposed settlement as recommended by the OAL.

Initially, the Commissioner emphasizes that – pursuant to *N.J.A.C.* 6A:3-5.6(a), – once tenure charges have been certified by a board of education, they may be settled only with the Commissioner's approval, and that any proposed settlement, whether submitted to the Commissioner or to the Administrative Law Judge, must address the standards expressly established for this purpose by the State Board of Education. *In re Cardonick*, 1990 *S.L.D.* 842, 846. Specifically, a proposed settlement must: 1) be accompanied by documentation as to the nature of the charges; 2) include an explanation of the circumstances justifying settlement; 3) evidence the consent of both the charged and the charging parties; 4) indicate that the charged party entered into the agreement with a full understanding of his or her rights; 5) demonstrate that the agreement is in the public interest; and 6) indicate, where the charged party is a teaching staff member, that he or she has been advised of the Commissioner's duty to refer tenure

determinations resulting in loss of position to the State Board of Examiners for possible action against the staff member's certificate.

In the present matter, the Bridgeton Board of Education (Board) has offered no justification for settlement other than its desire to avoid the cost, uncertainty and inconvenience of litigation while still obtaining removal of the respondent from employment with the district – notwithstanding the well-established principle that, having once taken up the burden of tenure charges, a board may not lay it down without spreading forth on the record a reasonably specific explanation of why such charges need no longer be pursued or why it is now in the public interest not to pursue them. *In the Matter of the Tenure Hearing of Kenneth Smith, School District of Orange, Essex County*, decided by the Commissioner March 22, 1982, decision on remand June 16, 1983, *aff'd with modification* by the State Board of Education November 2, 1983, *aff'd* N.J. Superior Court, Appellate Division, January 30, 1986. In the latter regard, the Commissioner stresses that the mere fact that the terms of a proposed tenure settlement call for the teaching staff member's resignation or retirement does not in and of itself assure that the *Cardonick* standards have been met, since the Commissioner's concern for the public interest extends beyond the boundaries of the particular district certifying the tenure charges. *In the Matter of the Tenure Hearing of Corey Younger, State-operated School District of the City of Jersey City, Hudson County*, decided September 7, 1999, and *In the Matter of the Tenure Hearing of Elmena Jean, State-operated School District of the City of Newark, Essex County*, decided October 4, 1999.

Furthermore, the record of this matter provides no indication that the respondent understands the Commissioner's duty, pursuant to *Cardonick, supra*, and *N.J.A.C.* 6A:9-17.1 *et seq.*, to refer this matter to the State Board of Examiners for possible suspension or revocation of

his teaching certificate – an omission that would itself preclude approval of the present settlement under any circumstances.

Finally, with respect to the Board's response to inquiries regarding the respondent's employment with the district (Term #4), the Commissioner reminds the parties that the Board's actions must at a minimum comport with the requirements of New Jersey's Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq.*, which states that the following employment information shall be public:

> An individual's name, title, position, salary, payroll record, length of service in the instrumentality of government and in the government, date of separation and the reason therefor; and the amount and type of any pension received ***. (emphasis added) *N.J.S.A.* 47:1A-10[1]

Accordingly, the proposed settlement and the Initial Decision of the OAL recommending its approval are hereby rejected, and this matter is remanded to the OAL for further proceedings addressing the concerns set forth above. If the parties are unable to reach agreement under these conditions, the tenure charges shall duly proceed to plenary hearing.[2]

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 2/19/08

Date of Mailing: 2/21/08

[1] The Commissioner additionally reminds the parties that the tenure charges and related case documents, unless sealed for good cause shown, are also a matter of public record. See *Williams v. the Board of Education of the Atlantic City Public Schools et al.*, 329 *N.J. Super.* 308 (App. Div. 2000); see also *N.J.A.C.* 1:1-14.1(a).

[2] In so holding the Commissioner stresses that she does not preclude the possibility of settlement in this matter, but cannot meet her broader obligation to the schools and children of this State without ensuring that proposed tenure settlements are consistent with the standards of *Cardonick, supra.*

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 2212-07
AGENCY DKT. NO. 69-3/07

IN THE MATTER OF THE TENURE HEARING OF GEORGE C. LANGLEY, SCHOOL DISTRICT OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY.

A. Paul Kienzle, Esq., for petitioner

Ned P. Rogovoy, Esq., for respondent

Record Closed: January 16, 2008 Decided: January 16, 2008

BEFORE **EDGAR R. HOLMES,** ALJ, T/A:

This matter was transmitted to the Office of Administrative Law on March 21, 2007, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

January 16, 2008
DATE

EDGAR R. HOLMES, ALJ, T/A

Date Received at Agency:

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JAN 2 4 2008

DATE

OFFICE OF ADMINISTRATIVE LAW

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

RESOLUTION
OF
THE BOARD OF EDUCATION
OF THE CITY OF BRIDGETON

WHEREAS, the Board of Education has filed tenure charges against George C. Langley for conduct unbecoming a teacher, insubordination, inefficiency, incapacity and failure to discharge responsibilities, excessive absenteeism and other just cause; and

WHEREAS, one day of trial was scheduled in connection with the hearing and all parties appeared; and

WHEREAS, there are extensive documents, proofs and trial days possible for this matter to proceed; and

WHEREAS, the parties have conferred;

NOW THEREFORE, BE IT RESOLVED, as follows:

The Bridgeton Board of Education hereby determines that it is in its best interest and the best interests of the public to agree to the settlement agreement attached hereto which includes the resignation of George C. Langley from employment in the School District of the City of Bridgeton and which agreement resolves the tenure charge;

BE IT FURTHER RESOLVED, that among the reasons the Board of Education determines that this is in its best interest are as follows:

1. It is anticipated that trial in this matter may take an additional seven (7) to eight (8) full days.

2. The anticipated trial would result in substantial financial expense to the Bridgeton Board of Education both with respect to attorney's fees and loss of staff time.

3. It is anticipated that the loss of work days for the Superintendent of Schools, the Principal of West Avenue School, the Assistant Principal of West Avenue School, the Human Resources Director, and Supervisors involved in this case as well as Teachers and witnesses would amount to over thirty (30) days in lost work time for school personnel.

4. The Board of Education is already paying George C. Langley his salary under the tenure hearing law and Mr. Langley's suspension of pay for one hundred twenty (120) days has expired.

5. Due to the complicated and involved nature of this tenure hearing, it is probable that the final resolution, if this matter were to go to trial, could extend beyond the time frame that the Board has agreed to pay Mr. Langley pursuant to the agreement between the parties. Due to the uncertainties of litigation, the Board of Education determines that it is in its best interest to approve the agreement that is set forth hereinafter which will bring finality to this matter and avoid possible continued litigation and expense.

6. It is clearly a business decision to come to the agreement between the Board of Education and George C. Langley as it will clearly save the Board of Education money and the agreement will provide to the Board of Education the desired result of having Mr. Langley removed as a Teacher in the School District.

BE IT FURTHER RESOLVED, that the President of the Board of Education and the School Business Administrator are hereby authorized to execute this agreement on behalf of the Bridgeton Board of Education.

The foregoing resolution was moved by Marie Bernstein; and seconded by Brenda Dellaquilla.

ROLL CALL VOTE

NAME	AYES	NOES
Marie Bernstein	X	
Brenda Dellaquilla	X	
Angelia Edwards	X	
Jonathan Griffin	X	
Willie Tukes	X	
Thelma Scott	X	
Jack Surrency	X	

CERTIFICATION

I, Nicole M. Schoener, School Business Administrator of the Board of Education of the City of Bridgeton, herewith certify that the foregoing Resolution was approved by the Bridgeton Board of Education in a roll call vote as herein set forth in executive session, at the regular meeting of the Bridgeton Board of Education held on

December 11, 2007.

Dated:

NICOLE M. SCHOENER
SCHOOL BUSINESS ADMINISTRATOR

RECEIVED
2008 JAN 16
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

SETTLEMENT AGREEMENT, APPROVED LEAVE OF ABSENCE AND RESIGNATION

This Settlement Agreement, Approved Leave of Absence and Resignation (the "Agreement"), is entered into this 11th day of December, 2007, by and between GEORGE C. LANGLEY ("Mr. Langley") and the BRIDGETON BOARD OF EDUCATION, CUMBERLAND COUNTY (the "Board") (collectively, the "Parties"). For purposes of this Agreement, the term the "Board" shall mean and include the Bridgeton Board of Education, a body public. The term "Mr. Langley" shall mean and include George C. Langley and any and all of his heirs, executors, administrators, successors, predecessors, assigns, agents, representatives and privies. This Agreement constitutes the complete and final settlement of any and all disputes arising from or relating to Mr. Langley's employment by the Board.

WITNESSETH:

WHEREAS, the Board prepared and filed tenure charges ("Tenure Charges") based on charges of conduct unbecoming a teacher, insubordination, inefficiency, incapacity and failure to discharge responsibilities, and excessive absenteeism against Mr. Langley pursuant to N.J.S.A. 18A:6-10 et seq. and said charges were certified on March 8, 2007 and are pending under Agency Docket No. 69-3/07 and OAL Docket No. EDUTH 02212-2007S; and

WHEREAS, the Parties desire to enter into this Agreement to fully and finally settle and resolve any and all claims, complaints, charges and actions of any kind whatsoever, whether known or unknown, which the Board may have against Mr. Langley; and

WHEREAS, the Board acknowledges and agrees that this Agreement shall

cause the Board to voluntarily dismiss, waive and withdraw any and all administrative actions of any kind against Mr. Langley and the Board has agreed to request that the Commissioner of Education approve the Board's voluntary dismissal of the tenure charges with prejudice;

NOW, THEREFORE, in consideration of the promises and mutual covenants contained in this Agreement, the Parties hereby agree as follows:

1. (A) Mr. Langley agrees that upon signing this Agreement and by signing his Resignation which is attached hereto as **Appendix A**, he is irrevocably resigning his employment with the Board effective June 30, 2008.

(B) As a result of the tenure charges being certified on March 8, 2007 and contested as represented in the prior introduction, Mr. Langley's pay was stopped for 120 days, but began again on September 1, 2007. All parties, to avoid the litigation of the contested tenure matter before an administrative law judge and specifically, the Board, in exchange for Mr. Langley's resignation pursuant to paragraph 1(A) above, agrees to place Mr. Langley on paid leave of absence until June 30, 2008.

2. (A) In addition, the Board shall pay to Mr. Langley a lump sum payment in the amount of TWELVE THOUSAND ($12,000.00) DOLLARS on June 30, 2008 for his release of any and all claims, complaints, charges and actions of any kind and/or nature whatsoever, whether known or unknown, that he may have regarding the Board including entitlement to future employment. The only contingency to this payment is the prior approval by the Commissioner of Education of this settlement.

(B) Mr. Langley, for the consideration given by the Board as set forth above,

which he acknowledges is adequate and satisfactory to him, hereby commits as follows:

(1) Mr. Langley irrevocably and unconditionally remises, releases, waives and forever discharges the Board from any and all manner of liabilities, actions, causes of action, contracts, agreements, promises, claims and demands of any kind or nature whatsoever, in law or equity, whether known or unknown, which Mr. Langley has ever had or now has against the Board in connection with his employment with the Board, the resignation of his employment, compensation and/or benefits with the Board and the charges. Mr. Langley further understands and agrees that this Agreement shall act as a complete bar to any claim, demand or action of any kind whatsoever which could be or could have been brought by him and which seeks personal, equitable or monetary relief for him against the Board, including but not limited to: any claims of wrongful discharge; breach of express or implied contract; fraud; discrimination; retaliation; wages; benefits; other compensation; misrepresentation; defamation; liability in negligence or tort; and any claims of any kind which may be brought in any court of law or equity or an administrative agency; claims for arbitration in any forum; the U.S. Constitution, as amended; the Constitution of the State of New Jersey; Title VII of the U.S. Civil Rights Act of 1964, as amended; the U.S. Age Discrimination in Employment Act of 1967; the U.S. Americans with Disabilities Act; the U.S. Age Discrimination in Employment Act; the U.S. Employment Retirement Income Security Act; the U.S. Fair Labor Standards Act; the United States Family and Medical Leave Act; the New Jersey Family Leave Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Department of Personnel; and

any other federal, state or local law, regulation or ordinance relating to employment; related torts; and employment, discrimination; employee benefits; collective bargaining agreement; and the termination of employment; and any other claim arising from or relating to Mr. Langley's employment. Mr. Langley understands that he is not releasing any claims he may have to enforce the provisions of this Agreement. This release covers both claims that Mr. Langley knows about and those he may not know about, except for claims (I) that may arise after the date Mr. Langley executes this Agreement; (ii) for a breach of this Agreement; or (iii) with respect to any benefits in which Mr. Langley has a vested interest under the terms and conditions of any of the Board's employee benefit plans. Mr. Langley further agrees not to file a lawsuit or administrative claim or demand for arbitration to assert any of the claims he has given up, released or waived. Any substantial or material breach of this Agreement shall entitle the non-breaching party to an injunction or any action at law or equity to remedy the breach and an award of reasonable attorneys' fees, other professional fees, costs and expenses incurred to remedy and defend against said breach.

3. The Board agrees to request that the Commissioner of Education approve the Board's voluntary dismissal of the tenure charges, Agency Docket No. 69-3/07, OAL Docket No. EDUTH 02212-2007S, with prejudice in light of Mr. Langley's resignation and the lump sum consideration paid and the paid and unpaid leave of absence granted to him by the Board. In executing this Agreement, Mr. Langley understands the ultimate decision with regard to the resolution of the tenure charges lies with the Commissioner of Education and in the event that the New Jersey Commissioner of

Education rejects the settlement between the Board and Mr. Langley, then this agreement is completely null and void and the tenure charges currently pending will continue to be processed.

4. With respect to any inquiries directed to the Bridgeton School Board's Department of Human Resources regarding Mr. Langley's status, the Board shall have the responsibility only as provided below. If any inquiries are made, there will be a neutral reference and **Appendix B** shall be read to the inquiring party.

5. This Agreement is not and shall not in any way be deemed to constitute an admission or evidence of any wrongdoing or liability on the part of the Board or Mr. Langley. Rather, this Agreement constitutes the good faith settlement and release of disputed claims, and it is acknowledged and agreed by the Parties that this Agreement is being entered into by the Parties solely to avoid the burden, expense, delay and uncertainties of further litigation and to fully and finally resolve, settle and dismiss with prejudice, any and all claims of any kind whatsoever, whether known or unknown, which the Board or Mr. Langley has ever had or now has against each other arising out of or relating to his employment with the Board.

6. This Agreement may not be changed orally and no modification, amendment or waiver of any provision contained in this Agreement, or any future representation, promise or condition in connection with the subject matter of this Agreement shall be binding upon any party hereto unless made in writing and signed by such party and subject to approval by the Board.

7. This Agreement contains the entire agreement and complete settlement

between the Parties and supersedes any and all previous agreements of any kind whatsoever between them, whether written or oral. All prior and contemporaneous discussions and negotiations have been and are merged and integrated into, and are superseded by this Agreement. This is an integrated document.

8. In the event that any provision of this Agreement or the application thereof should be held to be void, voidable, unlawful or, for any reason, unenforceable, the remaining portion shall remain in full force and effect and to that end, the provisions of this Agreement are declared to be severable.

This Agreement is made and entered into, and shall be subject to, governed by and interpreted in accordance with the laws of the State of New Jersey and shall be fully enforceable in the courts of that state, without regard to principles of conflict of laws. The parties agree that any suit, action or other legal proceeding arising out of th Agreement shall be brought in the Superior Court for the State of New Jersey, County of Cumberland.

9. Mr. Langley agrees that he shall be responsible for his own attorney's fees and costs incurred in connection with any matter mentioned in this Agreement.

10. In executing this Agreement, Mr. Langley has had an opportunity to speak to his attorney and has relied upon the legal advice of his attorney as to the terms of this Agreement, which have been completely read by him and explained by his attorney, and those terms are fully understood and voluntarily accepted.

11. This Agreement shall not be executed in counterparts and shall be enforceable only if executed by Mr. Langley and the Board.

12. This Agreement shall become effective immediately following the execution by Mr. Langley and the Board.

WHEREFORE, intending to be legally bound, the Parties have agreed to the aforesaid terms and indicate their agreement by signing below.

AGREED AND ACCEPTED:

George C. Langley Date: 12/11/07

Subscribed & sworn to before me
this 11th day of December, 2007

Patricia A. Love
Notary Public

Patricia A. Love
Notary Public of New Jersey
Commission Expires 3/15/2011

I hereby acknowledge and affirm that I have full authority to act on behalf of and to bind the Board to the terms set forth in this Agreement.

, Board President Dated: 12/11/07

Witness:

, Business Administrator/
Board Secretary

APPENDIX A

Resignation of George C. Langley

To the Bridgeton Board of Education, Cumberland County:

I, George C. Langley, hereby resign my employment with the Bridgeton Board of Education, Cumberland County, effective June 30, 2008.

George C. Langley

Subscribed & sworn to before me
this 11th day of December, 2007.

Patricia A. Love
Notary Public of New Jersey
Commission Expires 3/15/2011

APPENDIX B

Joint Statement of
George C. Langley, Bridgeton Board of Education, Cumberland County

George C. Langley was employed as a full-time certified elementary teacher by the Board on or about September, 1997 and he resigned on June 30, 2008

89-08

R.C. on behalf of minor child, R.H.,

PETITIONER,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner – a resident of Ewing Township – contested respondent's determination that her niece, R.H., is ineligible to attend school in respondent's district, claiming that R.H. resides with her because the child's father, who has full legal custody, works long hours as a truck driver. Petitioner acknowledged that she receives financial assistance from R.H.'s father for clothing and medical costs. Respondent district asserts that R.H. is not entitled to a free education in Ewing and counterclaimed for tuition reimbursement.

The ALJ found that: legal custody of R.H. lies with her father; petitioner does not support R.H. gratis; the record is absent of evidence to show that there is a family or economic hardship pursuant to *N.J.S.A.* 18A:38-1(b) and *N.J.A.C.* 6A:22-3.2(a); and the father's work schedule does not constitute hardship for purposes of eligibility for public school attendance at an out-of-district school. The ALJ concluded that R.H. is not eligible for a free public education in Ewing township, and ordered the petitioner to pay the Board $44.43 per day for each day of R.H.'s ineligible attendance.

Upon a full and independent review of this matter, the Commissioner concurred with the findings of the ALJ and adopted the Initial Decision as the final decision in this matter.

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

February 25, 2008

89-08

OAL DKT. NO. EDU 8546-07
AGENCY DKT. NO. 289-10/07

R.C. on behalf of minor child, R.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record in this matter and the Initial Decision of the Office of Administrative Law (OAL) have been carefully reviewed. No exceptions were filed.

Upon such review, the Commissioner concurs with the Administrative Law Judge's (ALJ) analysis and adopts the recommended decision as the final decision in this case. Accordingly, the minor child, R.H., is not entitled to a free public education in respondent's district; the petition is hereby dismissed, and the petitioner is ordered to remit to respondent $44. 43 for each day that R.H. attended school in Ewing.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 2/25/08

Date of Mailing: 2/26/08

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8546-07
AGENCY DKT. NO. 289-10/07

R.C., O/B/O MINOR CHILD, R.H.
Petitioner,
v.
EWING TOWNSHIP BOARD OF EDUCATION, MERCER COUNTY,
Respondent.

R.C., petitioner, pro se

Jeffrey F. Belz, Esq., for respondent Ewing Township Board of Education

Record Closed: November 29, 2007 Decided: January 10, 2008

BEFORE **DANIEL B. MC KEOWN,** ALJ (t/a):

Petitioner is single and rents a house in Ewing Township, Mercer County, New Jersey. She is the aunt of R.H. R.H. is petitioner's brother's daughter. Petitioner says R.H. lives with her in Ewing Township, along with two granddaughters who also live in her home. Petitioner appeals the residency determination reached by the Ewing Township Board of Education (Board) that R.H. is neither domiciled nor a resident of the school district for purposes of attending the Board's schools free of charge.

Simultaneous to the Board determining that R.H. is not a resident of Ewing Township and not otherwise entitled to attend its schools free of charge, it also demanded tuition payment from petitioner in the amount of $44.43 a day for the education R.H. received in its schools between October 8, 2007 and the date this dispute is finally resolved. Pending disposition of this matter, R.H. continues in Ewing Township school attendance.

Petitioner filed her pro se residency appeal October 11, 2007 with the Commissioner of Education after which the matter was transmitted to the Office of Administrative Law (OAL) for hearing. In its filed Answer, the Board asserts J.H. resides with her own biological mother [1] in another school district and that she should attend public school in that district. The Board counterclaims for tuition for the time J.H. was, it asserts, improperly enrolled in its schools on the strength of an affidavit filed by petitioner.

A hearing was conducted November 28, 2007 at the OAL, Mercerville after which the record closed November 29, 2007. The conclusion is reached in this initial decision that J.H. is not eligible by reason of residency or domicility to attend the Board's schools free of charge, and it is also concluded that petitioner is obligated to pay it $44.43 per diem for each and every day school was open for instructional purposes from October 8, 2007 when J.H. was enrolled on the strength of the assertedly false affidavit she filed.

ISSUES

The issues to be decided are whether R.H. is entitled to be enrolled in the Board free of charge under N.J.S.A. 38-1 for purposes of receiving a thorough and efficient program of Education. If not, is petitioner obligated to pay the Board $44.43 per diem for each and every day school was open for instructional purposes from October 8 forward.

FACTS

Except as otherwise noted, the facts established by a preponderance of credible evidence in the record are these.

1. R.H. is the daughter of petitioner's brother.

2. The father has full legal custody of R.H.

3. Petitioner lived in Trenton until on or about August 20, 2007 when she moved to Ewing Township.

[1] While the counterclaim specifically refers to R.H. as living in another school district with her mother, the evidence adduced at the November 28 hearing affirmatively shows the mother is not involved in this matter in any way.

3A. Petitioner says that R.H. has lived with her since she was about two years old. There is no corroborating evidence to support this claim.

3B. Petitioner sought to enroll R.H. in the Ewing Public Schools as a resident of Ewing. School officials required the father to file a Verified Information Sheet (P-1). School officials also required petitioner to file an affidavit (P-2), and a Residency Verification/Registration Form (P-3) to support the assertion R.H. is entitled to attend its school free of charge.

4. Petitioner acknowledges in testimony that her brother pays her, tenders her, gives her $100 a week for the support of R.H. (See, P-1, Id.)

4A. Father acknowledges in the Information Sheet (P-1) that he "contributes toward support of said [R.H.] child."

5. Father is gainfully employed as a truck driver. He did not testify at the hearing, nor did he attend the hearing. Petitioner says father had lived in Florence, New Jersey until sometime in the summer of 2007 when he moved to Trenton. However, in the Residency Verification Form (P-3) filed by petitioner, petitioner says father lives in Lawrence, New Jersey.

5A. Father reports in the Information Sheet (P-1) that he works from 5 a.m. in the morning. Related to that assertion petitioner attests the reason R.H. lives with her is "Due to [father's] early hrs. and late return home from work." (P-2)

5B. After the requested documents were filed with school authorities, the attendance and residency officer for the Board, David J. Mikalauskas, sent petitioner a Notice of Determination of Eligibility the following day, September 27, 2007, stating R.H. is not entitled to a free education in the Ewing school district petitioner failed to show a hardship.

5C. Petitioner acknowledges she receives assistance from father regarding clothing costs for R.H. and medical payments.

5D. While not precise, the testimony of petitioner is sufficient to find as fact that R.H. stays overnight with her father from time-to-time, and on the weekends, and that he visits her at petitioner's house in Ewing.

6. Petitioner testified that prior to her moving to Ewing Township during the 2007 summer months, she transported R.H. to and from school in Bordentown, New Jersey. In the filed Residency Verification Form (P-3), she says the prior school of attendance was the Miriam Morris School on South Broad Street in Hamilton Township.

7. J.H. began attending the Ewing Township public schools on October 8, 2007. She remains enrolled as a student pending disposition of this matter.

8. The Board seeks tuition payment from petitioner in the amount of $44.43 per day for each day R.H. was enrolled in its schools and schools were open for instructional purposes. This amount represents the average per pupil cost in the Township based on its current expense costs, on a 181 school day academic year, and, the number of average daily-enrolled students.

ANALYSIS

N.J.S.A. 18A:38-1 provides that:

> Public schools shall be free to the following persons over five and under 20 years of age:
>
> a. Any person domiciled who is domiciled within the school district.
>
> b. (1) Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that intends so to keep and support the child gratuitously for a longer time than merely through the school term * * * and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district . . .
>
> If in the judgment of the board of education the evidence does not support the validity of the claim by the resident, the board may deny admission to the child. The resident may contest the board's decision to the commissioner within 21

> days of the date of the decision and shall be entitled to an expedited hearing before the commissioner on the validity of the claim and shall heave the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection. . .
>
> No child shall be denied admission during the pendency of the proceedings before the commissioner. In the event the child is currently enrolled in the district, the student shall not be removed from school during he 21-day period in which the resident may contest the board's decision nor during the pendency of the proceedings before the commissioner. If in the judgment of the commissioner the evidence does not support the claim of the resident, he shall assess the resident tuition for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to t e local district multiplied by the number of days of ineligible attendance and shall be collected in the manner win which orders of the commissioner are enforced . . .

For purposes of this statute regarding education for out-of-district students based on hardship, the domicile of an unemancipated child is the domicile of the parent, custodian, or guardian. P.B.K. v. Board of Educ. of The Borough of Tenafly, 343 N.J. Super. 419 (App. Div. 2001) In this case, and with father having full custody of J.H., her domicile is Lawrence or Trenton, whichever town in which father resides. Recall that petitioner testified father lives in Trenton, while he reports in his filed Verified Information Sheet (P-1) that he lives in Lawrence, New Jersey.

N.J.A.C. 6A:22-3.1 (a) provides that a student is eligible to attend school in a school district if the student is domiciled with the district. Subparagraph 1 of the same rule states that a student is domiciled in the school district when he or she is living with a parent or legal guardian whose permanent home is within the district. Such is not the case here. Petitioner is neither the parent nor legal guardian of R.H.

Consequently, R.H. is not eligible to attend the Ewing Township schools by reason of domicility within the township. R.H. is not domiciled within the Township.

Next, the statute would allow for R.H. to attend the Ewing schools if certain conditions were met. One, the person with whom she is staying is a resident of Ewing. The Board does not dispute petitioner is a resident of Ewing Township. The second condition of the statute requires petitioner to support R.H. gratis 'as if [she] were [petitioner's] own child . . . and will assume all personal obligations for the child relative to school requirements' , or that the child resides with another because of family or economic hardship.

N.J.A.C. 6A:22-3.2 (a) 1 instructs that an otherwise eligible student, kept in the home of a person other than the student's parent or legal guardian, is eligible to attend school in that school district if:

> i. The student's parent or guardian has filed, together with documentation to support its validity, a sworn statement that he or she is not capable of supporting or providing care for the student due to family or economic hardship and that the student is not residing with the other person solely for the purpose of receiving a free public education.

The same rule, at (a) 4 allows:

> 4. A student shall not be deemed ineligible under this subsection solely because a parent or legal guardian gives gifts or makes limited contributions, financial or otherwise, toward the welfare of the student, provided that the resident keeping the student received no payment or other remuneration from the parent or guardian for regular maintenance of the student.

Petitioner has the burden of persuasion to demonstrate R.H. is entitled to attend the Ewing schools free of charge based on paragraph (b) (1) of the preceding statute and the cited administrative rules.

The evidence is that father contributes $100 a week for the support of R.H. While there are no hard and fast rules regarding what constitutes a 'limited contribution' for the maintenance of a child, a regular $100 a week contribution is more than a 'limited' contribution by any reasonable standard. Essentially, father is paying for the support of R.H. while she is at petitioner's home and, consequently, the conclusion must be drawn that petitioner does not support R.H. gratis, as is required by the statute.

While there is some evidence to show father and daughter more likely than not spend weekends together at father's home, a finding in this regard is not essential for disposition of this case.

Petitioner attests in her affidavit that the reason R.H. is at her home is not because R.H. has lived with her since she has been two years old, but because father goes to work early in the morning and does not return until late at night. It may be officially noted that such a circumstance is faced by many families every day of the week in single families and when both

parents are present. While it is a difficult situation, the fact of early work and late return home does not constitute hardship for purposes of eligibility for public school attendance at an out-of-district school.

CONCLUSIONS

The attendance and residency officer for the Board concluded that petitioner failed to show a 'hardship' existed as the basis for the enrollment of R.H. in Township schools. **I CONCLUDE** petitioner failed in her burden to demonstrate by a preponderance of credible evidence that R.H is entitled to attend the Ewing schools free of charge under N.J.S.A. 18;38- b (1). The record is absent evidence to show there is hardship based on the facts presented. In addition, the record shows petitioner does not support R.H. *gratis* contrary to the requirement of the law.

Having concluded petitioner failed to show R.H. is eligible for free public school attendance at the Ewing Township public schools by reason of domicile, or, on the strength of her affidavit, **I NOW FIND AND CONCLUDE** petitioner is obligated to pay the Board $44.43 per day for each day R.H. was enrolled in its schools while open for instructional purposes.

It is so **ORDERED**

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

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

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

January 10, 2008
January 10, 2008
DATE

DANIEL B. MC KEOWN, ALJ t/a

Date Received at Agency:

JAN 15 2008

JAN 15 200

DATE

Jan. 10-08
Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

/lam

DOCUMENTS IN EVIDENCE

C-1 Notice of Determination of Eligibility

P-1 Verified Information Sheet

P-2 Affidavit

P-3 Residency Verification

10-08

J.L. and D.L. on behalf of minor child, J.L., :

PETITIONERS, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE NORTHERN VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY, : DECISION

RESPONDENT. :

SYNOPSIS

Petitioners initially sought an emergent relief order directing respondent Board to effectuate their son's placement in an appropriate alternative education program, including instruction in advanced placement courses, following his long-term suspension in his senior year of high school; petitioners also sought an order directing the Board to treat J.L.'s college applications and recommendations no differently than it would for any other student. The parties jointly agreed to have the matter decided based on their written submissions and off-the-record discussions prior to the hearing, and they waived the right to have the matter decided under the standards for emergent relief established in *Crowe v. DeGioia*, 90 N.J. 126 (1982); effectively, the parties agreed that the ALJ's determinations following the emergent relief hearing would constitute an Initial Decision rather than an interim order addressing the petitioner's request for emergent relief.

The ALJ dismissed the petition, ordering that: the Board provide an Alternative Education Program to J.L. consisting of home-based instruction in physical education and English, and petitioner's requests for transcripts and/or teacher recommendations for college applications be forwarded by the school district's Director of Guidance to the appropriate staff members without comment.

The Commissioner adopted the Initial Decision of the OAL as the final decision in this matter, noting that the provisions of the order included in the Initial Decision are harmonious with pertinent regulations, and have not been the subject of exceptions by either party.

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

OAL DKT. NO. EDU 12543-07
AGENCY DKT. NO. 385-12/07

J.L. and D.L. on behalf of minor child, J.L.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTHERN VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter – including the audio tape of the hearing which took place in the Office of Administrative Law (OAL) on December 31, 2007, the recommended "Order-Emergency Relief" dated January 2, 2008, and the "Initial Decision Dismissal" dated January 9, 2008 – have been reviewed. No exceptions have been filed.

Petitioners' minor child, J.L. – a high school senior – was given a long-term suspension as a result of behavior which he does not substantially deny. The behavior also led to family court orders which, *inter alia,* directed that J.L. attend a Suspension Alternative Program (SAP) in Hackensack, New Jersey. It is undisputed that the respondent district is sending J.L. assignments in English and Physical Education – the only two remaining courses that he needs for graduation – and that a certified teacher at the SAP has been supervising J.L.'s execution of the assignments.

It is also undisputed that J.L. had been taking Advanced Placement (AP) courses at the time of his suspension from school on November 26, 2007. In their petition of appeal, petitioners requested that the district provide J.L. with an alternative educational program and

that instruction in the AP courses be included as part of that program. Further, petitioners requested that J.L.'s college applications be processed no differently than those of other twelfth graders, and that no information about the discipline imposed upon J.L. or the Family Court proceedings be included in J.L.'s transcripts.

In its answering papers, respondent advised that transcripts for J.L.'s college applications were being sent out on a timely basis, with no "disciplinary records." As to J.L.'s educational program, respondent stated that if the SAP program were terminated by the court, respondent would provide J.L. with home instruction – in English and physical education only – until graduation.

Respondent outlined its analysis concerning its obligations to J.L. as follows. Under *N.J.A.C.* 6A:16-7.3(a)(9), each student given a long-term suspension must be provided with "educational services, either in school or out of school, that are comparable to those provided in the public schools for students of similar grades and attainments, pursuant to *N.J.S.A.* 18A:38-25, which may include a public education program provided in accordance with the provisions of *N.J.A.C.* 6A:16-9 or 10." *N.J.A.C.* 6A:16-9.1 *et seq.* pertains to alternative education programs and *N.J.A.C.* 6A:16-10.1 *et seq.* pertains to home (or out of school) instruction.

Respondent reasoned that since J.L. was in a court ordered alternative program, *N.J.A.C.* 6A:16-9.2 dictated the nature of the educational benefits that he was entitled to receive. More specifically, respondent relied on *N.J.A.C.* 6A:16-9.2(a)(8) for the proposition that J.L.'s entitlement was limited to "[a]cademic instruction sufficient to fulfill graduation requirements, pursuant to *N.J.A.C.* 6A:8-5.1 . . . ." To fulfill respondent's graduation requirements, which – according to respondent – are in accordance with *N.J.A.C.* 6A:8-5.1, J.L. needs instruction in

English and physical education for the duration of this school year. Accordingly, respondent's position is that its obligation to J.L. goes no further than the provision of instruction in those two subjects. AP subjects are not required for graduation and, indeed, it would be a significant and unjustifiable burden on the district's resources to provide J.L. with tutors for the various advanced courses he had been taking.

Notwithstanding that petitioners initially applied for emergent relief, on the day of the hearing the parties mutually agreed as follows:

1. They would accept a decision by the Administrative Law Judge (ALJ) based upon the parties' written submissions, supplemented by off-the-record discussions prior to the hearing; and

2. They waived the right to have the matter decided under the standards for emergent relief articulated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982) and set forth in *N.J.A.C.* 6A:3-1.6(b).

Thus, the parties effectively agreed that the ALJ's determinations concerning the information proffered at the December 31, 2007 hearing would constitute an Initial Decision on the underlying appeal, rather than an interim order addressing petitioner's request for emergent relief.[1]

Without sharing his analysis of the facts and law, the ALJ dismissed the petition with the following conditions, to which no exceptions have been filed.[2] The ALJ ordered: 1) that respondent provide home instruction to J.L. in English and physical education – the

[1] It was for this reason that on January 9, 2008, the ALJ "re-identified" the action taken in his January 2 emergent relief order as an Initial Decision – Dismissal.

[2] The Commissioner notes that the the ALJ's reference on the audio tape of the hearing to off-the-record discussions, the lack of formal factual and legal analysis in the Initial Decision, and the absence of exceptions to the decision suggest a voluntary resolution by the parties.

physical education instruction to consist of written assignments in lieu of physical performance;[3] 2) that respondent's guidance counselor process transcript requests and forward reference requests to the designated teachers, who are free to respond – or not – as their conscience dictates; 3) that "to the extent permitted by law, the terms of this Order shall remain confidential";[4] and 4) that the petition be dismissed.

Upon consideration of the record, the Initial Decision and the audio tape of the OAL hearing, the Commissioner adopts the Initial Decision as the final decision in this case. In light of the regulatory provisions set forth above, the commissioner cannot conclude that respondent's actions are arbitrary or capricious. Further, the provisions of the order included in the Initial Decision are harmonious with the pertinent regulations, and have not been the subject of exceptions by either party.

Accordingly, the petition is dismissed without prejudice, subject to conformance with the provisions of the order incorporated into the Initial Decision.

IT IS SO ORDERED.[5]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 2/25/08

Date of Mailing: 2/26/08

[3] The Commissioner lacks jurisdiction to void or override the Family Court's directive that J.L. attend the SAP, and reminds petitioners that it is their responsibility to revisit this order with the court.

[4] The Commissioner reminds the parties that Initial Decisions of the OAL are government records accessible to the public, pursuant to *N.J.S.A.* 47:1A *et seq.*

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION DISMISSAL
OAL DKT. NO. EDU 12543-07
AGENCY DKT. NO. 385-12/07

J.L. AND D.L. OBO MINOR CHILD J.L.,
Petitioner,
v.
BOARD OF EDUCATION OF THE NORTHERN VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,
Respondent.

Stanley Turitz, Esq. for petitioner (Ferrara, Turitz, Harraka & Goldberg, attorneys)

James L. Plosia, Jr., Esq., for respondent (Apruzzese, McDermott, Mastro & Murphy)

Record Closed: December 31, 2007 Decided: January 9, 2008

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

Petitioner appeared on December 31, 2007, on an application for Emergency Relief seeking an order directing respondent the Board of Education of the Northern Valley Regional High School District, Bergen County (District) to effectuate J.L.'s placement in an appropriate alternative education program, and directing the District to confirm that it will treat J.L.'s college applications and related recommendations no differently than it would for any other student.

Ordinarily a request for interim relief or stay under N.J.A.C. 6A:3-1.6 requires as follows:

(b) A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982):

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

The parties however jointly requested and agreed that I make a determination based on their respective proffers in their written submissions without application of, or being bound by, the standards of Crowe v. DeGioia, after which petitioner would withdraw its Petition without prejudice.

The District suspended J.L. from school effective November 26, 2007. A hearing originally scheduled before the Board of Education had been adjourned at the request of petitioner. A hearing is now scheduled for January 14, 2007. At an initial hearing in Superior Court of New Jersey-Chancery Division, Family-Part, Bergen County, a juvenile court order issued placing J.L. in a Detention Alternative Program (DAP) and house arrest except for school or religious matters. The Court then directed J.L. to attend the Suspension Alternative Program (SAP) in Hackensack, which is not affiliated with the District. Petitioner complains that there is no effective instruction being provided to J.L. in the SAP.

The District contends that its obligation to provide an alternative education program is dictated by N.J.A.C. 6A:16-9.2(a)8, which only requires academic instruction sufficient to fulfill graduation requirements. It represents that J.L. already had a sufficient number of credits to graduate by the end of his Junior year and that the only

remaining core course requirements for his Senior year are physical education and English, instruction in which he is receiving at the SAP. Petitioner seeks an alternative education program that will be effective and will continue, in addition to physical education and English, instruction in four elective advanced placement courses, which J.L. had been taking prior to his suspension. For support of its claim of entitlement to the continuation of these additional courses in an alternative education program, petitioner relies on N.J.A.C. 6A:16-7.3(a)9, which requires, during long-term suspensions, that educational services be provided, either in school or out of school, that are comparable to those provided in the public schools for students of similar grades and attainment.

I have also been requested by the parties to address the issue of teacher recommendations that may accompany college entrance applications.

After careful consideration of the proffers of both parties as well as their representations on the record, including an agreement to accept a determination by me without an analysis of the Crowe v. DeGioia standards, I **CONCLUDE** that the following Order best harmonizes the regulations relied on by each party in light of the proffered facts.

ORDER

I hereby **ORDER** that:

1. The District shall provide an Alternative Education Program to J.L., which shall consist of home-based instruction in physical education and English to be provided by a certified teacher from the District. The physical education instruction shall consist of written assignments in lieu of actual physical performance.
2. Petitioner shall forward any requests for transcripts and/or college application-related teacher recommendations to the District's Director of Guidance. Such requests shall be forwarded by the Director of Guidance to the appropriate

teachers without comment. Such teachers shall be free to respond to the recommendation requests in accordance with their own conscience.

3. Based on the agreement of the parties as stated on the record, in view of this Order, the instant Petition is dismissed without prejudice.

4. To the extent permitted by law, the terms of this Order shall remain confidential.

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

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

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

Jesse H. Strauss

1/9/08

DATE

JESSE H. STRAUSS, ALJ

Date Received at Agency:

1/9/08

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

id

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER- EMERGENCY RELIEF
OAL DKT. NO. EDU 12543-07
AGENCY DKT. NO. 385-12/07

J.L. AND D.L. OBO MINOR CHILD J.L.,
Petitioner,
v.
BOARD OF EDUCATION OF THE NORTHERN VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,
Respondent.

Stanley Turitz, Esq. for petitioner (Ferrara, Turitz, Harraka & Goldberg, attorneys)

James L. Plosia, Jr., Esq., for respondent (Apruzzese, McDermott, Mastro & Murphy)

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

Petitioner appeared on December 31, 2007, on an application for Emergency Relief seeking an order directing respondent the Board of Education of the Northern Valley Regional High School District, Bergen County (District) to effectuate J.L.'s placement in an appropriate alternative education program, and directing the District to confirm that it will treat J.L.'s college applications and related recommendations no differently than it would for any other student.

Ordinarily a request for interim relief or stay under N.J.A.C. 6A:3-1.6 requires as follows:

(b) A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982):

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

The parties however jointly requested and agreed that I make a determination based on their respective proffers in their written submissions without application of, or being bound by, the standards of Crowe v. DeGioia, after which petitioner would withdraw its Petition without prejudice.

The District suspended J.L. from school effective November 26, 2007. A hearing originally scheduled before the Board of Education had been adjourned at the request of petitioner. A hearing is now scheduled for January 14, 2007. At an initial hearing in Superior Court of New Jersey-Chancery Division, Family-Part, Bergen County, a juvenile court order issued placing J.L. in a Detention Alternative Program (DAP) and house arrest except for school or religious matters. The Court then directed J.L. to attend the Suspension Alternative Program (SAP) in Hackensack, which is not affiliated with the District. Petitioner complains that there is no effective instruction being provided to J.L. in the SAP.

The District contends that its obligation to provide an alternative education program is dictated by N.J.A.C. 6A:16-9.2(a)8, which only requires academic instruction sufficient to fulfill graduation requirements. It represents that J.L. already had a sufficient number of credits to graduate by the end of his Junior year and that the only

remaining core course requirements for his Senior year are physical education and English, instruction in which he is receiving at the SAP. Petitioner seeks an alternative education program that will be effective and will continue, in addition to physical education and English, instruction in four elective advanced placement courses, which J.L. had been taking prior to his suspension. For support of its claim of entitlement to the continuation of these additional courses in an alternative education program, petitioner relies on N.J.A.C. 6A:16-7.3(a)9, which requires, during long-term suspensions, that educational services be provided, either in school or out of school, that are comparable to those provided in the public schools for students of similar grades and attainment.

I have also been requested by the parties to address the issue of teacher recommendations that may accompany college entrance applications.

After careful consideration of the proffers of both parties as well as their representations on the record, including an agreement to accept a determination by me without an analysis of the Crowe v. DeGioia standards, I **CONCLUDE** that the following Order best harmonizes the regulations relied on by each party in light of the proffered facts.

ORDER

I hereby **ORDER** that:

1. The District shall provide an Alternative Education Program to J.L., which shall consist of home-based instruction in physical education and English to be provided by a certified teacher from the District. The physical education instruction shall consist of written assignments in lieu of actual physical performance.
2. Petitioner shall forward any requests for transcripts and/or college application-related teacher recommendations to the District's Director of Guidance. Such requests shall be forwarded by the Director of Guidance to the appropriate

teachers without comment. Such teachers shall be free to respond to the recommendation requests in accordance with their own conscience.

3. Based on the agreement of the parties as stated on the record, in view of this Order, the instant Petition is dismissed without prejudice.

4. To the extent permitted by law, the terms of this Order shall remain confidential.

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

January 2, 2008
DATE

Jesse H. Strauss
JESSE H. STRAUSS, ALJ

91-08

OAL DKT. NOS. EDU 9056-06, 11124-06 AND 3320-07 (CONSOLIDATED)
AGENCY DKT. NOS. 237-7/06, 362-10/06 AND 53-2/07

IN THE MATTER OF THE TENURE HEARING OF GREGORY TYNES, SCHOOL DISTRICT OF THE CITY OF EAST ORANGE, ESSEX COUNTY.	:	
AND		
IN THE MATTER OF THE TENURE HEARING OF HARRY JAMES, SCHOOL DISTRICT OF THE CITY OF EAST ORANGE, ESSEX COUNTY.	:	COMMISSIONER OF EDUCATION DECISION
AND		
IN THE MATTER OF THE TENURE HEARING OF IRENE NICHOLS, SCHOOL DISTRICT OF THE CITY OF EAST ORANGE, ESSEX COUNTY.	:	

The record of these consolidated matters, the parties' proposed Stipulation of Settlement and Release with respect to each respondent, and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon such review, the Commissioner concurs with the Administrative Law Judge that the proposed settlement is consistent with established standards governing settlement of tenure matters. *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846; *N.J.A.C.* 6A:3-5.6(a).*

* The Commissioner notes that the charge of "aiding and abetting fraud, misrepresentation and/or theft by deception" certified against respondent James, recited in the Initial Decision at 2, refers to allegations that James repeatedly recommended respondent Tynes for reappointment as a coach notwithstanding an awareness that Tynes was (allegedly) not performing duties for which he was being paid.

Accordingly, for the reasons set forth in the Initial Decision, settlement is hereby approved and the tenure matters are dismissed, subject to compliance with the terms of the respective stipulations. A copy of this decision shall be forwarded to the State Board of Examiners for action against respondents' certificates, as the Board deems appropriate.

IT IS SO ORDERED.

Lucille Davy

COMMISSIONER OF EDUCATION

Date of Decision: 2/28/08

Date of Mailing: 2/29/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT - CONSOLIDATED

IN THE MATTER OF THE TENURE HEARING OF GREGORY TYNES, SCHOOL DISTRICT OF EAST ORANGE.	OAL DKT. NO. EDU 9056-06 AGENCY DKT. NO. 237-7/06
IN THE MATTER OF THE TENURE HEARING OF HARRY JAMES, SCHOOL DISTRICT OF EAST ORANGE.	OAL DKT. NO. EDU 11124-06 AGENCY DKT. NO. 237-7/06
IN THE MATTER OF THE TENURE HEARING OF IRENE NICHOLS, SCHOOL DISTRICT OF EAST ORANGE.	OAL DKT. NO. EDU 3320-07 AGENCY DKT. NO. 237-7/06

Nicholas Celso, III, Esq., and **John G. Geppert, Jr.** Esq., for Petitioner East Orange Board of Education (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Charles I. Auffant, Esq., for Respondent Gregory Tynes (Ball Livingston, LLP, attorneys)

Randy P. Davenport, Esq., for Respondent Harry James

Jerry N. Friedland, Esq., for Respondent Irene Nichols

Record Closed: December 13, 2007 Decided: January 8, 2008

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

These matters were transmitted to the Office of Administrative Law ("OAL") from the Department of Education, separately, on August 7, 2006, November 15, 2006 and March 12, 2007, for hearing as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

On January 10, 2007, the Board filed a motion to consolidate the matters bearing OAL Dkt. Nos. EDU 9056-06 and EDU 11124-2006. An order of consolidation was entered on January 24, 2007 granting the Board's motion to consolidate these two matters. Subsequently, the matter bearing OAL Dkt. No. EDU 3320-07 was transmitted to the OAL. A motion to consolidate this case was filed on April 20, 2007 and an order granting consolidation was entered on May 17, 2007.

A hearing was scheduled for numerous days at the OAL, 33 Washington Street, Newark, New Jersey. Prior to the hearing scheduled for December 4, 2007, settlement discussions were held and a settlement was reached.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement and Release indicating the terms thereof as well as the Certification from the Board approving the settlement, which are attached and fully incorporated herein.

In cases where, as here, tenure charges have been certified to the Commissioner, such charges may only be withdrawn or settled with the Commissioner's approval and, pursuant to regulation, the proposed settlement or withdrawal must address specific standards as established by the State Board of Education in the matter entitled In re Cardonick, State Board decision, April 6, 1983 (1996 School Law Decisions, 842, 846). N.J.A.C. 6A:3-5.6.

Those standards require that the proposal be accompanied by documentation as to the nature of the charges. In these three consolidated cases, the Respondents were charged with misconduct related to their respective positions. The misconduct involved the failure to fulfill duties as required by their respective positions and the mishandling of certain funds within East Orange Campus High School. In addition, Respondent James was charged with aiding and abetting fraud, misrepresentation and/or theft by deception. The charges are explicitly and specifically detailed in documentation transmitted to OAL as the "Sworn Tenure Charges" against each of the Respondents.

I **FIND,** therefore, the first requirement of the regulation has been satisfied.

Second, the regulation requires the circumstances justifying settlement or withdrawal be explained. In this case, at the time of settlement, eleven days of hearings had been held; and twenty-six additional days had been scheduled up to the end of June 2008 with the caveat that more days might be required. Several witnesses were located out of state and would have to travel substantial distances and incur expenses in order to appear. In addition, during the eleven days of testimony, it became apparent that there were significant credibility and proof problems with the case.

The consent of the parties, the indication that the charged parties entered into the agreement with a full understanding of their rights, and the showing that the Respondents, all teaching staff members, had been advised of the Commissioner's duty to refer tenure determinations resulting in loss of positions to the State Board of Examiners for possible suspension or revocation of certificate are indicated by and in the written agreements as will as having been made on the record by all Respondents on December 4, 2007.

With respect to showing that these agreements are in the public interest, because twenty-five additional hearing days will not be required, the parties, in particular, the Board herein, will save the expenses connected with the litigation and, perhaps more importantly, the District will be spared the disruption of having to cover positions for those employees who are called to appear as witnesses over such an extended period of time.

Finally, also in the public interest is the finality inherent in such settlements. The three positions occupied by Respondents can be filled on a permanent basis when the Commissioner approves the agreements.

Accordingly, I **FIND** the settlement agreements meets the standards as established by the State Board of Education and codified at N.J.A.C. 6A:3-5.6.

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

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

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

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

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

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

January 8, 2008
DATE

Maria M La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Date Received at Agency: 1-15-08

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

JAN 15 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER LLC
44 Whippany Road, Suite 210
P.O. Box 2355
Morristown, New Jersey 07962
(973) 301-0001 (973) 993-3152
Attorneys for East Orange
Board of Education

2007 DEC 13 P 1:59
OFFICE OF ADMIN. LAW

	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
IN THE MATTER OF THE TENURE HEARING OF GREGORY TYNES, BOARD OF EDUCATION OF EAST ORANGE, ESSEX COUNTY.	AGENCY DOCKET NO: 237-7/06 OAL DOCKET NO. EDU 9056-06
IN THE MATTER OF THE TENURE HEARING OF HARRY JAMES, BOARD OF EDUCATION OF EAST ORANGE, ESSEX COUNTY.	AGENCY DOCKET NO: 362-10/06 OAL DOCKET NO. EDU 11124-06
IN THE MATTER OF THE TENURE HEARING OF IRENE NICHOLS, BOARD OF EDUCATION OF EAST ORANGE, ESSEX COUNTY.	AGENCY DOCKET NO: 53-2/07 OAL DOCKET NO. EDU 3320-07
	ADMINISTRATIVE ACTION
	CERTIFICATION OF BOARD'S APPROVAL OF STIPULATION OF SETTLEMENT

Victor R. Demming, of full age, certifies as follows:

1. I am the Board Secretary for the East Orange Board of Education.

2. The East Orange Board of Education adopted the following resolutions at its duly convened Regular Public Meeting on December 4, 2007:

A. SUPERINTENDENT OF SCHOOLS
3. BUSINESS SERVICES

s. Resolved, that the Board hereby approves the Stipulation of Settlement and Release ("the Settlement") between itself and Irene Nichols, dated December 4, 2007, in the matter of the tenure charges against Irene Nichols, Agency Dkt. No. 53-2/07; OAL Dkt. No. EDU 3320-07, subject to the terms and conditions set forth therein and approval by the Commissioner of Education, and accepts Ms. Nichols' irrevocable resignation from employment with the Board, effective as of the date of the Commissioner's approval.

Be it further resolved, that the Board President and Secretary are hereby authorized to execute the above referenced document on behalf of the Board and that the Business Administrator is authorized to issue all payments specified therein, following approval of the Settlement by the Commissioner. The Settlement shall be made an official part of the minutes of this meeting.

t. Resolved, that the Board hereby approves the Stipulation of Settlement and Release ("the Settlement") between itself and Gregory Tynes, dated December 4, 2007, in the matter of the tenure charges against Gregory Tynes, Agency Dkt. No. 237-7/06; OAL Dkt. No. EDU 9056-06, subject to the terms and conditions set forth therein and approval by the Commissioner of Education, and accepts Mr. Tynes' irrevocable resignation from employment with the Board, effective as of the date of the Commissioner's approval.

Be it further resolved, that the Board President and Secretary are hereby authorized to execute the above referenced document on behalf of the Board and that the Business Administrator is authorized to issue all payments specified therein, following approval of the Settlement by the Commissioner. The Settlement shall be made an official part of the minutes of this meeting.

u. Resolved, that the Board hereby approves the Stipulation of Settlement and Release ("the Settlement") between itself and Harry James, dated December 4, 2007, in the matter of the tenure charges against Harry James, Agency Dkt. No. 362-10/06; OAL Dkt. No. EDU 11124-06, subject to the terms and conditions set forth therein and approval by the Commissioner of Education, and accepts Mr. James' irrevocable resignation from employment with the Board, effective as of the date of the Commissioner's approval.

Be it further resolved, that the Board President and Secretary are hereby authorized to execute the above referenced document on behalf of the Board and that the Business Administrator is authorized to issue all payments specified therein, following approval of the Settlement by the Commissioner. The Settlement shall be made an official part of the minutes of this meeting.

I certify that the foregoing statements made by me are true. I understand that if any of the statements contained herein are willfully false, I am subject to punishment.

Victor R. Demming

VICTOR R. DEMMING

Dated: December 5, 2007

CERTIFIED TO BE A TRUE COPY
BY Nicholas Celso
NICHOLAS CELSO, III
AN ATTORNEY AT LAW
OF NEW JERSEY

2007 DEC -7 P 5:49

OFFICE OF ADMIN LAW

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER LLC
44 Whippany Road, Suite 210
P.O. Box 2355
Morristown, New Jersey 07962
(973) 301-0001 (973) 993-3152
Attorneys for East Orange
Board of Education

	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY AGENCY DOCKET NO: 362-10/06 OAL DOCKET NO. EDU 11124-06
IN THE MATTER OF THE TENURE HEARING OF HARRY JAMES, BOARD OF EDUCATION OF EAST ORANGE, ESSEX COUNTY.	ADMINISTRATIVE ACTION STIPULATION OF SETTLEMENT AND RELEASE

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

WHEREAS, Harry James ("Respondent") commenced employment with the Board in or about September 1994; and

WHEREAS, on September 11, 2006, Dr. Laval Wilson, former Superintendent of Schools, filed sworn tenure charges of unbecoming conduct and/or other just cause against Respondent, together with a sworn statement of evidence in support of the charges, with Jamie Adams, Acting Board Secretary; and

WHEREAS, on October 3, 2006, after considering the sworn tenure charges and sworn statement of evidence against Respondent, together with the submission filed on his behalf, the Board determined to certify the charges to the Commissioner of Education for a hearing, pursuant to N.J.S.A. 18A:6-10 *et seq.*; and

WHEREAS, on or about October 4, 2006, the sworn tenure charges, together with a certificate of determination and certificate of service, were filed by the Board with the Commissioner of Education, and Respondent was simultaneously served with the sworn tenure charges, sworn statement of evidence, certificate of determination and certificate of service, pursuant to N.J.A.C. 6A:3-5.1 *et seq.*; and

WHEREAS, on or about October 24, 2006, the Department of Education transmitted the matter to the Office of Administrative Law as a contested case, where it was subsequently consolidated with pending tenure charges in the matters of Gregory Tynes (Agency Docket No. 237-7/06, OAL Docket No. EDU 9056-06) and Irene Nichols (Agency Docket No. 53-2/07; OAL Docket No. EDU 3320-07) and assigned to Administrative Law Judge Maria LaFiandra; and

WHEREAS, the parties, wishing to resolve the within matter amicably without the need for further, protracted litigation, while achieving the goals of both parties, hereby stipulate to settle same, subject to the terms and conditions set forth herein, upon approval by the Court and the Commissioner of Education;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the legal sufficiency of which is hereby acknowledged by the parties, they agree as follows:

1. Tenure Charges to be Moot/No Further Board Action

The Board agrees that upon approval of the within settlement agreement and release by the Commissioner that the subject tenure charges shall be moot and shall be withdrawn by the Board, and that no further action shall be initiated by the Board regarding the underlying charges. However, both parties agree that in the event that this agreement is not approved by the Commissioner of Education that they fully reserve their rights to proceed with this litigation and/or any other cause of action that they might have against one another and that their obligations under this agreement shall be null and void.

2. Resignation

Respondent has tendered his irrevocable resignation ~~for the purpose of retirement~~ (copy annexed hereto as Ex. A) from all employment with the East Orange Board of Education, subject to fulfillment of the terms and conditions set forth in this Stipulation of Settlement and Release ("this Agreement" or "this Settlement) said resignation to be effective as of the close of business on the date of approval of the within Settlement by the Commissioner.

3. Payment

In full and final satisfaction of all claims by respondent, as more fully detailed below, the Board shall pay respondent as follows:

A. Salary, less all normal payroll deductions (including but not necessarily limited to pension deductions), in lump sum fashion for the period of unpaid suspension imposed by the Board at the time of the certification of the subject tenure charges to the Commissioner of Education, from October 5, 2006 to

$41,349.73 H.J.

February 1, 2007, in the amount of ~~$41,094.48~~, to be paid within the first payroll period following receipt of the Commissioner's approval of this settlement; plus

B. Payment in the amount of $128,643. This amount shall be paid in lump sum fashion, in two equal installments, subject to the such payroll deductions as are required by law or regulation . The first installment shall be made within thirty days of receipt by the Board of final approval of the within settlement by the Commissioner of Education. The second installment shall be paid six months from the date of the Commissioner's decision.

4. No Further Compensation/Benefits

Respondent shall be entitled to no further compensation, emolument of employment or fringe benefit of any kind and specifically waives his right to same, including but not necessarily limited to payment for all unused vacation, sick and personal days and health insurance benefits. Notwithstanding the foregoing, subject to submission of appropriate documentation and the provisions of any pertinent Board policies and collective bargaining agreement, respondent shall be reimbursed for job-related mileage expenses incurred prior to his suspension as set forth in a voucher submitted by him prior to the date of his suspension in the approximate amount of $600.00. Respondent represents that he has previously submitted all required supporting documentation.

5. Release

In exchange for the above consideration, Respondent, and his heirs and assigns hereby irrevocably and unconditionally waive, release and forever discharge any claims or rights, whether known or unknown, which they have or may have against the Board, personally and officially, individually and collectively; its past and present Board members, officers, administrators, agents, employees, attorneys, and their successors, heirs and assigns, including, but not limited to any claims for attorneys fees, back pay or front pay, any claims for emotional distress or pain and suffering, any claims involving tax liability emanating from this settlement, and any claims arising under any federal, state or local ordinance, regulation or law including, but not limited to, the New Jersey and Federal Constitutions, Title VII of the Civil Rights Acts of 1871 and 1991, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Employee Retirement Income Security Act, the Federal Family and Medical Leave Act, the Fair Labor Standards Act, the Equal Pay Act, the Workers' Adjustment and Retaining Notification Act, the New Jersey Law Against Discrimination, the New Jersey Family Leave Act, the New Jersey Conscientious Employee Protection Act, the New Jersey Workers' Compensation Law, the New Jersey Wage and Hour Law, the Employer-Employee Relations Act, any collective negotiations agreement, any common law claim and any other claims for harassment, discrimination or retaliation of any kind, breach of promise, misrepresentation, negligence, fraud, estoppel, defamation, violation of public policy, wrongful or

constructive discharge, or any other tort, contractual or quasi-contractual claim. Specifically exempted from this release are any claims arising under the Workers' Compensation Act, *N.J.S.A.* 34:15-1 *et seq.*, and for health insurance continuation coverage under and pursuant to Consolidated Omnibus Budget Reconciliation Act (commonly referred to as "COBRA"), provided that Respondent is not entitled to have the District pay any amounts for his or his dependents' health insurance coverage under COBRA.

6. Referral to State Board of Examiners

Respondent acknowledges that it has been apprised of the Commissioner's duty to refer tenure matters, pursuant to N.J.A.C. 6A:3-5.6(a)(6), to the State Board of Examiners for possible suspension or revocation of his certificate.

7. No Admissions

Nothing contained in this Agreement shall be deemed to constitute an admission of wrongdoing or liability by either party.

8. Non-Disparagement

A. Respondent agrees not to disparage the Board, its past and present Board members, officers, administrators, agents, employees, attorneys, and their successors, heirs and assigns nor to make or solicit any comments, statements, or the like to the media or to others that may be considered to be derogatory or detrimental in nature. The Board agrees to the same terms regarding respondent.

B. The Board agrees to provide to prospective employers and the public, unless otherwise requested by respondent, directory type information concerning employment history, such as: dates of employment, positions held, salary history, and reason for separation—i.e., voluntary separation. Nothing contained herein, however, shall be construed to require the parties or its agents to make any untruthful statements~~ regarding respondent.~~

9. Surrender of Board Property

Respondent shall forthwith surrender all school keys and property in his possession to the below named legal counsel who, in turn shall forward same to the Board's counsel.

10. Public Interest

To date, fully eleven days of hearings have been completed and an additional twenty-five days are scheduled, involving some forty witnesses. The proposed

settlement of this tenure dispute will serve the public interest in that a lengthy and expensive tenure dismissal which now is scheduled to continue through the summer of 2008 will be avoided.

11. Board Approval

The Board President has been duly authorized by the Board to execute this Agreement on behalf of the Board of Education.

12. Assent to Terms

Respondent hereby acknowledges that he enters into this Agreement with a full understanding of his rights and that he was fully informed of the implications of this Agreement by his legal counsel. Respondent also enters into same without duress and of his own free will and volition.

Respondent acknowledges that he was given the opportunity to fully consider this Agreement for a period of up to twenty-one (21) days and seven (7) days from the execution of this document to revoke this Agreement by delivering written notification to Nicholas Celso, Esq., 44 Whippany Road, Suite 210, P.O. Box 2355, Morristown, New Jersey 07962. It is understood that if this Agreement is revoked, it will not be effective or enforceable and Respondent will be entitled to none of the consideration described herein.

13. Entire Agreement

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

14. Severablility

In the event that a court or agency of competent jurisdiction shall deem any part of this Agreement to be contrary to law, then the remaining portions of the Agreement shall remain in full force and effect.

15. Governing Law

This Agreement and all provisions hereof shall be governed by and construed under the laws of the State of New Jersey.

IN WITNESS WHEREOF, the signatures and/or seals of the parties or their duly authorized representatives have been set forth on the dates indicated below:

Harry James
HARRY JAMES

Date: 12/4/07

WITNESS:

/s/ Stanley L. Lamego, Esq.

Date: 12/4/07

FOR THE EAST ORANGE BOARD OF EDUCATION:

Bibi Stewart Garvin
BIBI STEWART GARVIN, BOARD PRESIDENT

Date: 12/4/07

ATTEST:

Victor R. Demming
VICTOR R. DEMMING
Board Secretary/Business Administrator

Date: 12/4/07

Exhibit A

East Orange Board of Education
715 Park Avenue
East Orange, NJ 07017

Dear Ladies and Gentlemen:

Subject to the terms and conditions of our Stipulation of Settlement and Release, dated December 4, 2007, and approval of same by the Commissioner of Education, I hereby tender my irrevocable resignation from all employment with the East Orange Board of Education, effective on the date of the Commissioner's approval of said Settlement.

Very truly yours,

Harry James

CERTIFIED TO BE A TRUE COPY
BY _____
NICHOLAS CELSO, III
AN ATTORNEY AT LAW
OF NEW JERSEY

2007 DEC -7 P 5:49

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER LLC
44 Whippany Road, Suite 210
P.O. Box 2355
Morristown, New Jersey 07962
(973) 301-0001 (973) 993-3152
Attorneys for East Orange
Board of Education

IN THE MATTER OF THE TENURE HEARING OF IRENE NICHOLS, BOARD OF EDUCATION OF EAST ORANGE, ESSEX COUNTY.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY AGENCY DOCKET NO: 53-2/07 OAL DOCKET NO. EDU 3320-07 ADMINISTRATIVE ACTION STIPULATION OF SETTLEMENT AND RELEASE

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

WHEREAS, Irene Nichols ("Respondent") commenced employment with the Board in or about February 1973; and

WHEREAS, on January 30, 2007, Dr. Laval Wilson, former Superintendent of Schools, filed sworn tenure charges of unbecoming conduct and/or other just cause against Respondent, together with a sworn statement of evidence in support of the charges, with Mark Kramer, Board Secretary; and

WHEREAS, on February 21, 2007, after considering the sworn tenure charges and sworn statement of evidence against Respondent, together with the submission filed on her behalf, the Board determined to certify the charges to the Commissioner of Education for a hearing, pursuant to N.J.S.A. 18A:6-10 *et seq.*; and

WHEREAS, on or about February 22, 2007, the sworn tenure charges, together with a certificate of determination and certificate of service, were filed by the Board with the Commissioner of Education, and Respondent was simultaneously served with the sworn tenure charges, sworn statement of evidence, certificate of determination and certificate of service, pursuant to N.J.A.C. 6A:3-5.1 *et seq.*; and

WHEREAS, on or about March 5, 2007, the Department of Education transmitted the matter to the Office of Administrative Law as a contested case, where it was subsequently consolidated with pending tenure charges in the matters of Gregory Tynes (Agency Docket No. 237-7/06, OAL Docket No. EDU 9056-06) and Harry James (Agency Docket No. 362-10/06; OAL Docket No. EDU 11124-06) and assigned to Administrative Law Judge Maria LaFiandra; and

WHEREAS, the parties, wishing to resolve the within matter amicably without the need for further, protracted litigation, while achieving the goals of both parties, hereby stipulate to settle same, subject to the terms and conditions set forth herein, upon approval by the Court and the Commissioner of Education;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the legal sufficiency of which is hereby acknowledged by the parties, they agree as follows:

1. Tenure Charges to be Moot/No Further Board Action

The Board agrees that upon approval of the within settlement agreement and release by the Commissioner that the subject tenure charges shall be moot and shall be withdrawn by the Board, and that no further action shall be initiated by the Board regarding the underlying charges. However, both parties agree that in the event that this agreement is not approved by the Commissioner of Education that they fully reserve their rights to proceed with this litigation and/or any other cause of action that they might have against one another and that their obligations under this agreement shall be null and void.

2. Resignation

Respondent has tendered her irrevocable resignation for the purpose of retirement (copy annexed hereto as Ex. A) from all employment with the East Orange Board of Education, subject to fulfillment of the terms and conditions set forth in this Stipulation of Settlement and Release ("this Agreement" or "this Settlement), said resignation to be effective as of the close of business on the date of approval of the within Settlement by the Commissioner.

3. Payment

In full and final satisfaction of all claims by respondent, as more fully detailed below, the Board shall pay respondent as follows:

A. Salary, less all normal payroll deductions (including but not necessarily limited to pension deductions), in lump sum fashion, for the period of unpaid suspension imposed by the Board at the time of the certification of the subject tenure charges to the Commissioner of Education, from February 22, 2007 to June

22, 2007, in the amount of $48,135.51, to be paid within the first payroll period following receipt of the Commissioner's approval of this settlement; plus

B. Payment in the amount of $156,767. This amount shall be paid in lump sum fashion, in two equal installments, subject to such payroll deductions as are required by law or regulation. The first installment shall be made within thirty days of receipt by the Board of final approval of the within settlement by the Commissioner of Education. The second installment shall be paid six months from the date of the Commissioner's decision.

4. No Further Compensation/Benefits

Respondent shall be entitled to no further compensation, emolument of employment or fringe benefit of any kind and specifically waives her right to same, including but not necessarily limited to payment for all unused vacation, sick and personal days and health insurance benefits.

5. Release

In exchange for the above consideration, Respondent, and her heirs and assigns hereby irrevocably and unconditionally waive, release and forever discharge any claims or rights, whether known or unknown, which they have or may have against the Board, personally and officially, individually and collectively; its past and present Board members, officers, administrators, agents, employees, attorneys, and their successors, heirs and assigns, including, but not limited to any claims for attorneys fees, back pay or front pay, any claims for emotional distress or pain and suffering, any claims involving tax liability emanating from this settlement, and any claims arising under any federal, state or local ordinance, regulation or law including, but not limited to, the New Jersey and Federal Constitutions, Title VII of the Civil Rights Acts of 1871 and 1991, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Employee Retirement Income Security Act, the Federal Family and Medical Leave Act, the Fair Labor Standards Act, the Equal Pay Act, the Workers' Adjustment and Retaining Notification Act, the New Jersey Law Against Discrimination, the New Jersey Family Leave Act, the New Jersey Conscientious Employee Protection Act, the New Jersey Workers' Compensation Law, the New Jersey Wage and Hour Law, the Employer-Employee Relations Act, any collective negotiations agreement, any common law claim and any other claims for harassment, discrimination or retaliation of any kind, breach of promise, misrepresentation, negligence, fraud, estoppel, defamation, violation of public policy, wrongful or constructive discharge, or any other tort, contractual or quasi-contractual claim. Specifically exempted from this release are any claims arising under the Workers' Compensation Act, *N.J.S.A.* 34:15-1 *et seq.*, and for health insurance continuation coverage under and pursuant to Consolidated Omnibus Budget Reconciliation Act (commonly referred to as "COBRA"), provided that Respondent is not entitled to

have the District pay any amounts for her or her dependents' health insurance coverage under COBRA.

6. Referral to State Board of Examiners

Respondent acknowledges that it has been apprised of the Commissioner's duty to refer tenure matters, pursuant to N.J.A.C. 6A:3-5.6(a)(6), to the State Board of Examiners for possible suspension or revocation of her certificate.

7. No Admissions

Nothing contained in this Agreement shall be deemed to constitute an admission of wrongdoing or liability by either party.

8. Non-Disparagement

A. Respondent agrees not to disparage the Board, its past and present Board members, officers, administrators, agents, employees, attorneys, and their successors, heirs and assigns nor to make or solicit any comments, statements, or the like to the media or to others that may be considered to be derogatory or detrimental in nature. The Board agrees to the same terms regarding respondent.

B. The Board agrees to provide to prospective employers and the public, unless otherwise requested by respondent, directory type information concerning employment history, such as: dates of employment, positions held, salary history, and reason for separation—i.e., voluntary separation. Nothing contained herein, however, shall be construed to require the parties or its agents to make any untruthful statements ~~regarding respondent.~~

9. Surrender of Board Property

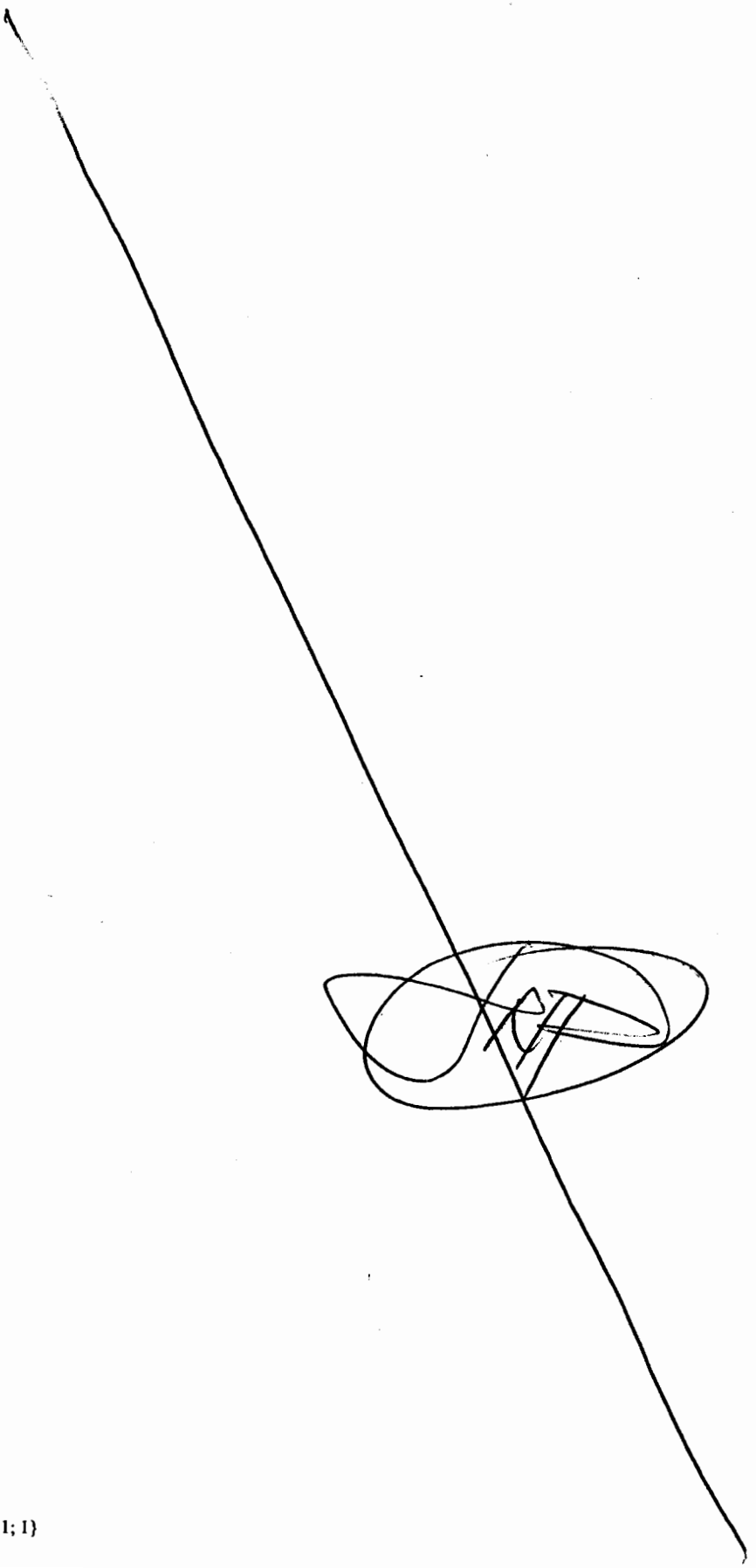
Respondent shall forthwith surrender all school keys and property in her possession to the below named legal counsel who, in turn shall forward same to the Board's counsel.

10. Public Interest

To date, fully eleven days of hearings have been completed and an additional twenty-five days are scheduled, involving some forty witnesses. The proposed settlement of this tenure dispute will serve the public interest in that the a lengthy and expensive tenure dismissal which now is scheduled to continue through the summer of 2008 will be avoided.

11. Board Approval

The Board President has been duly authorized by the Board to execute this Agreement on behalf of the Board of Education.



12. Assent to Terms

Respondent hereby acknowledges that she enters into this Agreement with a full understanding of her rights and that she was fully informed of the implications of this Agreement by her legal counsel. Respondent also enters into same without duress and of her own free will and volition.

Respondent acknowledges that she was given the opportunity to fully consider this Agreement for a period of up to twenty-one (21) days and seven (7) days from the execution of this document to revoke this Agreement by delivering written notification to Nicholas Celso, Esq., 44 Whippany Road, Suite 210, P.O. Box 2355, Morristown, New Jersey 07962. It is understood that if this Agreement is revoked, it will not be effective or enforceable and Respondent will be entitled to none of the consideration described herein.

13. Entire Agreement

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

14. Severablility

In the event that a court or agency of competent jurisdiction shall deem any part of this Agreement to be contrary to law, then the remaining portions of the Agreement shall remain in full force and effect.

15. Governing Law

This Agreement and all provisions hereof shall be governed by and construed under the laws of the State of New Jersey.

IN WITNESS WHEREOF, the signatures and/or seals of the parties or their duly authorized representatives have been set forth on the dates indicated below:

Irene L. Nichols Date: 12/4/07
IRENE NICHOLS

WITNESS: Jerry N. Friedland
/s/ JERRY N. FRIEDLAND Date: 12/4/07
Attorney

FOR THE EAST ORANGE BOARD OF EDUCATION:

Bibi Stewart Garvin Date: 12/4/07
BIBI STEWART GARVIN, BOARD PRESIDENT

ATTEST:

Victor R. Demming Date: 12/4/07
VICTOR R. DEMMING
Board Secretary/Business Administrator

Exhibit A

East Orange Board of Education
715 Park Avenue
East Orange, NJ 07017

Dear Ladies and Gentlemen:

Subject to the terms and conditions of our Stipulation of Settlement and Release, dated December 4, 2007, and approval of same by the Commissioner of Education, I hereby tender my irrevocable resignation for the purpose of retirement from all employment with the East Orange Board of Education, effective on the date of the Commissioner's approval of said Settlement.

Very truly yours,

Irene Nichols

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER LLC
44 Whippany Road, Suite 210
P.O. Box 2355
Morristown, New Jersey 07962
(973) 301-0001 (973) 993-3152
Attorneys for East Orange
Board of Education

CERTIFIED TO BE A TRUE COPY
BY [signature]
NICHOLAS CELSO III
AN ATTORNEY AT LAW
OF NEW JERSEY

P 5:49
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

IN THE MATTER OF THE TENURE HEARING OF GREGORY TYNES, BOARD OF EDUCATION OF EAST ORANGE, ESSEX COUNTY.

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
AGENCY DOCKET NO: 237-7/06
OAL DOCKET NO. EDU 9056-06

ADMINISTRATIVE ACTION

STIPULATION OF SETTLEMENT AND RELEASE

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

WHEREAS, Gregory Tynes ("Respondent") commenced employment with the Board in or about September 1979; and

WHEREAS, on May 23, 2006, Dr. Laval Wilson, former Superintendent of Schools, filed sworn tenure charges of unbecoming conduct and/or other just cause against Respondent, together with a sworn statement of evidence in support of the charges, with Jamie Adams, Acting Board Secretary; and

WHEREAS, on June 28, 2006, after considering the sworn tenure charges and sworn statement of evidence against Respondent, together with the submission filed on his behalf, the Board determined to certify the charges to the Commissioner of Education for a hearing, pursuant to N.J.S.A. 18A:6-10 *et seq.*; and

WHEREAS, on or about June 29, 2006, the sworn tenure charges, together with a certificate of determination and certificate of service, were filed by the Board with the Commissioner of Education, and Respondent was simultaneously served with the sworn tenure charges, sworn statement of evidence, certificate of determination and certificate of service, pursuant to N.J.A.C. 6A:3-5.1 *et seq.*; and

WHEREAS, on or about July 13, 2006, the Department of Education transmitted the matter to the Office of Administrative Law as a contested case, where it was subsequently consolidated with pending tenure charges in the matters of Irene Nichols (Agency Docket No. 53-2/07, OAL Docket No. EDU 3320-07) and Harry James (Agency Docket No. 362-10/06; OAL Docket No. EDU 11124-06) and assigned to Administrative Law Judge Maria LaFiandra; and

WHEREAS, the parties, wishing to resolve the within matter amicably without the need for further, protracted litigation, hereby stipulate to settle same, subject to the terms and conditions set forth herein, upon approval by the Court and the Commissioner of Education;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the legal sufficiency of which is hereby acknowledged by the parties, they agree as follows:

1. Tenure Charges to be Moot/No Further Board Action

The Board agrees that upon approval of the within settlement agreement and release by the Commissioner that the subject tenure charges shall be moot and shall be withdrawn by the Board, and that no further action shall be initiated by the Board regarding the underlying charges. However, both parties agree that in the event that this agreement is not approved by the Commissioner of Education that they fully reserve their rights to proceed with this litigation and/or any other cause of action that they might have against one another and that their obligations under this agreement shall be null and void.

2. Resignation

Respondent has tendered his voluntary resignation (copy annexed hereto as Ex. A) from all employment with the East Orange Board of Education, subject to fulfillment of the terms and conditions set forth in this Stipulation of Settlement and Release ("this Agreement" or "this Settlement), said resignation to be effective as of the close of business on the date of approval of the within Settlement by the Commissioner.

3. Payment

In full and final satisfaction of all claims by respondent, as more fully detailed below, the Board shall pay respondent as follows:

A. Salary, less all normal payroll deductions (including but not necessarily limited to pension deductions), in lump sum fashion for the period of unpaid suspension imposed by the Board at the time of the certification of the subject tenure charges to the Commissioner of Education, from September 1, 2006 to

October 28, 2006; and by the ALJ from December 30, 2006 to February 14, 2007, in the amount of $26,564.97, to be paid within the first payroll period following receipt of the Commissioner's approval of this settlement; plus

B. Payment in the amount of $96,823. This amount shall be paid in lump sum fashion, in two equal installments, subject to such payroll deductions as are required by law or regulation. The first installment shall be made within thirty days of receipt by the Board of final approval of the within settlement by the Commissioner of Education. The second installment shall be paid six months from the date of the Commissioner's decision.

4. No Further Compensation/Benefits

Respondent shall be entitled to no further compensation, emolument of employment or fringe benefit of any kind and specifically waives his right to same, including but not necessarily limited to payment for all unused vacation, sick and personal days and health insurance benefits.

5. Release

In exchange for the above consideration, Respondent, and his heirs and assigns hereby irrevocably and unconditionally waive, release and forever discharge any claims or rights, whether known or unknown, which they have or may have against the Board, personally and officially, individually and collectively; its past and present Board members, officers, administrators, agents, employees, attorneys, and their successors, heirs and assigns, including, but not limited to any claims for attorneys fees, back pay or front pay, any claims for emotional distress or pain and suffering, any claims involving tax liability emanating from this settlement, and any claims arising under any federal, state or local ordinance, regulation or law including, but not limited to, the New Jersey and Federal Constitutions, Title VII of the Civil Rights Acts of 1871 and 1991, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Employee Retirement Income Security Act, the Federal Family and Medical Leave Act, the Fair Labor Standards Act, the Equal Pay Act, the Workers' Adjustment and Retaining Notification Act, the New Jersey Law Against Discrimination, the New Jersey Family Leave Act, the New Jersey Conscientious Employee Protection Act, the New Jersey Workers' Compensation Law, the New Jersey Wage and Hour Law, the Employer-Employee Relations Act, any collective negotiations agreement, any common law claim and any other claims for harassment, discrimination or retaliation of any kind, breach of promise, misrepresentation, negligence, fraud, estoppel, defamation, violation of public policy, wrongful or constructive discharge, or any other tort, contractual or quasi-contractual claim. Specifically exempted from this release are any claims arising under the Workers' Compensation Act, *N.J.S.A.* 34:15-1 *et seq.*, and for health insurance continuation coverage under and pursuant to Consolidated Omnibus Budget Reconciliation Act (commonly referred to as "COBRA"), provided that Respondent is not entitled to

have the District pay any amounts for his or his dependents' health insurance coverage under COBRA.

6. Referral to State Board of Examiners

Respondent acknowledges that it has been apprised of the Commissioner's duty to refer tenure matters, pursuant to N.J.A.C. 6A:3-5.6(a)(6), to the State Board of Examiners for possible suspension or revocation of his certificate.

7. No Admissions

Nothing contained in this Agreement shall be deemed to constitute an admission of wrongdoing or liability by either party.

8. Non-Disparagement

A. Respondent agrees not to disparage the Board, its past and present Board members, officers, administrators, agents, employees, attorneys, and their successors, heirs and assigns nor to make or solicit any comments, statements, or the like to the media or to others that may be considered to be derogatory or detrimental in nature. The Board agrees to the same terms regarding respondent.

B. The Board agrees to provide to prospective employers and the public, unless otherwise requested by respondent, directory type information concerning employment history, such as: dates of employment, positions held, salary history, and reason for separation—i.e., voluntary separation. Nothing contained herein, however, shall be construed to require the parties or its agents to make any untruthful statements ~~regarding respondent~~.

9. Surrender of Board Property

Respondent shall forthwith surrender all school keys and property in his possession to the below named legal counsel who, in turn shall forward same to the Board's counsel.

10. Public Interest

To date, fully eleven days of hearings have been completed and an additional twenty-five days are scheduled, involving some forty witnesses. The proposed settlement of this tenure dispute will serve the pubic interest in that a lengthy and expensive tenure dismissal hearing which now is scheduled to continue through the summer of 2008 will be avoided.

11. Board Approval

The Board President has been duly authorized by the Board to execute this Agreement on behalf of the Board of Education.

12. Assent to Terms

Respondent hereby acknowledges that he enters into this Agreement with a full understanding of his rights and that he was fully informed of the implications of this Agreement by his legal counsel. Respondent also enters into same without duress and of his own free will and volition.

Respondent acknowledges that he was given the opportunity to fully consider this Agreement for a period of up to twenty-one (21) days and seven (7) days from the execution of this document to revoke this Agreement by delivering written notification to Nicholas Celso, Esq., 44 Whippany Road, Suite 210, P.O. Box 2355, Morristown, New Jersey, 07962. It is understood that if this Agreement is revoked, it will not be effective or enforceable and Respondent will be entitled to none of the consideration described herein.

13. Entire Agreement

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

14. Severablility

In the event that a court or agency of competent jurisdiction shall deem any part of this Agreement to be contrary to law, then the remaining portions of the Agreement shall remain in full force and effect.

15. Governing Law

This Agreement and all provisions hereof shall be governed by and construed under the laws of the State of New Jersey.

IN WITNESS WHEREOF, the signatures and/or seals of the parties or their duly authorized representatives have been set forth on the dates indicated below:

Gregory Tynes
GREGORY TYNES

Date: 12/4/07

WITNESS:

Charles D Duffant
/s/

Date: 12-4-07

FOR THE EAST ORANGE BOARD OF EDUCATION:

Bibi Stewart Garvin
BIBI STEWART GARVIN, BOARD PRESIDENT

Date: 12/4/07

ATTEST:

Victor R. Demming
VICTOR R. DEMMING
Board Secretary/Business Administrator

Date: 12/4/07

Exhibit A

East Orange Board of Education
715 Park Avenue
East Orange, NJ 07017

Dear Ladies and Gentlemen:

Subject to the terms and conditions of our Stipulation of Settlement and Release, dated December 4, 2007, and approval of same by the Commissioner of Education, I hereby tender my irrevocable resignation from all employment with the East Orange Board of Education, effective on the date of the Commissioner's approval of said Settlement.

Very truly yours,

Gregory Tynes

Gregory Tynes

92-08

#92-08

IN THE MATTER OF THE TENURE	:	
HEARING OF ANTHONY PARASKEVOPOULOS	:	COMMISSIONER OF EDUCATION
STATE OPERATED SCHOOL DISTRICT OF	:	DECISION
THE CITY OF NEWARK, ESSEX COUNTY.	:	

SYNOPSIS

Petitioning Board filed tenure charges of unbecoming conduct and other just cause against respondent, a tenured music teacher, and sought his removal from employment in the Newark Public Schools. Neither respondent nor any attorney acting on his behalf filed an answer to the petition following notice pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4.

The Commissioner concluded that the allegations – which respondent has chosen not to deny – may be deemed admitted and are sufficient to warrant removal of the respondent from his tenured position. Accordingly, the Commissioner granted summary decision to the Board, ordered respondent dismissed from his tenured position, and transmitted a copy of this decision to the State Board of Examiners for action as that body deems appropriate.

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

February 28, 2008

AGENCY DKT NO. 22-1/08

IN THE MATTER OF THE TENURE	:	
HEARING OF ANTHONY PARASKEVOPOULOS	:	COMMISSIONER OF EDUCATION
STATE OPERATED SCHOOL DISTRICT OF	:	DECISION
THE CITY OF NEWARK, ESSEX COUNTY.	:	
	:	

For the District, Adam S. Herman, Esq., Office of the General Counsel

No appearance by or on behalf of Anthony Paraskevopoulos

This matter was opened before the Commissioner of Education on January 7, 2008 through the certification of tenure charges of unbecoming conduct and other just cause by the State-operated School District of the City of Newark against Anthony Paraskevopoulos, a tenured teacher in the District.

By notice dated January 7, 2008, the Commissioner directed respondent, via both certified and regular mail – the certified copy having been signed for on January 9, 2008 – to file an Answer to the tenure charges against him. This communication clearly provided notice to respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified "*shall have 15 days from the day such charges are filed with the Commissioner to file a written response to the charges with the Commissioner*," and that failure to answer within the prescribed period would, absent granting of an extension for good cause shown, result in the charges being deemed admitted by the charged employee. Because no reply

reply has been received from respondent – or any attorney on his behalf – in response to the District's charges,[1] each count of the charges against respondent is deemed to be admitted.

The Commissioner has reviewed the tenure charges certified against respondent by the District and the statement of evidence in support of those charges, specifically:

> 1. Anthony Paraskevopoulos is a tenured teacher who was hired by the District on or about September 15, 2003. He has been assigned to the McKinley school as a teacher of music.
>
> 2. On or about May 7, 2007, Anthony Paraskevopoulos verbally reported to his principal, Ms. Carolyn Granato, that he observed another music teacher at McKinley school inappropriately touch students on multiple occasions.
>
> 3. Principal Granato reported the allegations made by Anthony Paraskevopoulos to the Division of Youth and Family Services.
>
> 4. Anthony Paraskevopoulos deliberately made a false statement to Principal Granato against another staff member.
>
> 5. On or about May 10, 2007, Anthony Paraskevopoulos admitted to Principal Granato that he fabricated the allegations of inappropriate touching of students by the other music teacher.
>
> 6. Anthony Paraskevopoulos either caused, and/or had the potential to cause, a severe negative impact on the District and its students, the Division of Youth and Family Services and the staff member who was the subject of Anthony Paraskevopoulos' deliberate false statement.
>
> 7. Anthony Paraskevopoulos' actions caused the District's administration to divert its time and attention from educational activities while dealing with the admittedly false allegations.
>
> 8. Anthony Paraskevopoulos' actions caused the Division of Youth and Family Services to divert its time and attention from legitimate allegations of child abuse and neglect.
>
> (Statement of Tenure Charges certified to the Commissioner January 7, 2008, Lydia Silva, Assistant Superintendent, State-operated School District of the City of Newark)

[1] It is noted that the District effectuated proper service by overnight mail sent on January 16, 2008.

Deeming such charges to be admitted, and noting that respondent has failed to respond to the allegations against him, the Commissioner finds that the District has demonstrated that respondent is guilty of unbecoming conduct and other just cause, warranting dismissal from his tenured position.

Accordingly, summary decision is hereby granted to the District, and respondent Anthony Paraskevopoulos is dismissed from his tenured teaching position in the District's employ as of the date of this decision. A copy of this decision will be forwarded to the State Board of Examiners for action as that body deems appropriate.

IT IS SO ORDERED.[2]

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 2/28/08

Date of Mailing: 2/29/08

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

#93-08

93-08
93-08

OAL DKT. NO. EDU 8548-07
AGENCY DKT. NO. 225-8/07

T.S.K. on behalf of minor child, B.T.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PINE HILL, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of the failure to appear transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 – along with a copy of the notification sent to the parties by the OAL on January 30, 2008, providing them with thirteen days to submit explanations for such nonappearance – have been reviewed. There being no explanation filed, this matter is no longer deemed to be a contested case before the Commissioner of Education and is hereby dismissed with prejudice.*

IT IS SO ORDERED.

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 2/28/08

Date of Mailing: 2/29/08

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FAILURE TO APPEAR

OAL Dkt. No. ED 8548-07

Date of Failure to Appear: January 23, 2008

ALJ: Lillard E. Law, ALJ, T/A

Party or parties who did not appear:

Talaya S. Kelly and Ronald Sahli, Esquire on behalf of Pine Hill BOE

/s/ Sharon J. Danks
SHARON J. DANKS (1/25/08)
Secretary for Judge Lillard E. Law, ALJ, T/A

#94-08

L.T., on behalf of minor child, P.T.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner – a resident of Ewing Township – contested respondent's determination that her niece, P.T., is ineligible to attend school in respondent's district, claiming that she has an order granting her residential custody of P.T. as of September 14, 2007. Respondent sought tuition reimbursement for the alleged period of ineligible attendance at the rate of $57.29 per day.

The ALJ found that: P.T. was not properly domiciled in respondent's school district as required under *N.J.S.A.* 18A:38-1(a); petitioner does not support P.T. gratis, as P.T.'s mother makes a significant monthly contribution to her upkeep; petitioner's testimony that P.T.'s mother lives in an abusive atmosphere is unpersuasive; and petitioner has failed to demonstrate that P.T. is entitled to attend Ewing schools free of charge because of a family or economic hardship. The ALJ concluded that petitioner is obligated to pay respondent $57.29 per day for each day P.T. was enrolled in its schools while open for instructional purposes.

Upon a full and independent review of this matter, the Commissioner adopted the Initial Decision as the final decision, and directed that petitioner be assessed tuition for P.T.'s period of ineligible attendance, as set forth by the ALJ.

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

February 28, 2008

OAL DKT. NO. EDU 8545-07
AGENCY DKT. NO. 288-10/07

L.T., on behalf of minor child, P.T.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	
RESPONDENT.	:	

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

Upon review, the Commissioner concurs – for the reasons fully set forth by the Administrative Law Judge – that the petitioner has not demonstrated D.T.'s entitlement to attend the schools of the district pursuant to *N.J.S.A.* 18A:38-1, and that the Ewing Township Board of Education is entitled to collect tuition for the period of her ineligible attendance.

Accordingly, the Initial Decision of the OAL – finding D.T. ineligible to attend Ewing Township schools and directing the petitioner to pay the Ewing Township Board of Education $57.29 per day for each school day of D.T.'s enrollment from October 5, 2007 – is adopted as the final decision in this matter.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 2/28/08

Date of Mailing: 2/29/08

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8545-07
AGENCY DKT. NO. 288-10/07

L.T., O/B/O MINOR CHILD, P.T.,
Petitioner,
v.
EWING TOWNSHIP BOARD OF EDUCATION, MERCER COUNTY,
Respondents.

L.T., petitioner, pro se

Jeffrey F. Belz, Esq., for respondent, Ewing Township Board of Education

Record Closed: December 5, 2007 Decided: January 22, 2008

BEFORE **DANIEL B. MC KEOWN,** ALJ (t/a)

Petitioner resides in Ewing Township, Mercer County, New Jersey. Her niece through marriage, P.T., her husband's sister's daughter, lives with her and her husband. P.T.'s parents live separately in Trenton, New Jersey. In a petition filed before the Commissioner of Education, petitioner seeks an Order to have her niece attend the public schools operated by the Ewing Township Board of Education (Board) free of charge. Petitioner makes claim that P.T. is entitled to such attendance ostensibly under N.J.S.A. 18A:38-1 (b) because she resides with her in Ewing Township and because the Honorable Audrey Peyton Blackburn, J.S.C., New Jersey Superior Court, Chancery Division - Family Part, issued an Order granting her residential custody of P.T. as of September 14, 2007. The Board says petitioner failed to carry her burden of persuasion to show P.T. is entitled to free education in its public school district.

In a counterclaim against petitioner, the Board seeks tuition payment in the amount of $57.29 a day for the education P.T. did receive in its schools between October 5, 2007, and the

date this dispute is finally resolved. Pending disposition of this matter, R.H. continues in Ewing Township school attendance.

A hearing was conducted November 28, 2007, at the Office of Administrative Law, Mercerville, after which the record closed December 5, 2007, upon receipt of the Board's writing. The conclusion is reached in this Initial Decision that J.H. is not eligible by reason of N.J.S.A. 18A:38-1 (b) to attend the Ewing Township Board of Education schools free of charge. The conclusion is also reached that petitioner is obligated to pay the Ewing Township Board of Education $57.29 per diem for each and every day school was open for instructional purposes from October 5, 2007, when P.T. was enrolled on the strength of petitioner's claim of eligibility.

FACTS

Except as otherwise noted, the facts established by a preponderance of credible evidence in the record are these.

1. P.T. is the niece of petitioner by marriage.

2. P.T.'s mother is petitioner's husband's sister.

3. Mother lives in Trenton with her male friend in his house.

3A. According to petitioner, mother and her male friend have been in a relationship for seven years, but then later during the hearing, petitioner asserted the relationship has existed for only three years.

3B. Petitioner says the relationship between P.T.'s mother and the male friend foments much verbal abuse.

3C. Petitioner is not specific when she alleges P.T. needs to escape verbal abuse other than to say the abuse upsets P.T. who telephones her when the abuse begins.

3D. Despite the verbal abuse, mother operates a day care center from the house in which she lives with her male friend.

3E. When asked how a day care center can be operated in an atmosphere where verbal abuse is such that her niece calls her for assistance, petitioner testified she does not really know and that she is only concerned about her niece.

3F. Petitioner testified P.T. returns to her mother's house, that is, the house of her male friend, every week-end. When asked how P.T. could return to the environment she left or how the mother tolerates P.T. returning to the tension created by the asserted verbal abuse, petitioner explained she did not know and that, had she known, this hearing would have gone into such detail she would have told the mother to be present to give testimony.

3G. Petitioner testified mother is looking for her own house so she could have her day care center there.

4. At hearing, petitioner identified P.T.'s father as H.M. When reminded that she stated in an affidavit (R-3) filed with the Board attesting to the eligibility of P.T. to attend its schools, she stated the father's name was P.M., petitioner explained that she intended to identify him as P.M., but that a son, P.T.'s brother, is also called P.M.

4A. In an Information Sheet filed with the Board in support of her claim P.T. is eligible to attend the Ewing Public Schools free of charge, mother identified the father as H.M. (See, R-4)

4B. Father lives in Trenton, in an apartment, with his female friend.

4C. Petitioner testified that while father does not visit P.T. at her home, he does come to her house to take P.T. to school in Ewing and may take her to his apartment from time to time.

5. Petitioner explained she had determined to allow P.T. to live with her this past September so that she would be removed from the asserted abusive environment of being with her mother and her mother's friend.

6. Petitioner testified it occurred to her to seek a court order allowing P.T. to live with her so that she could attend Ewing schools. Petitioner explained P.T. had attended Trenton Public Schools in prior years, but she could not drive her to Trenton every day because she does not have a car.

6A. Petitioner says mother agreed that residential custody should reside with petitioner.

7. Petitioner testified she secured her desired Order (R-1) on or about September 14, 2007, by appearing at the chambers of the Honorable Audrey Peyton Blackburn without having appeared before Judge Blackburn. Judge Blackburn's aide gave her the Order signed by Judge Blackburn.

8. The Order she received recites on its face that petitioner was the moving party for custody/visitation of P.T. and that P.T.'s mother was a respondent along with P.T.'s father, P.M., being a named respondent. The Order also recites;

> Both parties agree the Plaintiff shall obtain residential custody effective 9/14//07. It should be noted that Defendant, [P.M.] was not present during this consent agreement.

9. Petitioner testified she receives $400 a month from the parents for the care of P.T.

10. In addition to P.T. returning to her mother on the weekends during the school year, petitioner testified it is planned that P.T. shall also live with her mother during the summer months while on vacation from school.

11. Petitioner filed a Residency Verification Form (R-2) with the Board in furtherance of her goal to have her niece, P.T., attend the Ewing schools free of charge

12. There is no dispute petitioner resides in Ewing Township, Mercer County, New Jersey.

13. Petitioner filed an Affidavit (R-3) with the Board in furtherance of her goal to have her niece, P.T., attend the Ewing schools free of charge.

14. The affidavit is dated October 1, 2007. Petitioner attests that the reason P.T. resides in her household rather than with her mother or father is as follows:

> My niece should not have to be subjected to her environment she is being subjected to. Also her mother is currently becoming homeless. Abusive boyfriend making it not healthy for my niece, it [affects] he schooling & self, needs to be in loving household.

14A. In the Information Sheet (R-4) filed by mother, she says in response to the question of whether she has to means to support her child:

> Situation is unsafe. Not a good environment [?] boyfriend abusive [?] daughter [needs?] stable environment in a loving home with relatives

15. Petitioner attests in the same affidavit that "No person is paying me for the keep of this child or supplying the child with any means of support. I am contributing 100% of the support of this child including that time between school years." This attestation is inconsistent with her testimony that she receives $400 a month for P.T.'s upkeep.

16. Petitioner also attests that in the event any of the statements in the affidavit are false, she acknowledges she would be liable for tuition of P.T. during the days she attended the Ewing schools.

17. The attendance and residency officer for the Board notified petitioner by letter dated October 2, 2007, that the conclusion was reached that P.T. is not eligible for free admission to the Ewing Public Schools because the reasons stated in the custody affidavits do not constitute a hardship. (See, R-5).

Petitioner appeals the determination made by the Board that P.T. is not eligible to attend the Ewing Township Schools free of charge.

ANALYSIS

The Order from New Jersey Superior Court does not, by itself, constitute eligibility for free public school attendance in a specific school district under Education Law, Title 18A. The statute governing attendance at a local school district is N.J.S.A. 18A:38-1, et seq.

N.J..S.A. 18A:38-1 provides that:

Public schools shall be free to the following persons over five and under 20 years of age:

> a. Any person domiciled who is domiciled within the school district.
>
> b. (1) Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that intends so to keep and support the child gratuitously for a longer time than merely through the school term * * * and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district . . .
>
> If in the judgment of the board of education the evidence does not support the validity of the claim by the resident, the board may deny admission to the child. The resident may contest the board's decision to the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner on the validity of the claim and shall heave the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection . . .
>
> No child shall be denied admission during the pendency of the proceedings before the commissioner. In the event the child is currently enrolled in the district, the student shall not be removed from school during the 21-day period in which the resident may contest the board's decision nor during the pendency of the proceedings before the commissioner. If in the judgment of the commissioner the evidence does not support the claim of the resident, he shall assess the resident tuition for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to t e local district multiplied by the number of days of ineligible attendance and shall be collected in the manner win which orders of the commissioner are enforced . . .

Paragraph a. of the statute entitles a child to a free public school education in the district in which they are domiciled. The domicile of an unemancipated child is the domicile of the parent, custodian, or guardian. P.B.K. v. Board of Educ. of The Borough of Tenafly, 343 N.J. Super. 419 (App. Div. 2001). In this case, the domicile of the father is Trenton, New Jersey.

Therefore, under paragraph a. of the statute, P.T. is not eligible by reason of domicile to attend the Ewing Public Schools free of charge. N.J.A.C. 6A:22-3.1 (a) provides that a student is eligible to attend school in a school district if the student is domiciled within the district. Subparagraph 1 of the same rule states that a student is domiciled in the school district when he or she is living with a parent or legal guardian whose permanent home is within the district. Such is not the case here. Petitioner is neither the parent nor legal guardian of R.H.

Consequently, R.H. is not eligible to attend the Ewing Township schools by reason of domicility within the Township. R.H. is not domiciled within the Township.

Paragraph b., subparagraph (1), of the statute would allow P.T. to attend the Ewing schools if certain conditions were met. That part of the statute reads:

> Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district . . . a sworn statement that he is domiciled with the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term . . . and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district.

N.J.A.C. 6A:22-3.2 (a) 1 instructs that an otherwise eligible student, kept in the home of a person other than the student's parent or legal guardian, is eligible to attend school in that school district if:

> i. The student's parent or guardian has filed, together with documentation to support its validity, a sworn statement that he or she is not capable of supporting or providing care for the student due to family or economic hardship and that the student is not residing with the other person solely for the purpose of receiving a free public education.
>
> The same rule, at (a) 4 allows:
>
> 4. A student shall not be deemed ineligible under this subsection solely because a parent or legal guardian gives gifts or makes limited contributions, financial or otherwise, toward the welfare of the student, provided that the resident keeping the student received no payment or other remuneration from the parent or guardian for regular maintenance of the student.

Petitioner has the burden of persuasion to demonstrate P.T. is entitled to attend the Ewing schools free of charge based on paragraph (b) (1) of the preceding statute and the cited administrative rules.

The evidence is that mother contributes $400 a month for the support of P.T. While there are no hard and fast rules regarding what constitutes a 'limited contribution' for the maintenance of a child, a regular $400 per month contribution is more than a 'limited' contribution by any reasonable standard. Essentially, mother is paying for the support of R.H. while she is at petitioner's home and, consequently, the conclusion must be drawn that petitioner does not support R.H. gratis, as is required by the statute.

In addition, the evidence shows P.T. and mother spend weekends together and intend to spend the summer months together. I am not persuaded that P.T. is exposed to a verbal abuse atmosphere at mother and male friend's home as stated by petitioner. There are no domestic violence orders in effect, mother has been with her male friend for three to seven years, and mother operates a day care center out of her residence. Logic dictates that if the atmosphere at mother's residence was as abusive as petitioner claims, a day care center could not be operated on those premises because the parents of the toddlers enrolled in the center would be distraught as petitioner claims P.T., a 14 year old, is supposed to be. Petitioner's testimony that mother lives in an abusive atmosphere is not persuasive.

CONCLUSIONS

The attendance and residency officer for the Ewing Township Board of Education concluded that petitioner failed to show a 'hardship' existed as the basis for the enrollment of P.T. in Ewing Township Schools. I **CONCLUDE** petitioner failed in her burden to demonstrate by a preponderance of credible evidence that P.T. is entitled to attend the Ewing schools free of charge under N.J.S.A. 18:38- b (1). The record is absent of evidence to show there is hardship based on the facts presented. In addition, the record shows petitioner does not support R.H. *gratis,* contrary to the requirement of law. Finally, the record shows there is no intention of having P.T. reside with petitioner beyond the school term – or even during the school term – as if the child were petitioner's own, for she already spends weekends in Trenton with her mother. Therefore, the inference is drawn that the purpose for P.T. living with petitioner in Ewing Township instead of with her mother in Trenton is for P.T. to attend the Ewing Public Schools rather than the Trenton Public Schools.

Having concluded petitioner failed to show R.H. is eligible for free public school attendance at the Ewing Township public schools by reason of domicile, or, on the strength of her affidavit, **I NOW FIND AND CONCLUDE** petitioner is obligated to pay the Ewing Township Board of Education $57.29 per day for each day P.T. was enrolled in its schools while open for instructional purposes.

It is so **ORDERED.**

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

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

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

Daniel B Mc Keown

1-18-08

DATE

DANIEL B. MC KEOWN, ALJ (t/a)

Date Received at Agency:

1-18-08

JAN 29 2008

Mailed to Parties:

[illegible] AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

DBK/cs

DOCUMENTS IN EVIDENCE

For respondent:

R-1 Court Order

R-2 Residency Verification Form

R-3 Affidavit

R-4 Information Sheet

R-5 Notice of Ineligibility

95-08

OAL DKT. NOS. EDU 894-08 AND EDU 895-08
AGENCY DKT. NOS. 64-2/08 AND 65-2/08
(CONSOLIDATED)

D.K., on behalf of minor child, C.K.,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	
RESPONDENT	:	COMMISSIONER OF EDUCATION
AND	:	DECISION ON
MICHAEL HERCHAKOWSKI,	:	APPLICATION FOR EMERGENT RELIEF
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	
RESPONDENT.	:	

The record of this emergent matter – including the audiotape of the hearing conducted at the Office of Administrative Law (OAL) on February 29, 2008 – and the recommended order of the Administrative Law Judge (ALJ) from the bench, have been reviewed by the Deputy Commissioner to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-33.

Upon such review, the Deputy Commissioner adopts the ALJ's recommended order granting emergent relief in this matter, as she concurs – for the reasons articulated on the

hearing tape – that petitioners have satisfied the requisite standards for the granting of such relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Accordingly, the within application for emergent relief is hereby granted. This matter is being returned to the OAL for such further proceedings as may be necessary to bring it to conclusion.

IT IS SO ORDERED.*

DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 2/29/08

Date of Mailing: 2/29/08

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

96-08

BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BRUNSWICK, MIDDLESEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY AND NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

The Board of Education of the Township of North Brunswick challenged the determination of the Somerset County Superintendent that North Brunswick is the district of origin and residence of the children of the S family, and asked the Commissioner to determine that the family is homeless and that Somerville was their last permanent residence. Respondents both filed answers, and moved to dismiss the petition on the grounds that it had been filed well beyond the allowable 30-day filing period authorized by *N.J.A.C.*6A:17-2.8(b) and *N.J.A.C.* 6A:23-5.2(d).

The ALJ found that: North Brunswick was aware of the County Superintendent's determination that it was the residence of the children in question on or about January 17, 2007, and did not file its notification with the New Jersey Department of Education, Division of Finance, until June 8, 2007; the filing was substantially beyond the permitted 30-days from receipt of notice of the County Superintendent's determination; no legitimate reason for failure to file a timely notice has been presented. The ALJ concluded that North Brunswick failed to comply with *N.J.A.C.* 6A:23-5.2(d), and therefore the petition should be dismissed.

Upon full consideration, the Commissioner concurred with the ALJ and adopted the Initial Decision as the final decision in this matter; the petition was dismissed as untimely.

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

March 3, 2008

OAL DKT. NO. EDU 10499-07
AGENCY DKT. NO. 335-9/07

BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BRUNSWICK, MIDDLESEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY AND NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of petitioner North Brunswick Board of Education (North Brunswick) and reply exceptions of respondent Somerville Board of Education (Somerville) were filed in accordance with the prescriptions of *N.J.A.C.* 1:1-18.4.

On exception, North Brunswick attempts to argue: 1) that summary decision was prematurely granted as the Administrative Law Judge (ALJ) merely "presumed" that the Board had notice of the County Superintendent's January 17, 2006 decision, without any factual or discovery support; 2) that this matter is improperly dismissed as it has only been adjudicated with respect to tuition derived by the district "for school funding purposes," and failed to address the legal obligation of respondent Somerville to pay on the legal theories of quantum meruit or unjust enrichment; and 3) there is a statutory entitlement to reimbursement for tuition and

transportation costs which cannot be restricted by an administrative code 30-day limitation provision.

In response, respondent Somerville posits: 1) petitioner's argument with respect to summary decision being prematurely granted is wholly disingenuous as **at no time** during the course of this matter did it either allege that it was unaware of the determination of the County Superintendent or offer any excuse for its delay in appealing that determination; 2) to the extent petitioner believed it may have had other theories of recovery in this matter, it should have raised them in its underlying pleadings or responsive brief. Advancement of speculative claims must be made before – not after – the issuance of the Initial Decision; and 3) as the County Superintendent determined that petitioner, not Somerville, was the district of origin of the family in this matter, petitioner possessed no statutory entitlement to tuition and transportation which was curtailed by administrative regulations.

Upon a careful and independent review, the Commissioner – finding petitioner's exceptions without merit – concurs with the ALJ that this matter is appropriately dismissed as untimely.

Accordingly, the recommended decision of the OAL is adopted – for the reasons clearly articulated therein – and the instant Petition of Appeal is dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 3/03/08

Date of Mailing: 3/03/08

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10499-07
AGENCY DKT. NO. 335-9/07

NORTH BRUNSWICK TOWNSHIP BOARD OF EDUCATION,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE AND NEW JERSEY DEPARTMENT OF EDUCATION,

Respondents.

Anthony B. Vignuolo, Esq., for petitioner (Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, attorneys)

Marc H. Zitomer, Esq., for respondent Board of Education of Borough of Somerville (Schwartz Simon Edelstein Celso & Kessler, attorneys)

Joyce D. Atkins, Deputy Attorney General, for respondent New Jersey Department of Education (Anne Milgram, Attorney General of New Jersey, attorney)

Record Closed: December 26, 2007 Decided: January 17, 2008

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

The North Brunswick Board of Education ("North Brunswick") filed a Petition, and subsequently an Amended and Second Amended Petition (hereinafter referred to

simply as the "Petition"), with the Commissioner of Education ("Commissioner"), seeking a declaration that the children of the Soto family were homeless and that Somerville, New Jersey, was their last permanent residence and directing that the Somerville Board of Education ("Somerville") pay tuition costs for the six Soto children for the 2006-2007 school year. The petition named as respondents both the Somerville Board and the New Jersey Department of Education ("DOE"). They filed answers and each moved to dismiss the Petition on the grounds that it had been filed out of time, well beyond the allowable 30 day filing period authorized by N.J.A.C. 6A:17-2.8(b) and N.J.A.C. 6A:23-5.2(d). North Brunswick has responded to the motions and the Commissioner transferred the contested case to the Office of Administrative Law pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The facts relevant to the timeliness issue do not appear to be in dispute. North Brunswick claims that the Soto family left its Somerville residence in August 2006 due to financial difficulties and moved in with a relative at an address in North Brunswick for approximately one month. An affidavit of hardship was completed describing the family's dependence upon that relative. The six Soto children were enrolled in North Brunswick schools. North Brunswick notified the Business Administrator for the Somerville Board in 2006 that it sought reimbursement from Somerville for tuition for the six Soto children, claiming that they were homeless as defined in N.J.A.C. 6A:17-2.3, as they were residing with a relative temporarily out of necessity because the family lacked a permanent residence and asserting that Somerville was their last permanent place of residence. On January 17, 2007, the Somerset County Superintendent of Schools, acting pursuant to N.J.A.C. 6A:17-2.8(a), determined that the Soto family's district of origin and residence was in North Brunswick. On January 18, North Brunswick, which asserts it had not yet received the County Superintendent's determination, wrote to Somerville again demanding tuition payments for the Soto children. No response to this demand was received. North Brunswick filed its appeal of the County Superintendent's determination to the DOE's Division of Finance on June 8, 2007, which denied the appeal on July 3, 2007, as having been filed out of time under N.J.A.C. 6A:23-5.2(d). This appeal to the Commissioner followed.

N.J.A.C. 6A:17-2.8(b) provides that "[a] district disputing the county superintendent's determination may appeal to the Department of Education pursuant to N.J.A.C. 6A:23-5.2(d), (e) and (f)." Subsection (d) states,

> A district board of education contesting the Department's determination of district of residence shall submit a written notification that a dispute exists to the Assistant Commissioner, Division of Finance, within 30 days of the receipt of a final notice that a child is determined to be a resident of the district for the purpose of State funding. . . "

Here, North Brunswick does not dispute that its appeal to the DOE Division of Finance was not filed within thirty days of the receipt of the County Superintendent's determination that it was the residence of the Soto children. It claims, however, that it cannot be determined at this juncture in the case when it "could reasonably be determined to have knowledge of a total denial of its request." It bases this contention upon the fact that on January 18, it sent correspondence to Somerville demanding tuition and never received any answer to that demand. "Minimally, there was a new separate request for tuition reimbursement supported by undisputed legal authority submitted on January 18, 2006 for which no response was ever received." Indeed, it notes that its first submission to Somerville "had not set forth any legal authority concerning the Petitioner's entitlement to tuition payments and was summarily denied." North Brunswick relies upon Burd v. New Jersey Telco, 76 N.J. 284, 291 (1978) for the proposition that a Statute of Limitations period does not commence until a party "learns" or "reasonably should learn" of the existence of facts which equate to a cause of action.

N.J.A.C. 6A:23-5.2 establishes the procedure for determining the district of residence for school funding purposes. Subsection (g) provides how the district of residence of homeless children is to be determined. The regulations provide that the district of residence is determined by the Commissioner or her designee, here the County Superintendent of Schools. Upon notification by the DOE of the determination of a district of residence, the board may contest the DOE's determination by submitting written notification to the Division of Finance, within thirty days of receipt of a final notice that a child was determined to be a resident for purposes of State funding. The Division of Finance "shall notify the district board of education whether a redetermination of

district of residence shall be made within 90 days of the receipt of the written notification that a dispute exists."

North Brunswick does not dispute that it was notified by the County Superintendent of the determination that it was the district of residence shortly after the issuance of the January 17, 2007, decision. It does not dispute that it filed its notice with the Division of Finance on June 8, 2007, 142 days after the January 17 decision. It provides no excuse for this delay. Instead, in a feeble effort to get around the regulation and save its challenge, it invokes its letter to Somerville of January 18, which it says was sent out without knowledge of the previous day's decision by the County Superintendent. Yet it does not explain how that letter factors into the regulatory scheme. It is clear that as of shortly after the January 17 decision, it had notice that the decision made pursuant to N.J.A.C. 6A:23-5.2(b) had been made and was not in accord with its position on the residence issue. Knowing this, it also knew that under the regulation; subsection (c) provided that if it did not seek reversal or redetermination or appeal, it was "bound by such determination." Its next step therefore was to notify the Division of Finance of its dispute in writing within thirty days of its receipt of the final notice. That "final notice" under this regulatory construct was clearly the County Superintendent's decision. There is no provision for another request or demand to the school district which had not been determined the district of residence and certainly no hint or suggestion in the regulations that any such demand would toll the thirty day period for notifying the Division of Finance of the dispute and seeking its review of the County Superintendent's decision. The January 18 letter to Somerville and the lack of any response thereto is wholly irrelevant in regards to whether North Brunswick filed its challenge in a timely manner.

As in Board of Education of the Twp. Of Springfield v. N.J. Dept. of Educ. et al., EDU 5987-02, Initial Decision (August 21, 2003), adopted, Com'r (October 2, 2003), <http://lawlibrary.rutgers.edu/oal/search.html>, North Brunswick has failed to provide any compelling reason to justify its failure to file for approximately ninety days beyond the thirty day deadline. And, despite North Brunswick's attempt to suggest that this motion should not be determined until after discovery is completed and its contention

that there is a factual determination to be made as to when it "reasonably learned of a final determination that would initiate the counting on the applicable Statute of Limitations period," these are not meritorious objections. The district has never denied its knowledge of the County Superintendent's decision of January 17, and the regulations make it plain that that knowledge of the final determination is the starting point from which the thirty days is measured. Any question as to what is the "final determination" from which the deadline is calculated is answered by simple reference to the regulatory scheme. No further discovery appears necessary to permit a fair determination of the pending motions to dismiss.

I **FIND** that the North Brunswick Board was aware of the County Superintendent's determination that it was the residence of the Soto children on or about January 17, 2007, and that it did not file its notification with the Division of Finance until June 8, 2007. This filing was substantially beyond the allowable thirty days from receipt of notice of the County Superintendent's determination. No legitimate reason for failure to file a timely notice has been presented. I **CONCLUDE** that North Brunswick failed to comply with N.J.A.C. 6A:23-5.2(d) and therefore its appeal should be **DISMISSED**.

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

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

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

January 17, 2008
DATE

JEFF S. MASIN, ALJ

Date Received at Agency:

January 17, 2008
Mailed to Parties:

JAN 17 2008

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

FOR THE PETITIONER:

None

FOR THE RESPONDENT:

None

97-08

S.J., on behalf of minor child, V.J.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner contested respondent's determination that her son, V.J., is ineligible to attend school in respondent's district, claiming that she was domiciled in the district until she became homeless in March 2006; respondent Board is therefore responsible for his education as a homeless child. Respondent district asserts that V.J. is not entitled to a free education in South Orange-Maplewood schools, and counterclaimed for tuition reimbursement for the period of ineligible attendance.

The ALJ found that: petitioner was homeless from March 2006 until June 2007; as of July 2007, petitioner was domiciled in Newark; from March 2006 through June 2007, V.J. was eligible for a free public education in respondent's school district; beginning in July 2007, V.J. was no longer eligible to attend respondent's schools free of charge; respondent Board may disenroll V.J. upon issuance of the final decision in this matter; and respondent's request for tuition reimbursement for V.J.'s attendance during the 2007-2008 school year is granted, to be calculated at the rate of $67.20 per day for the number of days of attendance by V.J. during the current school year.

Upon a full and independent review of this matter, the Commissioner concurred with the findings of the ALJ regarding the period of homelessness of petitioner and her son, and that V.J. ceased to be eligible for free public education in respondent's school district as of July 2007. In response to petitioner's request that her son be permitted to finish out the current school year as a nonresident student and that she not be required to pay tuition because of the extreme financial hardship it would cause, the Commissioner found nothing in the record to support an order compelling the District to forgive tuition for the period of ineligible attendance or to permit V.J. to attend as a nonresident student. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter.

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

March 3, 2008

OAL DKT. NO. EDU 5656-07
AGENCY DKT. NO. 121-5/07

S.J., on behalf of minor child, V.J.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as has the petitioner's statement on exception, to which the Board of Education (Board) did not reply.

In her exceptions, the petitioner does not take issue with the findings of the Administrative Law Judge (ALJ), but asks that – since his behavior and attitude have improved at Columbia High School through the efforts of caring teachers – her son be permitted to finish out the 2007-08 school year in respondent's district as a nonresident student without payment of tuition, and that the tuition assessment against her be forgiven due to the extreme financial hardship it would cause. (Petitioner's Exceptions at 1-2)

Upon review, the Commissioner first concurs – for the reasons fully set forth by the ALJ – that the petitioner and her son were homeless from March 2006 through June 2007, prior to which time they resided in the respondent's school district so as to render V.J. entitled to attend school in South Orange-Maplewood during this period. She further concurs that – as of July 2007 – the petitioner and her son were no longer homeless, but rather domiciled in Newark; thus, at that point, V.J. ceased to be eligible for free public

education in the Board's district and the Board is entitled to collect tuition for the period of his ineligible attendance.

With respect to the petitioner's request for forgiveness of such tuition, the Commissioner finds that – while the Board is certainly free to exercise its own discretion and elect to forgo collection of the tuition it is now lawfully due – there is nothing in the record that would justify an order of the Commissioner compelling such action, notwithstanding that *N.J.A.C.* 6A:22-6.3(b) expressly permits this result when the particular facts so warrant. Similarly, while the Commissioner understands the petitioner's desire that her son be allowed to finish out the academic year in his current school, there is no basis in the record on which to order such relief; permitting nonresident students to attend school in a district – with or without payment of tuition – is a discretionary determination of the local district board of education pursuant to *N.J.S.A.* 18A:38-3, and nothing in the present record indicates that the Board abused its discretion or acted in violation of law or district policy in declining to permit V.J.'s attendance on this basis.

Accordingly, the Initial Decision of the OAL – finding V.J. ineligible to attend South Orange-Maplewood schools as of July 2007 and assessing the petitioner $67.20 per day for V.J.'s enrollment during the 2007-2008 school year – is adopted as the final decision in this matter.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 3/03/08

Date of Mailing: 3/03/08

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5656-07
AGENCY DKT. NO. 121-5/07

S.J. ON BEHALF OF MINOR CHILD, V.J.,

Petitioner,

v.

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

Respondent.

S.J., pro se

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

Record Closed: December 31, 2007 Decided: January 22, 2008

BEFORE **RICHARD McGILL**, ALJ:

S.J. (hereinafter sometimes "petitioner") filed a petition with the Commissioner of Education challenging a residency determination by the Board of Education of the South Orange-Maplewood School District (hereinafter "respondent") in regard to her son, V.J., who was attending respondent's Columbia High School. The substance of the

determination was that V.J. was not entitled to a free education in respondent's schools and that he would be denied admission as of May 1, 2007. Respondent counterclaims for tuition reimbursement for an alleged period of ineligible attendance.

PROCEDURAL HISTORY

Petitioner filed her petition on May 1, 2007, invoking the Commissioner's authority to hear and determine controversies arising under the school laws pursuant to N.J.S.A. 18A:6-9. As a result of the timely filing of the petition, V.J. has continued to attend Columbia High School during the pendency of the appeal. On May 21, 2007, respondent filed an answer and counterclaim.

The matter was transmitted to the Office of Administrative Law on May 30, 2007, for determination as a contested case. A hearing was scheduled for November 16 and 21, 2007, at the Office of Administrative Law in Newark, New Jersey. On October 26, 2007, respondent filed a motion for summary decision. Petitioner did not file a response to the motion, but as it appeared to the undersigned that there were genuine issues of material fact, the hearing took place as scheduled. Respondent's motion for summary decision was subsequently denied by Order dated December 31, 2007.

ISSUES

The main issue in this proceeding is whether V.J. was eligible to attend respondent's public schools during the period from May 1, 2007, to the present. S.J. maintains that she was domiciled in the school district until she became homeless in March 2006. S.J. contends that because she lived within the school district when she became homeless, respondent remains the district of residence for V.J. and therefore responsible for his education as a homeless child. Respondent contends that V.J. is not domiciled in the school district and is not homeless and that therefore respondent is entitled to tuition reimbursement for a period of ineligible attendance by V.J.

S.J. stayed at various locations during the period from March 2006 to the present. One issue is whether S.J. was in a state of homelessness during these stays. Another question is whether S.J. was domiciled at her mother's home in Newark or at an apartment which she rented in July 2007 in Newark.

FACTS

S.J. testified on her own behalf, and she also called her mother, E.B., as a witness. Registrar Tiffani Barnes testified for respondent. While petitioner and Registrar Barnes differed as to various details as well as S.J.'s status at various locations, all witnesses testified to essentially the same course of events.

Based upon the evidence presented at the hearing, I **FIND** as follows:

1. In September 2005, S.J. enrolled her son, V.J., in respondent's Maplewood Middle School for eighth grade.

2. At the time, S.J. had an apartment on C. Avenue in Maplewood, New Jersey.

3. V.J. was thirteen years old at the time.

4. S.J.'s mother, E.B., owned a home on O. Terrace in Newark.

5. S.J. has a daughter, K.N., who attended Mount Vernon Elementary School in Newark throughout the pertinent period of time.

6. In March 2006, S.J. left her apartment on C. Avenue in Maplewood pursuant to an Order for Orderly Removal dated March 13, 2006, of the Superior Court of New Jersey, Law Division, Essex County, Special Civil Part.

7. S.J. owned a beauty salon located in South Orange.

8. S.J. stayed at the beauty salon along with V.J. and K.N. from March to August 2006.

9. S.J. had to give up the beauty salon, because she could not pay the rent.

10. S.J. went to stay with a friend, B.S., on T. Avenue in South Orange, where she remained from August through November 2006.

11. Respondent's representative requested that S.J. produce a valid lease for this address.

12. S.J. was unable to produce a valid lease because B.S. was moving from the apartment.

13. S.J. stayed at her mother's home in Newark from December 2006 to January or February 2007.

14. S.J. was welcome to stay at her mother's home, but S.J. did not want to remain there, because she and her mother had differing views as to bringing up children.

15. In January or February 2007, S.J. went to live in the attic of a friend's home on M. Drive in South Orange.

16. Respondent's representative asked for a valid lease.

17. After S.J. produced a lease, respondent's representative threatened the homeowners with prosecution for leasing space in an area zoned for one-family homes.

18. Feeling harassed by the school district, the homeowners told S.J. that she had to vacate the premises.

19. S.J. left M. Drive in South Orange in or about April 2007.

20. S.J. stayed with a friend on M. Avenue in Newark from April to May 2007.

21. S.J. stayed with her mother from May to June 2007 and then with her sister.

22. At the time, S.J. was receiving public assistance.

23. In July 2007, S.J. rented an apartment on P. Avenue in Newark with the Essex County Division of Welfare paying a security deposit and providing temporary rental assistance for July through October 2007.

24. S.J. was still living at this location as of the hearing date.

25. In September 2006, V.J. entered the ninth grade at respondent's Columbia High School.

26. By letter dated March 9, 2007, a principal advised S.J. that V.J. was not properly domiciled within the school district and that therefore the superintendent was making application to have V.J. removed from the school district. A hearing was scheduled for March 23, 2007.

27. By letter dated April 10, 2007, the superintendent of schools advised S.J. that at a meeting on April 9, 2007, respondent determined that V.J. was not entitled to a free public education within its school district.

28. The letter further advised S.J. that she had twenty-one days to contest respondent's decision with the Commissioner of Education and that S.J. would be denied admission as of May 1, 2007.

29. S.J. filed a timely appeal to the Commissioner of Education.

30. By letter dated May 3, 2007, respondent acknowledged that V.J. could attend Columbia High School during the pendency of the appeal.

31. In September 2007, V.J. continued to attend Columbia High School, where he is still considered to be a ninth grade student.

32. As of the hearing in this proceeding, V.J. was still attending respondent's Columbia High School.

33. The tuition reimbursement rate for students attending Columbia High School is $63.18 per diem for the 2006-2007 school year and $67.20 per diem for 2007-2008 school year.

LAW AND ANALYSIS

A person who meets age requirements and is domiciled within a school district may attend its public schools free of charge. N.J.S.A. 18A:38-1(a). A person may have many residences but only one domicile. Somerville Bd. v. Manville Bd., 332 N.J. Super. 6, 12 (App. Div. 2000), aff'd, 167 N.J. 55 (2001). A child's domicile is normally that of his or her parents. Ibid. The domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is

absent, he has the intention of returning, and from which he has no present intention of moving. Matter of Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991), aff'd, 311 N.J. Super. 589 (App. Div. 1998), certif. denied, 157 N.J. 541 (1998), cert. denied, 526 U.S. 1051, 119 S.Ct. 1357, 143 L. Ed.2d 518 (1999).

The district of residence for a homeless child, as determined in accordance with N.J.S.A. 18A:7B-12, shall be responsible for the education of the homeless child. N.J.S.A. 18A:7B-12.1. The district of residence for children whose parent temporarily moves from one school district to another as the result of being homeless shall be the district in which the parent last resided prior to becoming homeless. N.J.S.A. 18A:7B-12(c). The term "homeless" refers to an individual who temporarily lacks a fixed, regular and adequate residence. Ibid.; N.J.A.C. 6A:17-2.2. The "school district of origin" means the school district in which the parent last resided prior to becoming homeless. Ibid. A child is homeless when he or she resides in any of the following: (1) a publicly or privately operated shelter designed to provide temporary living accommodations; (2) a public or private place not designated for or ordinarily used as a regular sleeping accommodation; and (3) the residence of relatives or friends with whom the homeless child is temporarily residing out of necessity because the family lacks a regular or permanent residence of its own. N.J.A.C. 6A:17-2.3. A homeless child is entitled to a free public education in his district of residence as determined in accordance with N.J.S.A. 18A:38-1(f). The parent has the burden of proof by a preponderance of the evidence. N.J.S.A. 18A:38-1(b)2.

Petitioner contends that she resided within respondent's school district until she became homeless with the result that V.J.'s education is still respondent's responsibility. Respondent maintains that S.J. has not proven that V.J. was domiciled within the school district or that he meets the definition of a homeless child. Further, respondent argues that S.J. was living in her mother's home in Newark and that therefore V.J. was domiciled in Newark.

Preliminarily, S.J. does not claim that V.J. was kept in the home of another and supported by such other person gratis within the meaning of N.J.S.A. 18A:38-1(b)(1), and there is no evidence that V.J. fell within that category. It follows that V.J. was not entitled to a free public education from respondent pursuant to N.J.S.A. 18A:38-1(b)(1).

As another preliminary matter, it is noteworthy that S.J.'s daughter, K.N., was attending school in Newark, while V.J. was enrolled in respondent's schools. S.J. claims that both K.N. and V.J. lived with her throughout the pertinent period of time, and she has not otherwise drawn a distinction between them. Although K.N.'s attendance at the Newark schools is not at issue in this proceeding, it would appear that there is an inconsistency in K.N. and V.J. attending school in different districts. However, this does not answer the question whether V.J. was ineligible to receive a free education in respondent's school district.

It is also noteworthy that in her petition, S.J. does not claim that she is currently domiciled in respondent's school district. Rather, S.J.'s claim is based exclusively on homelessness.

As of March 2006, S.J. lived on C. Avenue in Maplewood within respondent's school district. S.J.'s testimony along with the court papers removing her from this address clearly indicate that she resided at this location within the school district. It is noteworthy that for purposes of determining responsibility for the education of a homeless child, it is only necessary that he resided in the school district prior to becoming homeless.

Thereafter, S.J. and V.J. lived at S.J.'s beauty salon from March through August 2006. The beauty salon is a private place not designated for or ordinarily used as a regular sleeping accommodation within the meaning of N.J.A.C. 6A:17-2.3(a)2. It follows that V.J. was a homeless child during this period of time.

S.J. next moved to T. Avenue in South Orange where she remained with a friend from approximately August to November 2006. S.J. considered this location to be temporary because the friend was planning to move, and S.J.'s view is confirmed by the short duration of the stay. Under the circumstances, S.J. and V.J. were temporarily residing with a friend or relative out of necessity because they lacked a permanent residence of their own within the meaning of N.J.A.C. 6A:17-2.3(a)3. Therefore, V.J. was a homeless child during this period of time.

S.J. next moved to O. Terrace in Newark, where she lived with her mother from November 2006 to January or February 2007. Respondent maintains that this location was S.J.'s domicile based on the fact that she provided this address in relation to V.J.'s enrollment and also K.N.'s attendance in the Newark public schools. But S.J. and E.B. explained their differences, and the length of S.J.'s stay in E.B.'s home was very short. It follows that S.J. and V.J. were residing temporarily at the home of a relative out of necessity because they lacked a regular or permanent residence of their own within the meaning of N.J.A.C. 6A:17-2.3(a)3. This is not to say that any stay with a relative means that the parent or child is homeless. If the stay lasts for an extended time, it cannot be described as temporary. But in this instance, the stay of a few months was temporary in nature. It follows that V.J. was a homeless child during this period of time.

S.J. next moved to the home of a friend on M. Drive in South Orange and rented space in the attic. S.J. stayed at this location approximately from January or February 2007 to April 2007. In view of the shortness of the stay, it would be accurate to characterize S.J.'s circumstances as temporarily residing with a friend out of necessity because she lacked a regular or permanent residence of her own within the meaning of N.J.A.C. 6A:17-2.3(a)3. Under the circumstances, V.J. was a homeless child during this period of time.

S.J. stayed at a friend's home on M. Place in Newark for a time in April 2007. In view of the short duration of this stay, S.J. was temporarily living with the friend out of necessity because she lacked a regular or permanent residence of her own within the

meaning of N.J.A.C. 6A:17-2.3(a)3. It follows that V.J. was homeless during this period of time.

S.J. returned to her mother's home for May and part of June 2007. This stay was similar to the time that S.J. spent in her mother's home from December 2006 to January or February 2007. S.J. spent the end of June 2007 at her sister's home in Newark. These stays with relatives were temporary in nature and occurred out of necessity within the meaning of N.J.A.C. 6A:17-2.3(a)3. Therefore, V.J. was a homeless child during this period of time.

In July 2007, S.J. rented her own apartment on P. Avenue in Newark with a security deposit and temporary rental assistance from July through October 2007 provided by the Essex County Division of Welfare. S.J. emphasizes the word "temporary" in the expression "temporary rental assistance," but this word is intended to refer to the assistance rather than the housing. As the tenant in her own apartment, S.J. was no longer homeless within the meaning of N.J.A.C. 6A:17-2.3(a). With no other residence, S.J. and V.J. were domiciled in Newark as of July 2007.

Based upon the above, S.J. and V.J. were homeless from March 2006 through June 2007. Beginning in July 2007, S.J. and V.J. were no longer homeless, and they were domiciled in Newark. Therefore, I **CONCLUDE** that V.J. was eligible for a free education in respondent's public schools through June 2007, and I **FURTHER CONCLUDE** that V.J. was ineligible for a free education in respondent's public schools beginning July 2007. It follows that V.J. must leave respondent's public schools upon issuance of the final decision in this matter.

A counterclaim for tuition reimbursement may be granted when there is a period of ineligible attendance in a public school. N.J.S.A. 18A:38-1(b)(2). The determination herein is that V.J. was eligible to attend respondent's public schools during the 2006-2007 school year. Therefore, I **CONCLUDE** that respondent's request for tuition

reimbursement for a portion of the 2006-2007 school year is without merit and must be denied.

As determined above, V.J. did not meet the requirements to receive a free education in respondent's public schools during the 2007-2008 school year. Therefore, I **CONCLUDE** that petitioner must be assessed tuition for the period of ineligible attendance during the 2007-2008 school year. The tuition for the period of ineligible attendance is the product of the per diem rate of $67.20 and the number of days of attendance by V.J. during the 2007-2008 school year.

Accordingly, it is **ORDERED** that:

1. Respondent may disenroll V.J. upon issuance of the final decision in this matter.

2. Respondent's request for tuition reimbursement for V.J.'s attendance during the 2006-2007 school year is denied.

3. Respondent's request for tuition reimbursement for V.J.'s attendance during the 2007-2008 school year is granted and shall be calculated as set forth above.

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

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

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

Jan. 22, 2008
DATE

RICHARD McGILL, ALJ

Date Received at Agency: 1/22/08

Mailed to Parties:
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

JAN 23 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

cml

APPENDIX

WITNESS LIST

For petitioner:

E.B.

S.J.

For respondent:

Tiffani Barnes

EXHIBIT LIST

P-1	Pro se residency appeal dated December 21, 2006	Evidence
P-2	Letter dated March 19, 2007, from Thomas J. Dowd to S.J.	Evidence
P-3	Lease Agreement dated January 15, 2007	Evidence
P-4	Letter dated October 4, 2006, from Marcia Williams to S.J.	Evidence
P-5	Student Attendance Review dated March 1, 2007	Evidence
P-6	Pro se residency appeal dated March 7, 2007	Evidence
P-7	Notification Form dated April 25, 2007	Evidence

P-8	Letter dated June 29, 2007, from Mark Fullman to Mr. Clarke	Evidence
P-9	Notice to Quit and Demand for Possession dated January 12, 2006	Evidence
P-10	Letter dated May 1, 2007, from M. Kathleen Duncan, Director, Bureau of Controversies and Disputes	Evidence
R-1	File Summary Form dated 9/13/05	Evidence
R-2	Order for Orderly Removal and Certification of Relief dated March 2006	Evidence
R-3	Letter dated March 23, 2006 from District to Parent	Evidence
R-4	Letter dated April 4, 2006 from District to Parent	Evidence
R-5	Handwritten letter from Parent to District	Evidence
R-6	Homeless Student Parent Consultation Form dated April 25, 2006	Evidence
R-7	Registration Card for V.J. listing T. Avenue, South Orange address	Evidence
R-8	Letter dated October 25, 2006 from District to Parent	Evidence

R-9	Letter dated November 15, 2006 from District to Parent	Evidence
R-10	Affidavit of S.J. and B.S.	Evidence
R-11	Letter dated December 6, 2006 from District to Parent	Evidence
R-12	File Summary Form with handwritten notes of house surveillance from 1/25/07 to 2/2/07	Evidence
R-13	File Summary Form with handwritten noted dated 3/6/07	Evidence
R-14	Handwritten appeal dated March 7, 2007	Evidence
R-15	Letter from County Superintendent to Parent dated March 9, 2007	Evidence
R-16	Letter dated March 9, 2007 from District to Parent	Evidence
R-17	Letter dated April 10, 2007 from District to Parent	Evidence
R-18	Reduced Price School Meals Household Applications dated 10/25 and 10/30/07	Evidence
R-19	Registration Form dated August 31, 2005	Evidence

98-08

SEC DKT. NO. C52-04
OAL DKT. NO. EDE 6734-06
AGENCY DKT. NO. 33-1/08

IN THE MATTER OF ROBERT MARINNIE,	:	
BOARD OF EDUCATION OF THE BOROUGH OF	:	COMMISSIONER OF EDUCATION
PALMYRA, BURLINGTON COUNTY.	:	DECISION

The record of this matter and the parties' Consent Order as adopted by the School Ethics Commission ("Commission") have been reviewed.

Upon review, the Commissioner emphasizes that the determination of the Commission as to violation of the School Ethics Act is not reviewable by the Commissioner herein, since – pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1 – only the Commission may determine whether a violation of the School Ethics Act has occurred and the Commissioner's jurisdiction is limited to reviewing the sanction recommended by the Commission upon a finding of violation.

With this standard in mind, the Commissioner deems reprimand to be an appropriate penalty for the violation acknowledged by the respondent in this matter, and, accordingly, she approves the Consent Order and directs that the respondent hereby be reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 3/03/08

Date of Mailing: 3/03/08

Resolution Adopting Consent Order – C52-04

Whereas, this matter arose from the School Ethics Commission's decision of April 6, 2005 finding probable cause to credit the allegations that respondent, Robert Marinnie, violated N.J.S.A. 18A:12-24.1(c), (d), (e), (i) and (j); and

Whereas, Mr. Marinnie acknowledges that he violated N.J.S.A. 18A:12-24.1, affirms that he has not been a member of any board of education since April 2005, waives his right to a hearing pursuant to N.J.S.A. 18A:12-29 and N.J.A.C. 6A:28-6.8 and would accept a reprimand as penalty for the aforementioned violation; and

Whereas, the Commission has reviewed the Consent Order and agrees with terms of the settlement; and

Whereas, pursuant to N.J.A.C. 6A:28-6.11, the Commission recommends that the Commissioner impose a sanction of reprimand; and

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

Paul C. Garbarini/JB
Paul C. Garbarini, Chairperson

I hereby certify that this Resolution was duly adopted by the School Ethics Commission at it public meeting on January 22, 2008.

Joanne Boyle, Executive Director
School Ethics Commission

ANNE MILGRAM
Attorney General of New Jersey
Attorney for Petitioner,
New Jersey Department of Education,
School Ethics Commission
R.J. Hughes Justice Complex
25 Market Street
P.O. Box 112
Trenton, New Jersey 08625-0112

By: Melissa T. Dutton
Deputy Attorney General
(609)633-1972

	:	OFFICE OF ADMINISTRATIVE LAW
	:	
IN THE MATTER OF	:	OAL Dkt. No. EDE 06734-2006S
	:	
ROBERT MARINNIE	:	**CONSENT ORDER**

WHEREAS, Petitioner, New Jersey Department of Education, School Ethics Commission ("SEC") and Respondent, Robert Marinnie, ("Respondent") have mutually agreed to settle the above-captioned matter, with ANNE MILGRAM, Attorney General of New Jersey, by Melissa T. Dutton, Deputy Attorney General, appearing on behalf of the SEC, and William Delaney, Esq., appearing on behalf of Respondent; and

WHEREAS, this matter arose from the SEC's decision of April 26, 2005 finding probable cause to credit the allegations that respondent violated N.J.S.A. 18A:12-24.1(c), (d), (e), (i) and (j); and

WHEREAS, the settlement of this matter shall not constitute precedent in other pending or future litigation.

NOW, THEREFORE, the parties hereto agree to settle the above-captioned matter upon the following terms:

1. Respondent acknowledges that he violated the New Jersey Code of Ethics for School Board Members, N.J.S.A. 18A:12-24.1

2. Respondent accepts a reprimand for his actions by the New Jersey School Ethics Commission.

3. The SEC hereby withdraws its Order to Show Cause issued against Respondent.

4. By accepting a reprimand for his actions, respondent agrees to waive any and all hearings to which he is entitled pursuant to N.J.S.A. 18A:12-29 and N.J.A.C. 6A:28-6.8, and Respondent further agrees that he will not oppose the reprimand.

5. The parties agree that this Consent Order fully resolves all issues between them arising from the SEC's April 26, 2005 Decision finding probable cause.

G. William Delaney, Esq.
Attorney for Respondent

Date: December 7, 2007

Melissa T. Dutton
Deputy Attorney General

Date: 12/20/07

IN THE MATTER OF)

OF ROBERT MARINNIE)

BEFORE THE NEW JERSEY
SCHOOL ETHICS COMMISSION

SEC Docket No. C52-04

Civil Action

AFFIDAVIT OF
ROBERT MARINNIE

Robert Marinnie, of full age, being duly sworn upon his oath, deposes and says:

1. I was a duly elected member of the Palmyra Board of Education from April 2003 until April 2005. I have not been a member of any Board of Education since April 2005.
2. In or about September of 2003, I was informed of the possibility that a test breach of the Black Seal License test, administered to eleven Palmyra custodians in May 2003, had occurred.
3. I did not inform the Palmyra Board of Education, upon receipt of this information.
4. Subsequently and without the knowledge or consent of the Palmyra Board of Education, I conducted independent research of these allegations during the 2003-2004 school year.

5. I am now aware that my actions with regard to this independent research during the 2003-2004 school year were in violation of the New Jersey Code of Ethics for School Board Members, N.J.S.A. 18A:12-24.1.

6. I, at all times, acted in good faith and out of concern for the safety of the children of Palmyra Public School District.

7. I hereby waive my right to a hearing pursuant to N.J.S.A. 18A:12-29 and N.J.A.C 6A:28-6.8, and accept a reprimand from the New Jersey School Ethics Commission for the actions referred to above.

8. I acknowledge that in signing this affidavit I have secured the advice of an attorney and I understand the terms of this agreement.

Robert Marinnie

Sworn and Subscribed
before me this 7th day
of December, 2007

G. William Delaney, Esquire

#116-08

M. H.-C., on behalf of minor child, A.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed respondent's denial of her application to enroll her brother, A.R., in respondent's school district.

The ALJ found that A.R. resides with petitioner in respondent's district; petitioner and A.R.'s mother filed the necessary affidavits to apply to enroll A.R. in respondent's school district under *N.J.S.A.* 18A:38-1(b); petitioner has residential and joint legal custody of A.R.; and petitioner took custody of A.R. due to economic and family hardship. Thus, the ALJ concluded that petitioner had met her burden to show, pursuant to *N.J.S.A.* 18A:38-1(b), that A.R. is entitled to a free public education in respondent's district.

The Initial Decision was adopted as the final decision in this matter, as supplemented. The Commissioner concurred with the ALJ's determination that A.R. is entitled to a free public education in Ewing as an "affidavit student." The Commissioner further found that, as a result of the court order placing A.R. in petitioner's home, *i.e.,* bestowing upon petitioner joint legal and *residential* custodianship of A.R., A.R. is also entitled to a free public education in Ewing under *N.J.S.A.* 18A:38-1(a) and *N.J.S.A.* 18A:38-2.

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

March 12, 2008

OAL DKT. NO EDU 8850-07
AGENCY DKT. NO. 270-9/07

M. H.-C., on behalf of minor child, A.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision have been reviewed.[1] No exceptions were filed by the parties. For the reasons set forth in the Initial Decision[2] and those articulated *infra,* the Commissioner adopts the Initial Decision as the final decision in this case.

More specifically, the Commissioner concurs that the record contains evidence supporting the conclusion that economic hardship underlay A.R.'s transfer to petitioner's household, making A.R eligible for a free public education in Ewing as an "affidavit student" under *N.J.S.A.* 18A:38-1(b). The Commissioner also finds that A.R. qualifies for a free education in the Ewing district pursuant to *N.J.S.A.* 18A:38-2.[3]

It is undisputed that A.R. actually resides with petitioner and that the record contains a copy of an order of the Superior Court, Mercer County, Family Part, awarding joint

[1] No transcript of the hearing in the Office of Administrative Law has been provided to the Commissioner.

[2] The Commissioner notes that the second full paragraph on page 2 of the Initial Decision contains a passage from another case concerning a minor whose initials are J.H. Viewing the Initial Decision as a whole, it is clear that this passage was inserted in error, and that the conclusions on page 9 of the Initial Decision constitute the Administrative Law Judge's recommended decision in this matter.

[3] *N.J.S.A.* 18A:38-2 specifically provides, in pertinent part, that:

> Public schools shall be free to any person over five and under 20 years of age nonresident in a school district who is placed in the home of another person, who is resident in the district, by order of a court of competent jurisdiction of this state...

legal and *residential* custody of A.R. to petitioner. The Commissioner may not look behind that order. For example, in *L.D.M., on behalf of minor child, T.D. v Board of Education of the Township of West Orange, Essex County,* Commissioner Decision No. 151-01, decided May 11, 2001, L.D.M. had applied for custody of her younger brother, T.D., due to family circumstances. She was granted custody by way of an order of the Superior Court. The West Orange district maintained that it was not required to provide T.D. with a free public education. In determining, to the contrary, that T.D. *was* entitled to a free public education in West Orange, the Commissioner reasoned as follows:

> As was determined by the Commissioner and affirmed by the State Board of Education in *L.A. v. Board of Education of the Town of West Orange,* 97 *N.J.A.R.*2d (EDU) 266 (1996), *aff'd* by the State Board of Education, 97 *N.J.A.R.*2d (EDU) 554 (1997); and *V.H. v. Board of Education of the Township of Quinton,* 97 *N.J.A.R.*2d (EDU) 124 (1996), *aff'd* by the State Board of Education, 97 *N.J.A.R.*2d 554 (1997),[4] as of the date that a resident of a district takes *legal control* of a child, entitlement to attend school free of charge is no longer to be examined pursuant to *N.J.S.A.* 18A:38-1(b), the "affidavit student" provision.
>
> (...) once L.D.M. assumed legal custody of T.D., the only appropriate inquiry for respondent was whether L.D.M. and T.D. were domiciled in the District pursuant to *N.J.S.A.* 18A:38-1(a). Inasmuch as respondent does not dispute that L.D.M. is domiciled in West Orange, and the domicile of the child follows that of the parent or guardian having *legal custody* over him or her, *Mansfield Twp. Board of Education v. State Board of Education,* 101 *N.J.L.* 474, 479-480 (Sup. Ct. 1925), it is hereby found and determined that T.D. was entitled to a free public education pursuant to *N.J.S.A.* 18A:38-1(a), as of the effective date that L.D.M. acquired legal custody of T.D. *See also Y.L., on behalf of M.A. v. Board of Education of South Orange-Maplewood,* Number 658-97, decided by the Commissioner of Education December 24, 1997. (...) Further, as was held in *L.A.*, and affirmed by the State Board, the motives of the party obtaining a custody order are not determinative. A custody order must be accepted on

[4] In *V.H.*, when custody of a child was transferred from his parents to a great-grandmother, the child's domicile was changed to the district in which the great grandmother resided and he was deemed to be entitled to a free education in that district as of the effective date of the custody transfer.

its face. *See L.A.* at 269. *See also Y.L., supra.* (*L.D.M., supra*, at 7-8; *explanatory footnote supplied*)

See, also, V.S.-L., on behalf of minor child, Z.M.M. v. Board of Education of the City of Garfield, Bergen County, Commissioner Decision No. 281-07, decided July 9, 2007.

Respondent does not dispute that M.H.-C. is a resident of Ewing. In view of the above referenced custody order and school law, the Commissioner concludes that A.R. is entitled to a free public education in the Ewing school district. Respondent is, therefore, ordered to continue to admit him to its schools as long as there is no change in the Superior Court order that would alter his entitlement. Further, in view of the foregoing, no tuition is due respondent.

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: 3/12/08
Date of Mailing: 3/13/08

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8850-07
AGENCY DKT. NO. 270-9/07

M.H.C., O/B/O MINOR CHILD, A.R.,
Petitioner,
v.
EWING TOWNSHIP BOARD OF EDUCATION, MERCER COUNTY,
Respondents.

M.H.C., petitioner, pro se

Jeffrey F. Belz, Esq., for respondent Ewing Township Board of Education

Record Closed: December 13, 2007 Decided January 28, 2008

BEFORE **DANIEL B. MC KEOWN,** ALJ (t/a):

Petitioner is a resident of and domiciled in Ewing Township, Mercer County, New Jersey. Petitioner alleges her 16 year old brother, A.R., lives with her in her Ewing Township home since on or about September 16, 2007. A.R.'s parents are divorced. Father does not appear to be involved in the life of A.R. Mother lives in Morrisville, Pennsylvania, with her other son, A.R., who attends Morrisville High School. M.H.C. executed and filed an affidavit with Ewing Township school officials on or about September 16, 2007, along with an affidavit executed by A.R.'s mother, seeking A.R.'s enrollment on a tuition-free basis, or as an affidavit student, under N.J.S.A. 18A:38-1 (b). The Ewing Township Board of Education advised petitioner on September 18, 2007 that her application was denied.

On or about September 19, 2008, petitioner filed a Pro Se Residency Appeal under the referenced statute and under administrative rules, N.J.A.C. 6A:22-1, et seq., with the Commissioner of Education after which the matter was transferred November 7, 2008, to the Office of Administrative Law for hearing. On the strength of the appeal, the Board allowed A.R. to be enrolled in its school pending disposition of the dispute. In its filed Answer, the Board alleges A.R. resides with his mother in "another district [and] A.R. should attend public school in that district." (See, Board's First Separate Defense) The Board counterclaims for tuition for the time A.R. was, as it asserts, improperly enrolled in its schools on the strength of an affidavit filed by petitioner.

A hearing was conducted December 12, 2007 at the Office of Administrative Law, Mercerville after which the record closed December 13, 2007. The conclusion is reached in this initial decision that J.H. is not eligible under the provisions of N.J.S.A. 18A:38-1 to attend the Board's schools free of charge. I also conclude petitioner is obligated to pay it $54.75 for each day school was open for instructional purposes from October 8, 2007 when J.H. was enrolled.

ISSUES

The issues to be decided are whether A.R. is entitled to be enrolled in the Ewing Township Board of Education free of charge under N.J.S.A. 38-1 (b) for purposes of receiving a thorough and efficient program of education. If not, is petitioner obligated to pay the Ewing Township Board of Education $54.75 for each and every day school was open for instructional purposes from September 19, 2007 forward.

FACTS

Except as otherwise noted, the facts established by a preponderance of credible evidence in the record are these. David Mikalauskas is the Board's Attendance and Residency Officer. He is assigned the duty of insuring students seeking enrollment are eligible under N.J.S.A. 18A:38-1 to attend the Ewing schools free of charge. Mikalauskas testified that since his initial employment with the Board in 1989, more than 900 pupils have been removed from school enrollment through the discovery of lack of eligibility either through domicile or affidavits. He testified that because Ewing Township borders an urban area, the City of

Trenton, his experience shows that some urbanites and others seek to give custody of their children to relatives in Ewing so that the appearance of enrollment qualification may be secured.

In this case, Mikalauskas explains the reason for denying A.R. enrollment in the Ewing public schools is the failure of his mother, and petitioner, to show either a family or economic hardship as the reason for him to be living in Ewing with his sister, petitioner, while his mother is across the river in Morrisville, Pennsylvania.

A preponderance of the credible evidence in this record establishes the following facts:

1. A.R. is petitioner's brother.

2. The Board acknowledges that A.R. is a resident of Ewing Township.

3. Petitioner attests in her affidavit (R-1) filed with the Board on or about September 16, 2007 that A.R. is living in her home permanently as a member of her family since June 30, 2007.

4. Petitioner attests that the reason A.R. is residing with her and not his parents is:

[A.R.] is currently distressed about living in Morrisville and [his mother] cannot afford him. I [petitioner] am capable of providing him a better life.

5. Petitioner attests she was in the process of securing custody of A.R. at the time of filing the application. It is further noted the Honorable Audrey Peyton Blackburn, J.S.C., by Order dated October 30, 2007, granted petitioner joint legal custody with A.R.'s mother, and granted petitioner residential custody.

6. Petitioner attests she acknowledges that:

> In the event the Board challenges any of the statements I have made, and it is determined that the child is not eligible [to attend Ewing schools free of charge], I will be obligated to pay the school district tuition or all days of illegal attendance..."

(R-1, p.2).

7. At the time she filed her affidavit, petitioner also filed with school officials an affidavit executed by A.R.'s (R-2) mother.

8. Mother attests she is divorced; that she lives in Morrisville, Pennsylvania; that she is employed at a major department store at a local shopping mall; that she does not have the means to support A.R. despite her employment.; that she has one other child living with her at home who attends Morrisville High School; I and, that A.R. should not be enrolled at Morrisville High School because "I [could?] care for [only?] one child at this time."

9. In a case management sheet (R-3) used by New Jersey Superior Court, Chancery Division – Family Part, it is reported to Superior Court that mother earns between $170.00 a week to $290.00 a week. If we assume she earns the higher figure, $290.00 per week, then her annual income would be close to $15,000.00. Official notice may be taken that it is difficult, if not impossible, to provide for one's self on that amount of money in our society and more difficult to raise two teenage sons.

10. Mother attests A.R. will be living with M.H.C. the entire calendar year and that M.H.C. is authorized to make all school-related decisions regarding A.R..

11. The Board's attendance and residency officer, Mikalauskas, caused the district's investigators to confirm A.R. was living with his sister in Ewing Township by way of an at home visit. The investigators affirmatively reported A.R. was living with his sister, petitioner, in Ewing Township.

12. In the case management sheet (R-3), ostensibly completed by petitioner in securing joint and residential custody of A.R. and submitted to the Board after the instant appeal was filed with the Commissioner of Education, petitioner recites that A.R.'s mother was then:

> . . . working part time and not mother was not able to provide [A.R.] with financial [stability] as a young teenager. Additionally, [mother] has no health care for him. I am married with one child

> living in a home that I own in Ewing Twp. I am able to provide him a good home, foundation & stability, with legal rights I will be able to add him to my health plan with no additional cost. He currently resides with me.

13. Petitioner submitted copies of receipts for various purchases she made and many of which are purchases that would be typically made for a teenager such as A.R. Indeed, the Board does not dispute that petitioner does support A.R. gratis

14. Mikalauskas advised petitioner by letter dated September 18, 2007 that her application to have A.R. enrolled in the Ewing Township Public Schools was denied because "the reasons stated in the custody application do not constitute a hardship." (See, Notice of Determination of Eligibility, September 18, 2007 (C-1))

15. Mr. Mikalauskas testified he concluded that a family or economic hardship to justify the enrollment of A.R. in its schools was not established by petitioner as is required by Board policy which itself is based on N.J.S.A. 18A:38-1 (b).

16. When asked to explain what constitutes a 'family or economic hardship' under Board policy, Mr. Mikalauskas testified a hardship exists when, as an example, mother passes away and father is in jail, or, when the student has been abused by mother and father is not in the picture, or, when parents are in Florida and student has travelled thousands of miles to live with aunt or uncle, or, the student is in a situation in which should he/she remain, the situation would be detrimental to his health, welfare, or safety.

17. The Board seeks a daily tuition rate of $54.75 from petitioner. Mr. Mikalauskas testified that the Department of Education certifies the district's annual per pupil cost, which in this case is $9,911. That figure is then divided by the number of school days, which in this case are 181. The quotient, or $54.75, represents the daily average per pupil cost in the Ewing Township School District.

ANALYSIS

N.J.S.A. 18A:38-1 provides that:

> Public schools shall be free to the following persons over five and under 20 years of age:
>
> a. Any person domiciled who is domiciled within the school district.
>
> b. (1) Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that intends so to keep and support the child gratuitously for a longer time than merely through the school term * * * and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district . . .
>
> If in the judgment of the board of education the evidence does not support the validity of the claim by the resident, the board may deny admission to the child. The resident may contest the board's decision to the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner on the validity of the claim and shall heave the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection. . .
>
> No child shall be denied admission during the pendency of the proceedings before the commissioner. In the event the child is currently enrolled in the district, the student shall not be removed from school during the 21-day period in which the resident may contest the board's decision nor during the pendency of the proceedings before the commissioner. If in the judgment of the commissioner the evidence does not support the claim of the resident, he shall assess the resident tuition for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner win which orders of the commissioner are enforced . . .

The statute authorizes boards of education to challenge the validity of affidavits submitted by parents and relatives to determine if the pupil is entitled to a free education in the particular district. The statute was amended in 1977 to prevent the following situation:

> Parents sometimes attempt to send their children to schools in districts other than their own without actually changing their residences. It is a very simple matter for a parent to request a relative or friend who resides within the district to provide the child with an official address within the district for purposes of school attendance. Further, if the friend or relative agrees to sign an affidavit, the school district must accept the child as a student within the system.
>
> [Statement to Senate Bill No. 1464-L. 1977, c. 373.]

In addition to the above statute, State Board of Education rules, at N.J.A.C. 6A:22-3.2 (a), 1 instruct that a student, kept in the home of a person other than the student's parent or legal guardian, is eligible to attend school in that school district if:

> i. The student's parent or guardian has filed, together with documentation to support its validity, a sworn statement that he or she is not capable of supporting or providing care for the student due to family or economic hardship and that the student is not residing with the other person solely for the purpose of receiving a free public education.

The same rule, at (a) 4 allows:

> 4. A student shall not be deemed ineligible under this subsection solely because a parent or legal guardian gives gifts or makes limited contributions, financial or otherwise, toward the welfare of the student, provided that the resident keeping the student received no payment or other remuneration from the parent or guardian for regular maintenance of the student.

One who seeks to have an individual enrolled in a school on the basis of affidavits has the burden of persuasion to demonstrate the individual is entitled to attend the school free of charge. In this case, petitioner has the burden of persuasion to show the necessary entitlement. Petitioner is required to demonstrate that (1) she is domiciled within respondent's school district; (2) she is supporting A.R. gratis; (3) A.R.'s mother is not capable of supporting or providing care for him due to family or economic hardship; and (4) A.R. is not residing with petitioner solely for the purpose of receiving a free public education in respondent's school district.

The Board does not dispute that petitioner is domiciled within the Ewing Township school district, it does not dispute that petitioner supports A.R. gratis, and, it does not claim that A.R. resides with petitioner for the sole purpose of attending the Ewing Township public schools. The Board does contend petitioner failed to show a family or economic hardship.

Whether a hardship exists is determined on a case-by-case basis. As examples, in K.M. v. Board of Education of Ocean Township, 96 N.J.A.R.2d (EDU) 632, a fourteen-year-old student had been living with her mother and brother in a two-bedroom apartment in Neptune, N.J. The student and her brother shared a bedroom, which was deemed inappropriate by the family as the student reached her teenage years. The student's mother could not afford a three-bedroom apartment, so the student moved into the grandmother's home in Ocean Township. The commissioner found that a sufficient economic hardship existed to justify the student's enrollment in the Ocean Township district schools. In McClean v. Board of Education of Township of Ocean, 96 N.J.A.R.2d (EDU) 632, it was found to be inappropriate for a child entering adolescence to share a bedroom with her brother when their parents could not afford a larger apartment. Under the circumstances a hardship was found to exist. In Y.I.S. v. Northern Valley Regional High School District, EDU 10964-97, Initial Decision (December 6, 2001), adopted, Comm'r (January 8, 2002), aff'd, State Board (May 1, 2002), the travel schedule and working hours of a single parent were found to constitute a hardship.

The issue of what constitutes a family or economic hardship was discussed by the State Board of Education in J.B. v. Board of Educ. of Tp. of Ocean, 96 2d (EDU) 628, remanded, State Bd. of Educ. Dec. 4, 1996, on remand Feb. 11, 1997, remanded, State Bd. of Educ. Sept. 3, 1997. The State Board requires a two-part test for establishing hardship: (1) the presence of a family or economic hardship, and (2), parental incapability of supporting or providing care for the child due to that hardship.

In this case, it is clear mother does not have the financial resources necessary to raise two sons, each of whom is in their high school years. Indeed, when A.R. was living with his mother in Morrisville the evidence shows he was not covered by health insurance. Given the condition of present day health care and costs, that element could by itself constitute a hardship on A.R. that would affect him the rest of his life.

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The examples provided by Mr. Mikalauskas present what he believes to be a hardship and may well fit within the two-prong test required by the New Jersey State Board of Education. But the lack of parental regular and sufficient income for food, clothing, housing, and medial costs, as well as miscellaneous costs associated with raising children, does constitute a hardship. The consequence of that hardship is an incapacity by the parent to provide appropriate care for the child.

CONCLUSIONS

Based on a preponderance of credible evidence, and the stipulations entered by the Board on this record, **I CONCLUDE** petitioner met her burden to demonstrate A.R. is entitled to attend the Ewing schools free of charge under N.J.S.A. 18:38- b (1). The Board's counterclaim for tuition is denied based on the conclusion reached.

It is so **ORDERED.**

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

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

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

January 28, 2008
January 28, 2008
DATE

DANIEL B. MC KEOWN, ALJ (t/a)

Date Received at Agency:

1-28-08

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JAN 29 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

/lam

DOCUMENTS IN EVIDENCE

For the Court :

C-1 Notice of Determination of Eligibility

For petitioner:

P-1 Verified Information Sheet
P-2 Affidavit
P-3 Case Information Sheet

#180-08

OAL DKT. NO. EDU 3055-08
AGENCY DKT. NO. 48-2/08

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have exceptions and replies filed by the petitioning Board of Education (Board) and the respondent Department of Education (Department) pursuant to the provisions of *N.J.A.C.* 6A:10A-8.7(c).[1]

Upon consideration of the record and the parties' arguments on exception, for the reasons that follow, the Commissioner adopts in part, and rejects in part, the Initial Decision of the Administrative Law Judge (ALJ).

STANDARD OF REVIEW

Initially, the Commissioner concurs with the ALJ that the Board in this matter bears the burden of proving its entitlement to the funds sought by a preponderance of competent, relevant and credible evidence. (Initial Decision at 17).

[1] In its exceptions, the Department included introductory "background" information, together with a related certification of Department Budget and Policy Analyst David Joye, incorporating factual representations not proffered at hearing. The Board vigorously objected to such inclusion, noting that parties to contested matters may not use exceptions to supplement evidence and testimony. The Commissioner agrees, and, accordingly, has not considered this portion of the Department's submission in rendering the within decision. *N.J.A.C.* 1:1-18.4(c).

The Board has contended on exception – as it consistently did before the ALJ – that its burden lies solely in successfully countering the reasons for denial given in the Department's written decision. According to the Board, *N.J.A.C.* 6A:10A-8.7(a)1 requires that the Department's actions be judged exclusively on the basis of the specific written reasons included in its denial letter, and that the Department cannot be permitted to "cobble together" facts from the administrative record on appeal in an attempt to construct *post facto* justifications for its actions. The Board asserts that if the Department's stated reason for denying a request can be shown to lack sufficient evidentiary foundation or to be based on factually or legally unsupportable reasons and assumptions, then the Board must prevail on appeal. (Petitioner's Exceptions at 3-5; see also T1-T3 *passim*, and Petitioner's Post-hearing Brief at 6-7 and *passim* thereafter)

This position, in the Commissioner's view, effectively shifts the burden to the Department and improperly relieves the Board of its affirmative obligation to demonstrate on appeal that programs or expenditures denied by the Department are, in fact, necessary for adequate and efficient provision of required preschool education – an obligation that surely cannot be met by seizing upon the letter of the Department's written determination while ignoring, or attempting to foreclose, the more expansive explications presented at plenary hearing. As pointed out by the Department, the rule cited by the Board – although it does, indeed, require the Department to provide specific reasons for denying a program or expenditure – places no limitations on the scope of the ALJ's and Commissioner's review (Respondent's Reply at 1-3); moreover, the more directly applicable rule, *N.J.A.C.* 6A:10A-8.6(c) expressly states that – over and above the documents and information submitted to the Department by the Board – the record on

appeal shall include "any additional information relied upon by the Department in making the determination at issue."

The Board has further contended that the Supreme Court requires the Department to view the Board's assessment of its own particularized needs with deference, which may not be overcome without sufficient reason. (Petitioner's Exceptions at 5-6; see also Petitioner's Pre-hearing Brief at 5-6) However, as correctly noted by the Department (Respondent's Reply at 3-4), the deference invoked by the Board refers to the Department's review of district requests, not to the Commissioner's review on appeal; certainly, such deference cannot work to preclude the Department (or the Commissioner) from denying insufficiently justified requests – a result surely not intended by the Court, and one that would be manifestly contrary to sound public policy.

Accordingly, if the Board is to prevail on any of the issues in dispute in this matter, it must demonstrate to the Commissioner that the funding it seeks is, in fact, necessary to adequately and efficiently provide required preschool educational programs; anything less would prevent the Commissioner from responsibly exercising the duty of oversight charged to her by law. *Board of Education of the City of New Brunswick, Middlesex County v. New Jersey State Department of Education,* Commissioner's Decision No. 122-05, decided March 15, 2005; *Board of Education of the City of Elizabeth, Union County v. New Jersey State Department of Education,* Commissioner's Decision No. 127-06, decided April 7, 2006; *Board of Education of the Town of Phillipsburg, Warren County* v. *New Jersey State Department of Education,* Commissioner's Decision No. 166-04, decided April 21, 2004.

EXTENDED DAY/EXTENDED SCHOOL YEAR PROGRAM

Turning, then, to the Board's request for funding for an extended day/extended school year (ED/ESY) program in light of the requisite standard of review, the Commissioner concurs with the ALJ that the Board is not entitled to such funding.

The Board contends on exception that – contrary to the finding of the ALJ, who, according to the Board, did not apply the proper standard of review and erroneously focused on irrelevant evidence – it is entitled to the requested funding for its extended day/extended school year (ED/ESY) program. The Board asserts that the Department's stated basis for denial was the Board's exceeding of the six-hour, 180-day minimum preschool program required by law and the apparent overlap of the ED/ESY program with wrap-around services funded by the Department of Human Services (DHS) – the former of which is not precluded by any court decision, statute or rule when based on student need, and the latter having been discounted at hearing through evidence and argument indisputably demonstrating the qualitative difference between the ED/ESY program and DHS-provided child care. (Petitioner's Exceptions at 6-11; see also Post-hearing Brief at 7-9 and 13-17) The Board further contends that the ALJ erred in construing too narrowly the National Institute for Early Education Research (NIEER) study, which – when read properly so as to recognize its broader point that more time in the classroom yields better results for disadvantaged preschoolers – fully supports the Board's determination that the student population it serves would benefit significantly from the ED/ESY model – a determination to which deference should have been accorded as required by the Court. (*Id.* at 11-15; see also Post-hearing Brief at 9-13)

The Commissioner, like the ALJ, is unpersuaded by the Board's arguments. Initially, the Commissioner notes that the State Board of Education has acted

to fulfill the mandate of the Supreme Court that all children in *Abbott* districts be afforded the opportunity to obtain a high-quality preschool education by defining the elements it believes to constitute such education and establishing processes to ensure that sufficient funds are available to support them; to this end, the State Board has directed that children in *Abbott* districts be provided with comprehensive full-day, full-year preschool programs meeting stringent educational and staffing requirements. *N.J.A.C.* 6A:10A-2.1 *et seq.*; *N.J.A.C.* 6A:10A-1.2 (defining "full-day, full year" as a six-hour comprehensive educational program offered for not less than 180 days over the course of the ten-month academic year) Thus, as recognized by the ALJ, and previously by the Commissioner in *Phillipsburg, supra*, any request for funding of preschool education beyond the extensive program already required by law must be justified by a compelling showing that even this program – which is presumed to be fully adequate for its purpose and can in no way be accurately characterized as a minimally sufficient "base line" – does not enable students to enter kindergarten ready to succeed in accordance with *N.J.A.C.* 6A:10A-2.1. In the present matter, as set forth by the ALJ in the Initial Decision at 16-17 and detailed by the Department in its Post-hearing Brief at 4-13 and 21-24, no such showing has been made; to the contrary, both Department and Board witnesses attested that the district is able to meet the needs of its preschool students during the regular school day. (Initial Decision a 6, 12; Testimony of Ellen Wolock at T2:232-34, 291-98, 302;[2] Testimony of Olga Hugelmeyer at T1:160-67)[3]

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[2] This and all similar citations refer to transcripts of OAL hearings held on March 13, 2008 (T1), March 18, 2008 (T2) and March 19, 2008 (T3), respectively, followed by applicable page numbers.

[3] Although the Board has evidently been providing ED/ESY programs at some of its schools for a number of years, funds budgeted for this purpose were neither identified nor scrutinized as such, nor was express approval ever granted by the Department. (Initial Decision at 4-5; Board's Pre-hearing Brief at 7; Exhibit P-1 at Bates stamp 092; Testimony of Tracy Markowitz at T1:27; Department's Reply Exceptions at 9, note 7; Testimony of David Joye at T2:62-65, 125-33, 161-63; Testimony of Ellen Wolock at T2:182-83)

Moreover, even entertaining, *arguendo*, the Board's contention that the NIEER study (Exhibit P-6) supports its claims,[4] the Commissioner could not accept a simple "more is better" rationale without a specific factual nexus to the identified unmet needs of district students, which was not provided herein. Finally, as to the Department's reference to "overlap" with DHS wraparound services, the record is clear that such reference was to time and funding, not to educational character, and that the Board would, in fact, be receiving State funding from two sources for the same time period had its request been granted. (Department's Reply at 7-10; Testimony of David Joye at T2:149-60; Testimony of Beverly Wellons at T2:321-22) Accordingly, the Department did not err in citing "overlap" as an additional reason for denying the requested funding.[5]

LUNCH ASSISTANTS

Applying the requisite standard to the Board's request for funding for lunch assistants, the Commissioner adopts in part, and rejects in part, the recommendation of the ALJ.

Both parties take exception to the Initial Decision on this point, the Department to the ALJ's recommendation that funding should be provided for 165 lunch assistants for one hour and the Board to the fact that such funding was limited to one hour

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[4] The Department objects to this argument as an interpretation of counsel having no support in the record and not consistent with the testimony of any witness at hearing. (Department's Reply at 10-11) The Department had additionally objected to the introduction of this document into evidence because it was not submitted by the Board either in support of its original application or during subsequent discussions prior to appeal; however, it was ultimately allowed by the ALJ. (T1:29-32, T2:6-11)

[5] The Department recommended that further action be considered to address the possibility of certified teachers being paid twice for overlapping hours, so as to, in effect, be paid for longer days and/or longer school years than they actually worked. (Department's Reply at 9-10) Because the present record does not permit a determination on this point and the Commissioner has an obligation to ensure the effective and efficient use of *Abbott* funds, the Department's Office of Fiscal Accountability and Compliance will be directed to investigate this matter.

rather than granted in full. The Department contends that its use of a 1:3 assistant-to-classroom ratio to determine that 55 was the appropriate number of lunch assistants for the district reflects what it has found to be reasonable, customary and consistent with practices in *Abbott* districts statewide; furthermore, according to the Department, this level of support could be properly effectuated by the Board in this instance – so as to maintain the required 2:15 and 1:15 teacher-to-student ratios during lunch and nap times, respectively, *without* additional lunch assistants – if teachers and teacher assistants were held to the half-hour lunch specified in their contract or relief teachers were utilized for lunch purposes, as they are in other *Abbott* districts, rather than (less appropriately) for specialty instruction in subjects such as physical education, music and art. The Department further stresses that funds for lunch assistants were sought through a special request[6] – *i.e.*, a one-year request either exceeding or not fitting within guidelines for a line-item category on the budget submission form – so that the Board was required to provide a detailed justification including documented evidence of need and effectiveness, which it did not. (Respondent's Exceptions at 4-9; see also Post-Hearing Brief at 13-17 and 24-25)

The Board in turn objects to the ALJ's finding that a 2:15 teacher-to-student ratio need not be maintained during student nap time. According to the Board, the ALJ's provision of single-adult (1:15) coverage during this period – when many students remain active, according to the uncontradicted testimony of Board witnesses – compromises student safety by not allowing for adequate supervision if the one adult must leave the classroom for any reason; moreover, the Board continues, it is inconsistent

[6] The request is erroneously characterized as a line item in the Initial Decision at 2. See Exhibit P-1 at Bates stamp 161; see also testimony of Tracy Markowitz at T1: 9-12, and Testimony of David Joye at T2:62.

with his (correct) finding that safety and security considerations require that two adults be present during lunch hour. The Board asserts that the Department's decision – with respect to both lunch and nap times – was based on inaccurate assumptions about the length of teacher lunch hours, and on arbitrary application of a 1:3 assistant-to-classroom ratio that ignores the district's actual circumstances – including the fact that the Board cannot utilize relief teachers for lunch purposes, as do other *Abbott* districts maintaining a 2:15 teacher-to-student ratio, because they are assigned elsewhere. (Petitioner's Exceptions at 15-21; see also Post-Hearing Brief at 18-23)

Upon review, the Commissioner finds that the Department correctly determined the appropriate number of lunch assistants needed by the Board. The ALJ's recommendation that the requested 165 positions be funded during the student lunch hour is based on his categorical acceptance of the Board's established operational pattern, with teachers permitted to take a one-hour lunch rather than the contractually specified half-hour,[7] and relief teachers unavailable because they are assigned to deliver specialty instruction. However, as evidenced by the testimony of Department witnesses – both the budget analyst involved in making the decision under appeal and the educational expert with whom he collaborated, who was directly familiar with the district's lunch practices – this pattern could readily be altered to make more efficient use of available resources and bring the district's costs and staffing allocations more into line with those of other districts and with best practices, while fully complying with staffing ratios designed to ensure adequate student supervision; indeed, the Department has been working with the

[7] The Commissioner notes that no past or current contract was ever produced specifying a one-hour lunch for teachers and teacher assistants; Exhibit P-19 is a proposed successor agreement pertaining to the 2009-10 and 2010-11 school years. See also Initial Decision at 7; Statements of counsel at T2:46; and Testimony of Olga Hugelmeyer at T1:216-219 and T2:52-58.

district to effectuate exactly that result. (Testimony of David Joye at T2:113-23, 168-70; Testimony of Renee Whelan at T3:11-125) Thus, the Department's determination to limit funding to 55 lunch assistants was neither an arbitrary application of "numbers crunching" nor a mistake based on incorrect factual assumptions; rather, it was a fully informed judgment against State subsidization of an inefficient and ineffective operational arrangement, and must accordingly be upheld on appeal.

TECHNOLOGY INFRASTRUCTURE

Finally, for similar reasons, the Commissioner rejects the ALJ's recommendation that the Board be granted its special request for $44,000 in technology infrastructure funding.

On exception, the Department again contends, as it did before the ALJ, that the Board's existing $132,000 aid allotment – which represents $800 per class that can be spread across all in-district preschool classrooms – is sufficient for infrastructure purposes, which are additionally supported by initial start-up funding for new classrooms ($44,100 in 2008-09, for 18 new classrooms). According to the Department, the fact that the Board was granted an identical request for the 2007-08 school year does not bind the Department to grant similar requests in subsequent years, and certainly cannot prevent the Department from rectifying inefficient use of funds. Moreover, the Department asserts, a special request for technology funds cannot be granted unless the Department can verify that the entire amount of available technology funding has been appropriately allocated – a standard which the Board did not meet, either before the Department or at hearing. The Department notes that its denial of the Board's request is in no way inconsistent with its stance on the importance of technology, as evidenced by the significant level of support provided to the district for this purpose; it further rejects the

Board's contention that denial of the requested special funding will result in elimination of telephone service, the router, internet access and maintenance/support services in three schools, observing that these fundamental costs should be addressed before expending funds, as the Board does, on nonessential items such as digital cameras and smart board bulbs. (Respondent's Exceptions at 9-15; see also Post-hearing Brief at 17-18 and 26-27)

The Board counters that the reason proffered by the Department's denial letter was the sufficiency for infrastructure needs of the Board's $800 per classroom allocation, so that the Department cannot now claim that the Board's request was inadequately supported or that funds could be appropriately reallocated from elsewhere in its budget. According to the Board, the ALJ assessed the evidence and (correctly) concluded that the Board had demonstrated its need for the funding at issue, so that the Department's position to the contrary should be rejected as based on unsupported assumptions, conjecture and speculation, as well as considerations other than need – as evidenced by its own prior approval of the same request. (Board's Reply at 8-13; see also Post-hearing Brief at 23-27)

The Commissioner, however, finds that the ALJ's decision was predicated on need for the items requested while ignoring the Board's manner of addressing its technology expenditures. Although the need for the services at issue in this matter – basic internet and telephone connectivity – is beyond serious dispute, what *is* in question is the need for funding over and above amounts ordinarily provided to support preschool technology.

Notwithstanding that the Board has in the past been allowed to fund infrastructure needs for Schools 50, 51 and 52 through special requests, now that this situation has come to the Commissioner's attention on appeal, she cannot condone and

perpetuate inefficiency by allowing past practice to compel the award of additional funding in an area where the Board has failed to exercise reasonable fiscal discretion. As the Department's denial reflects (Testimony of David Joye at T2:95-112), there is no indication on this record that the Board made any attempt, before seeking additional funding, to first address its basic technological needs, then assess how best to use remaining allocations; to the contrary, the record clearly suggests that the Board treats its $800 per-class allotment as a series of self-contained entitlements, with each class's expenditures expanding to fill the amount available regardless of broader needs and no consideration given to ongoing infrastructure components.[8] Under these circumstances, the Commissioner cannot be persuaded, as she must by law, that the requested *funds* – as opposed to the services identified as their intended purpose – are necessary for the Board's adequate and efficient provision of preschool services.

In so holding, the Commissioner fully recognizes that she is requiring the Board to make choices, since, in the ever-burgeoning realm of technology, services and materials arguably of benefit to students are always likely to exceed levels that can realistically be supported by public funds. However, maintenance of a rich learning environment through use of technology (Exhibit P-15) is not inconsistent with efficiency and fiscal prudence, and proposed expenditures must always be scrutinized to identify items which can be done without, deferred, or provided in a more efficient manner while

[8] Tracy Markowitz testified that a classroom not needing a new smart board lamp ($300) would then have more money to spend on software, or that if software were not purchased, on a digital camera; she further testified that if the Board's special request is not granted, much of the existing classroom technology will be rendered useless due to lack of connectivity. (T1:113, 122-127, 130-131) Olga Hugelmeyer testified that funds are exhausted each year because classroom teachers are informed of the remaining balance on their $800 allotments as the year progresses and invited to submit additional order(s) based on their further needs assessments; she, too testified that denial of the special request would cut off phone and internet connectivity to the affected schools. (T3:133-36)

still meeting student needs; for those items deemed truly necessary but for which funds are otherwise unavailable, the special request process is then appropriately utilized.

CONCLUSION

In sum, the Commissioner finds no merit to the Board's claims that the Department's January 15, 2008 denial of the funding requests herein at issue in any way violated constitutional remedies, court mandates, rules of the State Board of Education or departmental guidelines, nor to its claim that such denial will prevent the district from providing required and needed programs, services, positions and resources for preschool students. (Petition of Appeal at 1-10) Rather, for the reasons set forth above, the Commissioner finds that the Department's actions were reasonable and lawful in all respects, and that the Board on appeal has failed to meet its burden of proving that the funding it has requested is necessary to provide required preschool educational programs in an adequate and efficient manner.

Accordingly, the Initial Decision of the OAL is adopted in part, and rejected in part, as set forth above, and the petition of appeal is dismissed in its entirety.[9]

IT IS SO ORDERED.[10]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 4/21/08

Date of Mailing: 4/21/08 (Faxed)

[9] The Commissioner notes that, at pages 10-11 of the Initial Decision, the Early Screening Inventory-Revised (ESI-R) is inadvertently referred to as the "ECER" (Early Child Environmental Rating Scale, or ECERS). (Department's Exceptions at 4, note 7)

[10] Pursuant to *N.J.A.C.* 6A:10A-8.7(a)5 and *N.J.A.C.* 6A:10-3.7(a)5, this decision is a final agency action appealable to the Appellate Division of the Superior Court within six (6) days of the Commissioner's decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 03055-08
AGENCY DKT. NO. 48-2/08

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION ,
Respondent.

Richard E. Shapiro, Esq., for petitioner

Melissa Dutton and **Joyce Atkins,** Deputy Attorneys General (Anne Milgram, Attorney General of New Jersey, attorney)

Record Closed: March 20, 2008 Decided: March 25, 2008

BEFORE **J. HOWARD SOLOMON**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This is an appeal by the Board of Education of the City of Elizabeth (petitioner or District) from the denial of its request for State funding of certain items contained in its preschool budget for the 2008-2009 fiscal year. Pursuant to the mandate of the New

Jersey Supreme Court, Abbott school districts must provide high quality preschool programs to their three-and four-year old children and the Commissioner of Education (Commissioner) must ensure that such programs are adequately funded and assist local districts in implementing them.[1] The petitioner challenged the amount of funding in three categories, namely, its extended day/extended school year (ED/ESY) program, the reduction in funding for lunch assistants and the denial of funding for its technology infrastructure.

Petitioner's appeal was filed with the Commissioner on February 14, 2008, and was referred to the Office of Administrative Law (OAL) on February 15, 2008 as a contested case. Hearings took place on March 13, 18 and 19, 2008, and the parties were given until March 20, 2008 for the submission of post hearing briefs, on which date the record closed.

FACTUAL DISCUSSION

The petitioner, an Abbott district, produced several witnesses in support of its request for funding in these three areas. Tracy Markowitz, the Interim Director of Early Childhood Education for the District, testified that on November 15, 2007, petitioner submitted its budget proposal (Exhibit P-2) to the New Jersey Department of Education (respondent or Department), which included funding for its ED/ESY Program, funding for 165[2] lunch assistants, and a special request of $44,000 for technology infrastructure. According to her, the teachers' and administrators' salaries connected with the ED/ESY Program were budgeted in the line items for teachers and administrative staff (principals, vice principals, clerks). Funding of $705,171 for lunch assistants was also a line item.

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[1] Abbott v. Burke, 153 N.J. 480, 505-508 (1998) (Abbott V) and Abbot v. Burke, 163 N.J. 95, 120 (2000) (Abbott VI).

[2] Originally, the proposed budget requested 139 lunch assistants, but it was stipulated at the hearing that the correct number was 165 lunch assistants, one for each preschool class.

By letter from the Department, dated January 15, 2008 (Exhibit P-3), the budget of the District was approved, with the exception of funding for the ED/ESY Program, reduced funding for lunch assistants since only fifty-five assistants were approved from the original request of 165, and of funding for the special request of technology infrastructure, which was denied. Regarding the ED/DYS Program, the Department claimed that the budget it approved contained sufficient funding for a six hour, 180 day education program mandated by Abbott and the regulations, but "does not include funding for extended day or summer wrap-around programs[3], which are provided by the Department of Human Services [DHS]." (Exhibit P-3). The Department also reduced funding for lunch assistants to $235,345 for fifty-five lunch assistants instead of the 165 requested by the District "based on a ratio of one lunch aide for every three classrooms, and salaries have been adjusted to fit the regular day/year salary guide." (Id.) The technology infrastructure request was denied altogether on the basis that classroom technology funds allotted for each classroom were to be used for infrastructure costs. (Id.)

In her description of the ED/ESY Program, Markowitz explained that children receive one and one-half additional hours of education per day than those in the regular schedule since classes begin at 7:45 a.m. and last until 3:45 p.m. Furthermore, the regular schedule starts in September while the ED/ESY Program starts in August. In supporting the need for ED/ESY funding, she discussed the Early Screening Inventory Revised (ESI), an assessment tool to determine those children who may need intervention and referral to a child study team which she confirmed was administered by learning consultants (LTDC), not by teachers. Under this assessment tool, there are three categories: "okay," "rescreen," and "refer." The "referral" category is for those children who appear to have difficulties in language, fine motor and other essential skills, and require referral to a child study team. (Exhibit P-4). The "re-screen" category deals with children who may, but not necessarily, need intervention. (Exhibit P-4). The children in the "okay" category are those children who require no referral. She stated that the State-wide "referral" average should be five to seven percent, while petitioner's

[3] Wraparound provides longer school days for children of working parents.

average was higher, at eleven percent. Children under the "okay" category should be at the eighty-five percent level, while petitioner's level reflected seventy-nine percent.

She mentioned that there were four schools in the District with an ED/ESY Program and three schools with ED (extended day) only. While the regulations require six hours per day of education, she felt that children were receptive to more instructional time beyond the six-hour minimum requirement. She referred to the study done by the National Institute for Early Educational Research (NIEER) (Exhibit P-6), which studied early child development and the positive results of a longer preschool program. She prepared comparison graphs (Exhibit P-7) to support the District's position that ED/ESY children are better prepared for entry into kindergarten than those in the regular day program. She claimed that wraparound services provided by DHS (further discussed below) were essentially childcare services which did not provide an instructional component since the staffs in wraparound were not required to be certified teachers as in the ED/ESY Program. The graphs she prepared (Exhibit P-7), which were also based upon the Early Learning Assessment System (ELAS) for literacy, made a comparison between the ED/ESY Program and the regular program. She opined that the ED/ESY Program gave a higher proficiency level in phonological awareness and word recognition/fluency.

In discussing these comparison graphs, she initially thought the information on the State percentages, against which she made her comparisons, came from an e-mail provided by a representative of NIEER, when in fact it came from respondent. She further corrected her testimony on the results of the Early Screening Inventory (ESI-R) (Exhibit P-4), indicating that the State percentages were not State averages, but expected percentages. Accordingly, petitioner did not make its analysis in comparing test results on State-wide averages, only on expected averages. She also acknowledged that some teachers work in the wraparound program.

Markowitz also discussed the impact that reduced funding for lunch assistants would have on the District. In the District, lunches are not only served in classrooms, but also in temporary trailers which requires additional time since the lunch assistant must leave the school building and walk to the trailers. Additionally, there is a safety

concern caused by such a reduction where a teacher or assistant teacher would not be able to address an emergent situation without leaving the rest of the children unattended. Petitioner wants to maintain two adults for every fifteen students, but the funding approved by the Department would only allow for one lunch assistant for three classrooms. Each classroom contains fifteen students for a total of forty-five children per lunch assistant. She also mentioned that there are disciplinary concerns which are not infrequent among three and four-year-olds, which might not be addressed if staffing were reduced. Additionally, the District received a rating of over five on the Early Child Environmental Rating Scale (ECERS), which she felt it would lose with such a reduction. Lunch not only includes preparation, but children washing their hands and brushing their teeth, as well as getting ready for a nap. She claimed that since the 1999-2000 school year, petitioner had been approved for one lunch assistant for each class.

Markowitz also discussed the need for technology infrastructure in order to maintain preschool learning expectations, which involve critical thinking skills. She related that most students in the District do not have computers at home and rely upon the District for their technology experiences. Part of infrastructure includes access to the internet through servers and routers. She disputed the Department's decision that the allotment of $800 for technology support, which is given to each class, would accomplish those goals. The $800 allotment is used to purchase replacement items, such as smart board bulbs, which cost approximately $300 each, and cartridges. She presented a sampling of technology costs for Schools 50, 51, and 52 (Exhibit P-16), which included a breakdown on how the $800 allotment is used. This sampling only represented costs to the present, and not further anticipated costs before the school year ends. Schools 50, 51 and 52 each contain twenty class rooms and in each class room there is a smart board. She noted that funding for technology infrastructure had been approved by the Department for the past nine years, with $44,000 being approved for the past school year.

Olga Hugelmeyer, the District's Assistant Superintendent for Teaching and Learning, mentioned that the ED/ESY Program had been in place for some time. It was established in School 26 in 1999, in School 50 in September 2001, in School 51 in

September 2004, in School 52 in September 2005, in School 29 in January 2006, in School 30 (ED only) in September 2006, and in School 31 (ED only) in September 2006. In the school year 2008-2009, there will be three new schools (Schools 21, 27 and 28) which are scheduled to provide extended services. These schools, with the exception of Schools 50, 51 and 52, which are stand-alone preschools, will house pre-K through eighth grade. She, too, is familiar with the wraparound program which she asserts is lacking an educational component since the ED/ESY Program requires certified teachers, while the wraparound program does not. The District does receive funding for a two-hour wraparound program at six sites where a half hour is used in the morning and an hour and a half is used for after school hours.

While the District is a large Abbott district, where she felt there would be more at-risk students, she did, however, confirm that the educational needs of the students were met during the regular day school hours of 8:15 a.m. to 3:00 p.m. She further noted that the District selected students for the ED/ESY Program on a lottery basis, where two hundred students were accepted at each site. Therefore, any student, not just at-risk students, could be admitted under the lottery system, even children who were screened as "okay" under ESI-R screening.

With regard to lunch assistants, there are seven or eight children seated at a table, with two tables per classroom. Classrooms are limited to fifteen students. A "family-style" lunch is served which requires supervision. She also mentioned that the District received an ECERS score of 5.3 which the District did not want to lose with a reduction in lunch staffing. She reiterated that a ratio of two adults per class of fifteen students was necessary to maintain proper supervision and adult interaction. She stated that since the District allows teachers and assistant teachers a one-hour lunch, the reduction would have an adverse effect on safety and supervision. The time for lunch is approximately two hours, which includes cleanup and nap time. She mentioned that during nap time, many students do not sleep, but remain active, reiterating the need for the presence of two adults per fifteen students. She originally thought that there was a written contract for teachers and assistant teachers for their lunch hours, but then realized that there was no written contract in that regard, only an unwritten practice. A provision will be in place in a written contract for the 2009-2010 and 2010-2011 school

years for teacher and assistant teacher lunch hours. She noted that the practice of allowing teachers and assistant teachers a one-hour lunch had been in effect since October 1994.

On the issue of infrastructure funding, she stated that the Department had approved such funding over the past five years in amounts ranging from $32,000 to $44,000 and that if such funding were not approved for the 2008-2009 school year, internet and telephone services, among other services, would be lost. She related that the infrastructure justification for the 2008-2009 school year was identical to the justification submitted for the 2007-2008 school year where $44,000 was approved. The 2008-2009 school year was the first year the Department denied such funding. The District also cited the Department's treatise entitled "Preschool Teaching & Learning Expectations: Standards of Quality" (July 2004), which provides that "[a] rich learning environment contains the following elements: . . . the use of technology, such as computers with age-appropriate software, to enhance the development of critical thinking skills." (Exhibit P-15).

Susan Mettlen, the District's Director of Technology and Information Systems, prepared the request for infrastructure funding. She mentioned that this funding is necessary for telephone service, a router which provides internal and external networking capabilities, access to the internet, and fixed and annual service costs in implementing this technology. If funding were denied, these services would not exist. She noted that preschoolers use computers most of the school day, even the internet.

Corey Weiss, a data analyst for petitioner, referred to the Terra Nova Standardized Assessment (Terra Nova) to support the District's request for ED/ESY funding at Schools 50, 51 and 52. He explained that the comparisons of language, math and reading scores (Exhibit P-17) justifies funding the ED/ESY Programs since those students in the program performed better than those in regular day programs. He admitted, however, that he was not familiar with all facets of Terra Nova, such as when, at the kindergarten level, it should administered. He further confirmed that his findings did not take into account certain variables, such as dual language, environmental or

other differences, but claimed that he took the entire school district into consideration which, in his opinion, negated such variables.

The first witness for the Department was David Joye, its Budget and Policy Analyst for early childhood development. His duties include developing and implementing guidance for budget expenditures as well as reviewing budgets of the various boards of education. He confirmed that the Department approved petitioner's budget for the 2008-2009 school year in the sum of $44,825,158 to implement its approved Abbott Preschool Program. (Exhibit P-3). This was less than the requested budget of $45,946,763 submitted by the District (Exhibit P-2) since there was a reduction in line items for teacher and administrative salaries which the District had included for its ED/ESY Programs, a reduction in funding for lunch assistants and a denial of funding for technology infrastructure. He mentioned that the Department approved all of the special requests made by the District, with the exception of funding for technology infrastructure and further stated that if a special request were approved in one school year that approval does not bind the Department in succeeding school years. In submitting a special request, a justification must be submitted with the proposed budget. He stated that nowhere in the District's budget line items were there entries specifically for ED/ESY Programs. He claimed that he only learned of the ED/ESY Programs in March 2007, and the Department followed with a letter to the District on March 2, 2007 (Exhibit R-1) requesting confirmation. The District responded on March 12, 2007 [Exhibit R-2(a)-(c)] confirming its ED/ESY Programs. Joye noted that the regulations only require that preschool children attend a minimum of a six-hour day for 180 days and further mentioned that the District offered wraparound services through DHS, a program which provides longer school days for children of working families and which is funded by DHS. He acknowledged that he participated in the preparation of the letter dated January 15, 2008 (Exhibit P-3) which approved the budget for the District and authored the comments on the budget reductions.

While the regulations only require a six-hour day, 180-day school year, Joye acknowledged that districts could seek additional funding beyond the minimum, but stated that that was not done here. He did state, however, that the Department allowed

the District a six-hour forty-five minute school day which was beyond the minimum, not, however, the eight hours requested.

While he claimed that he only became aware of the ED/ESY Program recently, he was shown a letter from the District dated June 1, 2007 (Exhibit P-20), which discussed the ED/ESY Program as early as November 15, 2001. Nevertheless, he felt that the denial was justified since the wraparound program "wraps around" an educational component, although he was not sure if the wraparound programs contained the same educational components as ED/ESY Programs

On the reduction of funding for lunch assistants to fifty-five, providing a 3:1 ratio (three classrooms per one lunch assistant), he based this reduction upon his assessment that other Abbott districts were funded for one lunch assistant per three classrooms. He mentioned that there is nothing in the regulations pertaining to lunch assistants and concluded that the data submitted by the District failed to justify its request. However, he acknowledged that he was not familiar with the specific use of lunch assistants by the District and further acknowledged that the Department's budget approval letter (Exhibit P-3) provided no explanation for the reduction of lunch assistants nor did it explain how the ratio was to work.

With regard to the technology infrastructure request of $44,000, Joye claimed that the District could use technology funding of $800 per classroom which appeared on the District's line items. In support of his position, he mentioned that each new preschool is given initial funding of $2,450 which is intended for all essential technology components. Therefore, he concluded that the $800 allotment per year per classroom should suffice. With 165 classrooms, the District's $800 per classroom allotments totaled $132,000. He explained that these funds could be used across all classrooms, meaning that the $800 allotment was not dedicated to a particular classroom and that unused portions could be shared with other classrooms. He further noted that follow-up justification for infrastructure funding was submitted in February 2008, after the Department denied this special request. [Exhibit R-5(a-d)]. He felt that the District had not explained how its allotments for technology costs would not sufficiently fulfill its infrastructure needs. He also noted that some of the items for technology expenditures

(Exhibit P-16) were not recurring, such as the cost for a digital camera. He did, however, acknowledge that the technology costs submitted (Exhibit P-16) were only to the present, and he did not know if those funds would be exhausted before the end of the school year.

The Department then presented Ellen Wolock, its Director for Preschool Education. She received a doctorate in education and specializes in early childhood education. She has been serving as director for the past eleven months, and for the past five years was involved with preschool education for the Department. Part of her duties include overseeing the implementation of Abbott pre-school programs, reviewing Abbott pre-school budgets in their final stages, and assisting in drafting budget approval letters.

She was unaware that the District provided ED/ESY Programs since she was not "that involved" with petitioner. She reviewed the District's letter of March 12, 2007 [Exhibit R-2(a)] which sought to justify funding for its ED/ESY Program. However, she felt that the analysis performed by the District in its justification was not accurate. She stated that the District receives six hours and forty-five minutes for its preschool day, which the District was comparing to an eight-hour study. She further stated that the Abbott Preschool Program Longitudinal Effects Study (APPLES) (Exhibit P-5), cited by the District, only measured the positive effects on children who were enrolled in preschools over those who were not, not the effects of longer school days. In agreeing with the findings in APPLES, she felt that children who attended Abbott preschools performed better than those who did not.

She was familiar with the ECER screening assessment since she worked with its developer, Dr. Samuel Meisel, at the University of Michigan. She explained that the purpose of ECER is to sample children's skills in the areas of language, motor skills and cognition where a school could "flag" a child with a potential learning problem. This screening process should only be used after school starts, within the first six weeks, and not during the summertime, in order to enable students to become familiar with their teachers, thereby providing a more comfortable and secure atmosphere which would translate into better test results. If LTDCs, and not teachers, administered this test, as

is done in the District, students would not have the same familiarity as they have with their teachers, which could translate into poorer test results. In her opinion, the ECER assessment does not determine learning needs, which can only be verified by a child study team.

In discussing the category of "rescreen" under ESI-R screening, which the District used to justify funding, she stated that this category is of no significance since it could include children who refused to cooperate in the screening process, not necessarily those who require further evaluation. However, the category "refer" does necessitate some form of intervention, such as a child study team for full testing to determine if there is a special need, such as in speech. In her opinion, the screening results performed by the District did not justify ED/ESY Programs. She was not aware of any studies which compared the extended day in preschool to a regular day.

In further disputing the validity of the analyses done by the District, Wolock commented that the Early Learning Assessment System (ELAS), advanced by the District, requires a teacher to observe a child in various activities, such as playing with blocks, and to assess that child's performance. This requires a subjective analysis where teachers may vary in points assessed. She pointed out that, rather than using the four point scoring scale as required in this assessment, the District used only two points in its assessments. She further disputed the graphs submitted by the District (Exhibits P-7 and P-9) in support of ED/ESY funding, she disputed the validity of these graphs since it was not shown if the graphs included wraparound or dual language programs.[4] With regard to the other graphs presented by the District (Exhibit P-9), she expressed the same concerns. When asked about Terra Nova testing (Exhibit P-17), which assesses the skills of children in mathematics and reading, and was used by the District in support of ED/EYS funding, she again expressed the same concerns about the variables she noted in the other analyses prepared by the District.

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[4]Dual language programs require teaching the children for two weeks in English and for two weeks in their other spoken language which enhances their learning skills.

When examining the District's preschool schedule (Exhibit R-7), she had a concern where large group time (LGT), which usually involves children sitting in a circle while a teacher conducts some activity, was followed by "story time" where children also sit in a circle while a teacher reads a story. She felt that these types of activities, which are programmed back-to-back, were not beneficial since the total time involved was too long for a child.

She was part of the approval process for the 2008-2009 budget, and in denying funding for the ED/ESY Program, she was confident that the District could meet the Abbott requirements for preschoolers in the regular day sessions since there has been improvement and growth in the quality of its teachers. She noted that the District not only has master teachers, but a system which supports children with special needs, all without the need for the extended day model. She related that no other Abbott district was approved for ED/ESY preschool funding, asserting that it was the quality of instruction, not the length of the school day that was important.

When asked about the NIEER study (Exhibit P-6), also cited by the District, she stated that this study only pertained to half-day versus extended-day programs, not the six hour forty-five minute days in the District to eight hour days. She also noted that the District placed children in the ED/ESY Program on the basis of a lottery, not upon need. She did confirm that the wraparound program did not require certified teachers and that the wraparound program did not require the same 15:2 student-teacher ratio as required by Abbott.

Beverley Wellons, the Assistant Director for Childcare Operations with DHS, Division of Family Development, has been involved with the wraparound programs for Abbott districts since 2004. She also received a degree in early education. She mentioned that wraparound programs consist of four hours a day from September to June, which can be utilized before and after the school day (thus "wraparound"), and ten hours per day for the months of July and August. The purpose of the program is to give children of working families a longer school day so that a work day is not affected. She mentioned that the staffs for the wraparound programs are required to be licensed in child care by the Department of Children and Families, and that the wraparound

program is required to be developmentally appropriate. In describing the educational component in wraparound, she referred to the "Manual of Requirements for Childcare Centers" (section 10:122-6.1) issued by DHS (Exhibit R-9) in which the following is provided:

> (a) The center shall develop and provide a variety of children's planned activities, geared to the age and developmental level of the children served, that:
>
> 1. Promote the development of language, thinking and problem-solving skills, curiosity, exploration, large and small muscles, social competence, self-esteem, and positive self-identity; and
> 2. Are relevant to the cultural background of the children and foster intercultural awareness.
>
> Id., at p. 55.

In order to qualify for wraparound funding, which is based on a per student basis, family income must be below 300% of the Federal poverty level. Those parents whose income is above that level can pay from their own resources for wraparound services. While wraparound provides a ratio of two adults per twenty children, the District can use certified teachers in the program and can expand the adult ratio to students.

Renee Whelan, who has a doctorate in education, is involved in early childhood education for the Department. She serves as the liaison between the Department and the District, as well as liaison for three other Abbot districts. As liaison, she assists in developing programs through visits to these districts and is involved in the budget process. Over the past two years, she had observed about thirty preschool classrooms in the District and made other visits to assess those areas in need of attention.

On February 6, 2007, she visited the District for the purpose of assessing lunchroom assistants and to see if the Department's best practices were followed. She observed three classrooms housed in temporary trailers and two classrooms in the school building. Each visit lasted approximately five minutes. In all but one classroom, she noticed lunch assistants standing about, without any interaction with the children, except in one class where the lunch assistant directed a child to be seated. There was

only one teacher in each of the rooms. She commented that best practices suggest that teachers eat with their students in order to continue the educational component and provide interaction. She also felt that if teachers remained in the classroom during lunch time, there would be a higher ECER score. She did not remain for nap time.

Based upon information she received from the District, she based her budget analysis for lunch assistants on a half hour lunch for teachers and assistant teachers. In making this analysis, she took into account her personal observations of February 6, 2007, the daily schedule provided by the District (Exhibit R-7), the daily routine for the 2007-2008 school year (Exhibit R-11) and the contract settlement for 2006-2009, which all appeared to confirm that teachers and assistant teachers were given a half hour for lunch. Therefore, she felt that teachers and assistant teachers could easily have their lunches either during the children's naptime or lunch time. She did, however, acknowledge that, on or about March 11, 2008, she received an email from Gissela Diaz of the District confirming that teachers and assistant teachers were given one-hour for lunch. (Exhibit P-21).

She also mentioned that the three other Abbott districts where she serves as liaison, although smaller in size, did not use lunch assistants, but relief teachers. It was her position that petitioner did not follow best practices which recommends that teachers remain with their children during lunch time. (Exhibit P-22). While she did, in part, base her budget assessment for lunch assistants on her visit on February 6, 2007 when she observed only five classrooms, in visiting the District on other dates for reasons unrelated to lunch assistants, she continued to note the failure of the assistants to interact with the children.

In the previous school year, she acknowledged that 122 lunch assistants were approved for the District and in the year prior to that, more than 100 lunch assistants were approved. However, she noted that, in her other districts, the teachers and assistant teachers were given a thirty to forty minute lunch. She also noted that petitioner is approved for twenty relief teachers which the other districts use during lunch. Although she was aware that the District used relief teachers between different sites, in her opinion, that was not the best use of these teachers who could be

monitoring children during lunch hour. In the other districts, relief teachers remain in the classroom for about forty minutes and then leave to prepare for their next class, which she felt was in accordance with best practices.

LEGAL DISCUSSION AND ANALYSIS

In Abbott v. Burke, 153 N.J. 480, 508 (1998) ("Abbott V"), the New Jersey Supreme Court emphasized the importance of early childhood education and directed the Commissioner to "ensure" that preschool programs for three-and four-year-old children are adequately funded. Thereafter, in Abbott v. Burke, 163 N.J. 95, (2000) ("Abbott VI"), the New Jersey Supreme Court reaffirmed its commitment to quality preschool programming and reiterated its direction to the Commissioner to "ensure" adequate resources and funding for that purpose. Two years later, in Abbott v. Burke, 170 N.J. 536, 559 (2002) ("Abbott VIII"), the Supreme Court revisited the topic and commented that funding decisions should be "based not on arbitrary, predetermined per-student amounts, but rather, on a record containing funding allocations developed after a thorough assessment of actual needs." More recently, in Board of Education of Millville v. New Jersey Department of Education, 183 N.J. 264 (2005), the Supreme Court clarified that to "ensure" adequate funding is not the same as to "provide" state funding and that the Commissioner may require Abbott districts to reallocate money from District budget accounts to make up preschool funding shortfalls.

N.J.A.C. 6A:10A-2.1 repeats the Court's mandate in Abbott V that all children residing in the Abbott districts be given the opportunity of a high-quality preschool education beginning at age three. This provision also includes specific standards for quality preschool education: a certified teacher and an assistant teacher for each class, maximum class size of fifteen students, developmentally appropriate preschool curriculum, adequate facilities, and transportation, health and other related services, as needed.

In that regard, under N.J.A.C. 6A:10A-2.2 (preschool programs), "(a) [t]he district board of education shall offer a full-day, full-year preschool program to all eligible

children." A "full-day, full-year" is defined as "a preschool day consisting of a six-hour comprehensive educational program meeting Department requirements at N.J.A.C. 6A:10A-2.2 for at least 180 school days and not exceeding a 10-month academic period." N.J.A.C. 6A:10A-1.2.

The District is in compliance with this requirement. It offered no expert testimony to justify that longer school hours are clearly beneficial over the six hour minimum mandated by Abbott and N.J.A.C. 6A:10A-2.2. Although the District suggested such a result, the data submitted in support of its position was not sufficiently credible. Several variables were not taken into account, such as wraparound and dual language programs. The ESI-R results only serve to identify those students who may require further evaluation, such as by a child study team. Accordingly, the graphic analyses were not accepted as reliable. In support of its position, the District relied upon the NIEER study "Is More Better? The Effects of Full-Day vs. Half-Day Preschool on Early School Achievement" which indicates that children who are involved in a longer day (eight hours) demonstrated positive benefits over those children who experienced only a 2.5 to three hour day. This was not relevant to the District which provides, at least, a six hour day, and, according to the Department, a six hour and forty-five minute day. The District even agreed that its regular day program was sufficient to meet the requirements of Abbott and the regulations, and, accordingly, no proofs were offered to the contrary. The Department noted there were no other Abbott districts which operated an ED/ESY program for preschool children. Furthermore, wraparound funding is available, whether based on income eligibility or pay status, which provides extended hours to "[p]romote the development of language, thinking and problem-solving skills, curiosity, exploration . . . social competence, self-esteem and positive self-identity . . ." (Exhibit R-9, at p. 55).

The District's justification for ED/ESY funding, even though forwarded to the Department after its proposed budget was submitted, did not establish that the Department's denial was arbitrary, nor did it establish by credible evidence the need for such funding. The burden of proof from an agency's adverse action is on the petitioner. N.J.A.C. 6A:10A-8.6(c) states:

> The burden of proof shall be on the petitioning party to demonstrate that these standards were met by the applicant notwithstanding the Department's determination to the contrary. The record on appeal shall consist of those documents and information submitted to the Department in support of its application and any additional information relied upon by the Department in making the determination at issue.

The burden must be met by a preponderance of competent, relevant and credible evidence. In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). Precisely what is needed to satisfy the standard must be decided on a case-by-case basis. The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metropolitan Bottling Co., 26 N.J. 263 (1958). Preponderance may also be described as the greater weight of the credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975).

Based upon the facts adduced, I **CONCLUDE** that the District has not met its burden. There were many variables in its analyses which were not addressed. In addition, its reliance upon various assessments and screening processes did not outweigh the contrary explanations offered by the Department. The regulations require a six hour, 180 day school year. The District is complying with these requirements. Accordingly, it presented no compelling proofs that it was unable to meet the needs of its preschoolers. Therefore, its request for ED/ESY funding should be denied.

The next issue involves the reduction in funding for lunch assistants. The Department reduced a request to fund 165[5] lunch assistants to fifty-five. In dollars, the District requested funding of $705,171, while the Department approved only $235,345. In the absence of legal precedent on the ratio of preschool lunch assistants per classroom, reliance will be made upon the testimony and documents presented. The Department relied upon its preschool program guides (Exhibits R-10 and R-12) to advance its position that teachers should be present during lunch time to enhance the learning component. It assumed that teachers and teacher assistants had half an hour for lunch as in other Abbott districts, and as contained in many of the documents

[5]As noted, the number 165 was stipulated at the hearing.

submitted by the District. Instead, the District allows its preschool teachers and assistant teachers a full hour. In order to provide a safe environment during lunch and nap time, which together consists of a two hour period, the District requested one lunch assistant for each of its 165 preschool classrooms.

When the Department visited five preschools in the District in the prior year, it was noticed that lunch assistants provided no interaction with children, with the exception of one who told a child to be seated. The lunch assistants were seen standing around with little or no interaction. In support of its position, the District related that while many children sleep during nap time, others do not, requiring some activity for those children who do not nap. No indication, however, was given about the usual number of students who nap and those who do not. Therefore, it is difficult to assess the need for a lunch assistant during nap time since a teacher or assistant teacher is present. Since the District provides a one hour lunch for its teaching staff, which the Department indicates is more than any other Abbot preschool, some accommodation must, however, be made to ensure that a safe and secure environment exists during lunch. Based upon the facts adduced, I **CONCLUDE** that the Department should provide funding for 165 lunch assistants for one hour only, during the eating, hand washing and teeth brushing phases. During nap time, the presence of the teacher or assistant teacher should be sufficient to monitor those children engaged in an activity.[6]

On the issue of technology infrastructure for Schools 50, 51 and 52, the District made a special request for funding of $44,000 in addition to the $800 allotment each class receives for technology costs. The Department maintained the position that this classroom allotment, which consists of $132,000 when taking into account the 165 classrooms in which each is funded $800, should be sufficient to meet the District's infrastructure needs. These allotments were not limited to a particular classroom, but could be shared with other classrooms which had not exhausted their allotments. The District contended, however, that these allotments were exhausted each year in replacing various items, such as ink cartridges and bulbs for smart boards. What was

[6] This conclusion should not be construed as allowing such funding in future school years since this Initial Decision only addresses the 2008-2009 school year.

evident from the proofs provided by the District was that not all of the replacement items were recurring annually, such as the cost for a digital camera. However, even putting aside digital camera costs, it was clear that this allotment would likely be exhausted by the end of the school year since the proofs submitted only reflected those costs up to the hearing dates.

Although a determination by the Department in one year may not binding on succeeding years, nevertheless, the justification presented for infrastructure funding was identical to the justification provided for the 2007-2008 school year, which was granted. In addition, the District mentioned that such funding, although not necessarily in the amount presently requested, had been granted over the past several years.

Of particular interest is the Department's own treatise which encourages a rich learning environment through the use of technology, ". . . such as computers with age-appropriate software, to enhance the development of critical thinking skills."[7] In this regard, the District offered compelling reasons for infrastructure funding—the need for telephone service, networking capabilities, and internet access. Based upon the facts adduced, I **CONCLUDE** that funding of $44,000 for technology infrastructure be provided.

ORDER

Based upon the foregoing, the following is **ORDERED**:

1. Funding for the ED/ESY Programs be and is hereby **DENIED**;
2. Funding for lunch assistants be and is hereby granted for 165 lunch assistants for one hour only.
3. Funding for technology infrastructure of $44,000 be and is hereby **GRANTED**.

---

[7] "Preschool Teaching & Learning Expectations: Standards of Quality" (July 2004) (Exhibit P-15).

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within twenty-five days as provided under the order of the New Jersey Supreme Court at 177 N.J. 578 (2003) and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Notwithstanding the provisions of any rule to the contrary, exceptions to Initial Decisions of the Office of Administrative Law in Abbott District budget appeal matters shall be filed within five days of the date of mailing of the Initial Decision, and reply exceptions shall be filed within two days of receipt of exceptions. File written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

3-25-08
DATE

J. HOWARD SOLOMON, ALJ

Date Received at Agency: 3-25-08

Mailed to Parties:

3-25-08
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

pb

APPENDIX

Witnesses

For Petitioner:

Tracy Markowitz
Olga Hugelmeyer
Susan Mettlen
Corey Weiss

For Respondent:

David Joye
Dr. Ellen Wolock
Beverley Wellons
Dr. Renee Whelan

Exhibits

For Petitioner:

P-1	District Special Request Forms
P-2	2008-2009 Budget Worksheet
P-3	Letter from the New Jersey Department of Education dated January 15, 2008 regarding 2008-2009 Abbott Preschool Budget
P-4	Results of the Early Screening Inventory (ESI-R)
P-5	The Abbott Preschool Program Longitudinal Effects Study (APPLES) Interim Report dated June 2007
P-6	NIEER Study dated May 2006 entitled "Is More Better? The Effects of Full-Day vs. Half-Day Preschool on Early School Achievement
P-7	Kindergarten ELAS - Comparison of Extended Day/Year Preschool vs. Other Program 2007-2008
P-8	Data for Schools 17, 19, 12 and 14
P-9	Kindergarten ELAS - Comparison of Extended Day/Year Preschool vs. Other Program 2007-2008
P-10	Data from Schools 6, 16 and 18
P-11	Material entitled "All About the ECERS-R"

P-12	Rating System for Meals/Snacks
P-13	Technology Infrastructure Justification for Schools 50, 51 and 52
P-14	Data for Schools 50, 51 and 52 for Computers
P-15	Preschool Teaching & Learning Expectations: Standards of Quality dated July 2004
P-16	Data for Schools 50, 51 and 52 for Classroom Technology Supplies
P-17(a-g)	Mean National Percentile Scores Extended Day/Year
P-18	E-mail from Vincent Costanza dated March 3, 2008
P-19(a-c)	Proposals of the Elizabeth Education Association For a successor Agreement with The Board of Education dated January 10, 2008
P-20	Letter from Olga Hugelmeyer dated June 1, 2007
P-21	E-mail or facsimile from Gissela Diaz dated March 11, 2008 to Renee Whelan
P-22	(NJDOE p. 283) Preschool Program Guidance

For Respondent:

R-1	(NJDOE p. 318-319) Letter from the Department of Education to Pablo Munoz, Superintendent dated March 2, 2007
R-2(a-c)	(NJDOE p. 320-325) Letter from Olga Hugelmeyer to Renee Whelan dated March 12, 2007 with attachments
R-3	(NJDOE p. 59-76) District Line-Item One-Year Budget Instructions and Guidance School Year 2008-2009
R-4(a-c)	(NJDOE p. 376-378) School 50, 51 and 52 Computer Data
R-5(a-d)	(NJDOE p. 379-382) Technology Infrastructure Information for Schools 50, 51 and 52
R-6(a-b)	(NJDOE p. 350-351) Appendix A: State Survey Data 2005-2006
R-7	(NJDOE p. 358) Petitioner's Daily Schedule for Room 146
R-8	Early Childhood Environment Rating Scale Revised Edition
R-9	Chapter 122 Manual of Requirements for Childcare Centers
R-10	(NJDOE p. 285-286) Preschool Program Guidance

R-11	(NJDOE p. 357) Daily Routine 2007-2008
R-12	(NJDOE p. 353-356) Ratification Materials Elizabeth Education Association Contract Settlement for 2006-2009
R-13	Naptime Guidance
R-14(a-g)	(NJDOE p. 367) Early Learning Improvement Consortium Spring 2007 Summary Report - Year Five
R-15	Rating system for meals and snacks
R-16	(NJDOE p. 288) Letter from Department of Education dated January 12, 2007 to Pablo Munoz, Superintendent

181-08

#181-08

OAL DKT. NO. EDU 8170-07
AGENCY DKT. NO. 242-8/07

IN THE MATTER OF THE TENURE HEARING OF CHARLOTTE ROBINSON, SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter, the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, the executed "Settlement Agreement" and accompanying "Health Improvement Program Contract" (Integrated Settlement), and the excerpt from the minutes of a January 14, 2008 meeting of the Trenton Board of Education wherein it approved the Integrated Settlement (J-2), have been reviewed. Upon review, the Commissioner approves the terms of the Integrated Settlement.

Accordingly, the Commissioner adopts the Initial Decision as the final decision in this case and dismisses the petition, subject to compliance by both parties with the terms of the Integrated Settlement.

IT IS SO ORDERED.

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 4/21/08

Date of Mailing: 4/22/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8170-07
AGENCY DKT. NO. 242-8/07

IN THE MATTER OF THE TENURE HEARING OF CHARLOTTE ROBINSON, SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY.

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

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

Record Closed: February 28, 2008 Decided: March 6, 2008

BEFORE **JOHN SCHUSTER III**, ALJ:

This matter was transmitted to the Office of Administrative Law on October 2, 2007, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement (J-1) indicating the terms thereof, which is attached and fully incorporated herein. The Settlement Agreement includes a Health Improvement Program Contract between the Board of Education and the respondent.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures and the Board's minutes showing approval of the Agreement (J-2).

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

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

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

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

March 6, 2008
DATE

JOHN SCHUSTER III, ALJ

Date Received at Agency:

MAR 7 2008

Mailed to Parties:

CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

jh

EXHIBITS

Joint exhibits:

J-1 Settlement Agreement

J-2 Minutes

J-1 Enid

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

RECEIVED
2008 JAN 30 A 10:57
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

	:	BEFORE THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY
IN THE MATTER OF THE TENURE CHARGES AGAINST CHARLOTTE ROBINSON, BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY	:	AGENCY DOCKET NO. 242-8/07 OAL DOCKET NO. EDU 8170-07S
	:	***SETTLEMENT AGREEMENT***

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

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

WHEREAS, the Board filed tenure charges with the Commissioner of Education, Agency Docket No. 242-8/07, OAL Docket No. EDU 8170-07S; and

WHEREAS, the charges allege that from the 2000-01 through the 2006-07 school years, Robinson has had excessive absenteeism; and

WHEREAS, the charges also allege that Robinson had excessive tardiness; and

WHEREAS, Robinson admits that her absenteeism and tardiness over the last few school years was the result of a substance abuse addiction; and

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

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

1. Respondent will be reinstated to her former position as a tenured secretary and returned to the payroll the next work day after approval of this settlement agreement by the Commissioner of Education;

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

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

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

5. Respondent acknowledges that she is not entitled to any back pay as a part of this settlement agreement, or to have any of her attorney's fees paid by the Petitioner.

6. This agreement constitutes a full and final settlement of all claims in dispute, which were raised, or could have been raised, in this matter. Both parties waive any rights to any further appeals with respect to this matter, or any other proceedings to contest the matters which

were raised in this proceeding, or could have been raised, except that either party may file an appropriate action to enforce the terms of this settlement agreement.

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

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

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

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

Joyce M. Kersey — 1/8/08 — Jayne S. Howard

Joyce M. Kersey
President
Trenton Board of Education

Date

Jayne S. Howard
Board Secretary
Trenton Board of Education

1/8/08 — Charlotte Robinson

Michael T. Barrett, Esq.
Respondent's Attorney

Date

Charlotte Robinson
Respondent

	:	BEFORE THE COMMISSIONER OF
	:	EDUCATION, STATE OF NEW JERSEY
IN THE MATTER OF THE	:	
TENURE CHARGES AGAINST	:	AGENCY DOCKET NO. 242-8/07
CHARLOTTE ROBINSON, BOARD OF	:	OAL DOCKET NO. EDU 8170-07S
EDUCATION OF THE CITY OF	:	
TRENTON, MERCER COUNTY	:	
	:	

HEALTH IMPROVEMENT PROGRAM CONTRACT

THIS HEALTH IMPROVEMENT PROGRAM CONTRACT (hereinafter referred to as "Contract") is made and entered into this 14th day of January, 2008 by and between the Trenton Board of Education ("BOARD") and Charlotte Robinson ("ROBINSON") (hereinafter collectively referred to as the "parties").

WITNESSETH

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

WHEREAS, alcoholism is acknowledged as a handicap with the protection of the New Jersey Law Against Discrimination ("NJLAD") and the Americans with Disabilities Act ("ADA") as set forth in *Clowes v. Terminex Int'l, Inc.*, 109 *N.J.* 575 (1988). The BOARD acknowledges that under the NJLAD and the ADA, it is required to formulate a reasonable accommodation for employees with disabilities. Similarly, ROBINSON realizes that though the BOARD has a duty to reasonably accommodate her disability, she must be able to perform her duties, including but not limited to maintaining sobriety and having a satisfactory record of attendance and that, consistent with *In re Yaniello*, CD 203-95 (Jun. 12, 1995), *aff'd.* S.B. 78-95 (Jan. 8, 1997), *aff'd.* App.Div. Dkt. No. A-3482-96T1 (Apr.2, 1998) (unreported), the BOARD may lawfully hold ROBINSON to the terms of a return to work agreement. The BOARD cannot assume that, without the following protections contained in the Contract, ROBINSON will limit possible alcohol consumption to off-duty hours, or that the effects of alcohol will be dissipated by the time the workday commences.

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

EXHIBIT A

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

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

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

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

expense of the BOARD. The third test shall be conclusive. In the event that the third part of the sample tests positive, the BOARD will consider the result as a violation of this agreement by ROBINSON. In the event of a violation of this agreement by ROBINSON, following the principles articulated in *Yaniello*, ROBINSON acknowledges that she will be subject to the termination of her employment and tenure.

5. In the event that ROBINSON is absent from work for two (2) or more consecutive days, the BOARD may require that she supply a physician's note providing that she was unable to work due to illness or medical condition and indicate the illness or medical condition she suffered from. In the event she fails to provide the physician's note within three (3) work days upon written request to ROBINSON, she acknowledges that she will be subject to termination of her employment and tenure.

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

WITNESS:

Michael T. Barrett, Esq.
Bergman & Barrett

By: Charlotte Robinson 1/8/08
Charlotte Robinson
Respondent

WITNESS:

Jayne S. Howard
Board Secretary
Trenton Board of Education

By: Joyce M. Kersey
Joyce M. Kersey
President
Trenton Board of Education

J-2 Enid

TRENTON BOARD OF EDUCATION
108 North Clinton Avenue
Trenton, New Jersey 08609
BOARD CONFERENCE MEETING
Monday – January 14, 2008 - 6:30 P.M.
MINUTES

RECEIVED
2008 FEB 28 P 12: 02
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

ROLL CALL	YES	NO	ABSTAIN
Alexander Brown	absent		
L. Diane Campbell	X		
Lucy Guzman	X		
Lisa M. Kasabach	X		
Harry Luna	X		
Donald O. Shelton	X		
Marcellus Smith	X		
Nicola Tatum	absent		
Joyce M. Kersey	X		

The meeting was adjourned to Executive Session. Ms. Kersey stated the Board would come back into Public Session to vote on matters that were to be discussed in Executive Session.

ADJOURN 9:10 p.m.

INFORMAL ADJOURNMENT TO DEBRIEFING
Board President Kersey led the debriefing.

EXECUTIVE SESSION 9:35 p.m.

Open Public Meeting convened at 10:00 p.m.

* In the Matter of the Tenure Charges Against Charlotte Robinson,
School District of the City of Trenton, Mercer County
OAL Docket No. EDU 8170-07 / Agency Docket No. 242-8/07

Motion by Dr. Campbell, seconded by Mr. Luna to accept the Proposed Settlement Agreement.

ROLL CALL	YES	NO	ABSTAIN
Alexander Brown	absent		
L. Diane Campbell	X		
Lucy Guzman	X		
Lisa M. Kasabach	X		
Harry Luna	X		
Donald O. Shelton	X		
Marcellus Smith	X		
Nicola Tatum	absent		
Joyce M. Kersey	X		

185-08

OAL DKT. NO. EDU 9810-07
AGENCY DKT. NO. 236-8/07

N.T., on behalf of minor child, C.V.T., :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL HIGH SCHOOL DISTRICT, MORRIS COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

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

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

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 4/22/08

Date of Mailing: 4/22/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 09810-07
AGENCY DKT. NO. 236-8/07

N.T., ON BEHALF OF MINOR CHILD, C.V.T.,
Petitioner,
v.
BOARD OF EDUCATION OF MORRIS HILLS REGIONAL HIGH SCHOOL DISTRICT, MORRIS COUNTY,
Respondent.

Frederick A. Simon, Esq., for petitioner (Simon and Lupo, attorneys)

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

Record Closed: March 11, 2008 Decided: March 11, 2008

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

The Department of Education Bureau of Controversies and Disputes transmitted this matter to the Office of Administrative Law (OAL) on September 26, 2007 for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to –15 and N.J.S.A. 52:14F-1 to –13. The matter was scheduled for a hearing on several occasions, each of which were adjourned due to the designation of a new counsel, a scheduled surgery

and medical emergency of a witness. I heard the matter on February 15, 2008, at which time the parties reached a settlement.

On March 11, 2008, the parties submitted the attached original settlement agreement and the Board's Resolution.

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

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

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

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

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

March 11, 2008
DATE

Jesse H. Strauss
JESSE H. STRAUSS, ALJ

Date Received at Agency: 3-18-08

Mailed to Parties:

MAR 18 2008
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

id

EXTRACT FROM THE MINUTES OF A REGULAR
BOARD OF EDUCATION MEETING OF THE
MORRIS HILLS REGIONAL DISTRICT
OF ROCKAWAY, NJ, AS RECORDED IN THE OFFICIAL MINUTES BOOK

2008 MAR 11 A 7:54
OFFICE OF ADMIN LAW

The Board of Education of the Morris Hills Regional District of Rockaway, in the County of Morris, New Jersey, convened in Regular Session on Monday, February 25, 2008, at 7:45 p.m. in the Cafeteria at Morris Hills High School, Rockaway, NJ.

The following members were **present:** Steven Kovacs, Vice-President, Michael Collins, Mark DiGennaro, Debra J. Erwine, Paula Gilbert, Kalman N. Kolis, Samuel J. Parsons, E. James Soltys and Thomas Greulich, President.

The following resolution was offered by Mr. Parsons and seconded by Mrs. Erwine and adopted by the Board of Education on a roll call vote:

RESOLVED: Recommend authorization to accept the Settle Agreement for N.T. o/b/o C.V.T. v. Morris Hills Regional School District Board of Education as per the attached.

All present voting yes – Motion Carried

STATE OF NEW JERSEY)
) ss
COUNTY OF MORRIS)

I, Manuel E. Deus, Board Secretary of the Morris Hills Regional District Board of Education in the County of Morris, State of New Jersey, hereby certify that the attached extract of the minutes of the meeting of the Board of Education, of said district, duly called and held on February 25, 2008, have been compared by me with the original minutes as officially recorded in my office in the official minutes book of said Morris Hills Regional District Board of Education and is a true and complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said minutes. In witness I have hereunto set my hand and affixed the corporate seal of said Board of Education on this twenty-sixth day of February 2008.

Manuel E. Deus
Board Secretary

(seal)

N.T. o/b/o C.V.T.	: State of New Jersey
v	: Office of Adm. Law
Morris Hills Regional	: Ag. Ref. No. 236-8/07
School District BOE	: OAL DKT NO. EDU 05098-07

This matter having come before the Court on the petition filed by Ngan Thi Tran ("N.T."), and the Counterclaim filed by Morris Hills Regional School District Board of Education ("Board"), and the parties desiring to amicably resolve this matter without hearing, agree as follows:

1. Petitioner N.T. has applied for custody with the Morris County Superior Court, and this resolution is expressly contingent upon obtaining court-ordered custody from the Family Court.

2. Petitioner will obtain custody, which will entitle C.V.T. to enroll in District schools prospectively, and his continued enrollment with subject to N.T.'s and C.V.T.'s continued domicile in the District

2a. In the event that Petitioner, N.T. does not obtain custody by March 30, 2008, this settlement is voidable by the Respondent Board and the hearing before Judge Strauss ~~will be~~ may be rescheduled.

3. In consideration of resolving this matter without reimbursement for prior months' tuition in full, Petitioner will pay to Board, by certified check or money order, in the total amount of $4000.00, payable as follows: $400.00 by March 30, 2008, and $300.00 per month for the next twelve (12) successive months, by the ~~fifteenth~~ thirtieth (30th) of each month.

4. This settlement is expressly contingent on timely payment each month, and any payment not received by the 30th of each

month will render this settlement null and void, making Petitioner liable for the full amount of tuition which would be due by the date this agreement has been prepared and has been signed by Petitioner (February 15, 2008), which amount is $8245.68.

4. This settlement is the resolution of disputed claims and is not deemed to constitute an admission of liability or absence of meritorious claims.

5. Both parties acknowledge to have been represented by Counsel in this action.

6. Petitioner herein waives any claims which have been made or could have been made by virtue of this petition or any other pleading arising out of or relating to C.V.T.'s enrollment in District schools.

7. This agreement is subject to the approval of the Respondent Board at its next regular meeting at which action will be taken (scheduled currently for February 25, 2008).

8. This agreement will be incorporated into an Initial Decision by the Hon. Jesse Strauss.

Petitioner

Ngan Thu Tran

Date: 2/15/08

Respondent

Manuel E. Deus

Morris Hills Regional BOE

By: Manuel E. Deus

Date: 2/25/08

187-08

#187-08+

OAL DKT. NO. EDU 5347-07
AGENCY DKT. NO. 101-4/07

CORRECTED DECISION

K.C., on behalf of minor child, M.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of failure to appear transmitted by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 – along with copies of notifications sent to the parties by OAL on February 15, 2008, providing an opportunity for the petitioner to submit an explanation for her nonappearance – have been reviewed. There being no explanation filed by petitioner, and the record being clear that the parties do not wish to pursue their respective claims,[1] this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.[2]

IT IS SO ORDERED.

Lucille Davy
COMMISSIONER OF EDUCATION

Date of Decision: 5/15/08
Date of Mailing: 5/15/08

[1] Petitioner's child attended school for one day subsequent to the filing of the instant appeal of the Board's determination that she was ineligible to attend school in the district based upon residency or domicile, then moved out of state to live with her father; in its answer, the Board had counterclaimed for tuition..

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

187-08

OAL DKT. NO. EDU 5347-07
AGENCY DKT. NO. 101-4/07

K.C., on behalf of minor child, M.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of failure to appear transmitted by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 – along with copies of notifications sent to the parties by OAL on February 15, 2008, providing an opportunity for the petitioner to submit an explanation for her nonappearance – have been reviewed. There being no explanation filed by petitioner, and the record being clear that the petitioner no longer wishes to pursue her claim,[1] this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.[2]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/23/08
Date of Mailing: 4/23/08

[1] Petitioner's child attended school for one day subsequent to the filing of the instant appeal of the Board's determination that she was ineligible to attend school in the district based upon residency or domicile, then moved out of state to live with her father. The Board did not counterclaim for tuition.

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

188-08

#188-08

OAL DKT. NO. EDU 12530-07
AGENCY DKT. NO. 355-11/07

Z.A., on behalf of minor child, J.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SADDLE RIVER, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and replies of the Board – filed in accordance with *N.J.A.C.* 1:1-18.4[1] – were fully considered by the Commissioner in reaching her determination herein.

Petitioner's exceptions recast and reiterate her arguments advanced below, again presenting in detail reasons why she feels justified in withholding information with respect to her domicile. As the Commissioner determines that all of this "justification" was fully considered and addressed by the Administrative Law Judge (ALJ) in his initial decision it, will not, therefore, be revisited here.

Upon full and independent review of the record, the Commissioner agrees with the ALJ that summary decision is appropriately granted to the Board – as petitioner's failure to

[1] It is noted that although the OAL mailing advisory sheet purports that the Initial Decision was mailed to the parties on March 14, 2008, the OAL's decision mailing envelope addressed to petitioner (copy included with her exceptions) evidences a postmark mailing date of March 19, 2008.

provide and ununwillingness to demonstrate any proof of residency is fatal to her claim that J.K. is entitled to a free public education in the district schools.

Accordingly, the recommended decision of the OAL is adopted for the reasons presented therein and the within petition of appeal is dismissed. Petitioner is directed to remit tuition to the Board for the period of J.K.'s ineligible attendance in its schools in the amount of $22,625.66 plus $58.75 per diem for each day of attendance after March 5, 2008.[2]

IT IS SO ORDERED.[3]

Lucille Davy

COMMISSIONER OF EDUCATION

Date of Decision: 4/23/08

Date of Mailing: 4/24/08

[2] It is noted that the ALJ's computation of tuition on Page 5 of his decision is incorrect. For the 2005-06 school year petitioner owes tuition of $5,506.69 (97 days of her son's ineligible attendance @ $56.77 per diem); for the 2006-07 school year she owes $10,538.97 (183 days of ineligible attendance @ $57.59 per diem); and for the 2007-08 school year she owes $6,580 (112 days of ineligible attendance calculated to the date of the hearing on March 5, 2008) plus $58.75 per diem for every day subsequent to this date that J.K. continues impermissibly to attend the Board's schools. (See Board's Motion for Summary Decision at 6)

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 12530-07

AGENCY DKT. NO. 355-11/07

Z.A., ON BEHALF OF MINOR CHILD,
J.K.,

Petitioner,

v.

BOARD OF EDUCATION OF THE
BOROUGH OF SADDLE RIVER,
BERGEN COUNTY,

Respondent.

Z.A., pro se

Meri J. Van Blarcom-Gupko, Esq., for the respondent (Wiley Malehorn Sirota & Raynes, attorneys)

Record Closed: March 5, 2008 Decided: March 11, 2008

BEFORE **JOSEPH PAONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Z.A. appeals the determination of respondent Board of Education of the Borough of Saddle River (Board) that J.K., petitioner's son, is ineligible to attend

Northern Highlands Regional High School (NHRHS) because Z.A. refuses to provide her address to the Board. The Board is seeking reimbursement from petitioner representing tuition for the number of days of ineligible attendance.

On October 3, 2007, the Board wrote to Z.A. and requested proof of residency. Z.A. then wrote to the Commissioner, State Board of Education, and requested "emergent relief" to prevent the Board from demanding her residency information. She was advised by the New Jersey Department of Education, Bureau of Controversies and Disputes (Bureau), that if she could not reach a resolution with the Board, she could file a residency appeal. By letter of October 15, 2007, the Board notified petitioner that it determined that J.K. is not domiciled in the district because his "parent failed to provide and is unwilling to demonstrate proof of residency." After receipt of A.A.'s residency appeal, the Bureau transmitted the contested case to the Office of Administrative Law on December 21, 2007. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

On January 24, 2008, the Board filed for summary decision, which Z.A. opposed. The Board contended that Z.A.'s refusal to provide her home address required that J.K. be removed from NHRHS, A.A.'s residency appeal be dismissed and the Boards cross-petition for tuition be granted. Z.A. responded, in essence, that due to her concern for her and her child's safety, she should not be required to provide her home address. I denied the Board's motion and scheduled a hearing for February 20, 2008. On that date, at my request, the parties endeavored to resolve their dispute. They agreed that because Z.A. harbored concern for her safety and desired to keep her address confidential, Z.A. would be permitted to verify her address directly with Borough of Saddle River Police Chief Timothy McWilliams, who would then confirm to the Board Z.A.'s residence in the Borough, without disclosing Z.A.'s actual address to the Board. The hearing was rescheduled for March 5, 2008, after the Board advised me that Z.A. failed to abide by the resolution. On that date, the hearing was held and the record closed.

FINDINGS OF FACT

The Board sends high school students residing in the Board's district to NHRHS. J.K. is Z.A.'s eighteen-year-old son and attends NHRHS. Each day, either Z.A. drives J.K. or J.K. drives himself to school. Z.A. claims that she lives in the Borough. When uncertainty arose as to J.K.'s residence, the Board requested that Z.A. provide proof of her residence. Z.A. had previously only provided a post office box number to the Board. Z.A. refused, citing concern for her safety.

Z.A. testified that her fear arose after her previous landlord filed an eviction action against her five years ago and obtained a judgment for possession. She contends that he prevailed in that action because he had bribed the judge. She alleges that her landlord has connections to organized criminal families in New York. She said that her landlord told her that he could make life difficult for her. She claims to have received harassing phone calls and to have been followed. She believes that her landlord is somehow responsible for loosening lug nuts on her motor vehicle. She fears that if the Board obtains her address, it may be released to her former landlord. At the hearing, Z.A. provided no police reports, documents, witnesses or corroboration of any sort to substantiate her suspicion about her landlord or her fear for her safety.

Z.A. further testified that she met with the police chief on February 26, 2008. She admitted that she did not provide McWilliams with any information to verify her address. Z.A. related that she lives with a man and the lease and utility bills are in his name. She claims that he refuses to help her because he does not want to be involved with the police. She also claims that her landlord refuses to provide a letter verifying that she lives in the apartment because he also wants no involvement with the police. Z.A. does not work or attend school. She has no bank account and her address is not listed with any government agency. The address shown on her driver's license is to a post office box. She asserts that there is nothing in her name anywhere, "in fact I don't exist." Z.A. is unable to offer any document to support her contention that she resides in Saddle River.

McWilliams testified that when he met with Z.A., he explained to her that he would not release her address to anyone and was only acting on the Board's request to confirm her residence in Saddle River. He would not use the information for any code enforcement or criminal investigation purpose. R-1. McWilliams added that not only would Z.A. not provide verification of her address, she wouldn't even reveal to him her address. McWilliams added that Z.A. asked if he could give her a break and falsely report that he confirmed her address.

Z.A. denied that she refused to tell McWilliams her address. She suggested that he never asked. As a result of this dispute in testimony, I halted the hearing and allowed Z.A. and McWilliams to go outside of the hearing room so that Z.A. could, at a minimum, provide her address to McWilliams. When the hearing resumed, McWilliams informed me, and Z.A. conceded, that Z.A. refused to give him her address.

Z.A.'s refusal to provide her address to the Board due to a concern for her safety is suspect. Her testimony regarding her fear was unsubstantiated and fanciful. And notwithstanding her failure to provide verification of her residence to the McWilliams, her credibility is seriously undermined by her refusal to provide merely her address to the police chief. Accordingly, I **FIND** that Z.A. refused to provide any evidence that she lives in the Board's district. I further **FIND** that her purported reason for not providing her address is baseless.

According to the Board, tuition was calculated for the 2005-2006 year at $10,388.91, the 2006-2007 year at $10,539.61, and the 2007-2008 year at $10,751.25. R-2. J.K. attended NHRHS 97 days during the 2005-2006 school year. He attended the entire 2006-2007 school year. And during the 2007-2008 school year, he attended 112 days, until the March 5, 2008, hearing date. R-3

CONCLUSIONS OF LAW

"Public schools shall be free to . . . [a]ny person who is domiciled within the school district" and is over five and under twenty years of age. N.J.S.A. 18A:38-1(a). In order for a district to determine a student's eligibility for enrollment, the board is

authorized to request documentation. N.J.A.C. 6A:22-3.4. The regulations allow a plethora of documents to constitute proof of domicile. These documents may include, but are not limited to, leases, signed letters from landlords, and other evidence of tenancy or residency, voter registrations, licenses, permits, financial account information, utility bills, delivery receipts and other evidence of personal attachment to a particular location, court orders, receipts, bills, employment documents, unemployment claims, business records or documents issued by a governmental agency. Ibid.

I **CONCLUDE** that Z.A. is obligated to provide proof of her domicile. I further **CONCLUDE** that since I found that Z.A. failed to provide any proof of her residency, J.K. is not entitled to a free education. The Board, however, is entitled to recover tuition from Z.A. N.J.S.A. 18A:38-1(b)(2). "Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance . . . ." Ibid. Therefore, the per diem rate for the 2005-2006 school year is $57.72, and the per diem rate for the 2007-2008 school year is $59.73. Accordingly, I also **CONCLUDE** that the total tuition for the 2005-2006 school year is $5,598.84. The total tuition for the 2006-2007 school year is $10,539.61, and the total tuition for the 2007-2008 school year, up to, and including, March 5, 2008, is $6,689.76. Thus, the total due the Board as of March 5, 2008, the date of the hearing, is $22,828.21.

ORDER

I hereby **ORDER** that the Board's decision to remove J.K. from the NHRHS is **AFFIRMED**. I further **ORDER** that the Board's application for tuition reimbursement is **GRANTED** in the amount of $22,828.21, plus $59.73 per day for each day that J.K. continues to attend NHRHS after March 5, 2008.

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

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

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

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

3-11-08
DATE

JOSEPH PAONE, ALJ

Date Received at Agency: MAR 11 2008

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

MAR 14 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

lr

APPENDIX

Witnesses

For Petitioner:

Chief Timothy McWilliams
Dr. David Goldblatt

For Respondent:

Z.A.

Exhibits

For Petitioner:

P-1 Letter to John J. Keenan from Z.A., dated 8/16/07
P-2 Letter to David Goldblatt from Z.A., dated 10/8/07
P-3 Four-page document from Allendale and Saddle River Police Departments
P-4 Proposed unsigned form of Order

For Respondent:

R-1 Two-page Saddle River Police Department
R-2 Certification of David Goldblatt
R-3 Letter from Meri J. Van Blarcom-Gupko, dated 3/6/08

189-08

#189-08

OAL DKT. NO. EDU 6129-07
AGENCY DKT. NO. 184-6/07

MICHELLE GAMBINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MAPLE SHADE, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions – dated April 3, 2008 and filed on April 4, 2008 in response to an OAL decision mailing date of March 20, 2008 – were untimely pursuant to *N.J.A.C.* 1:1-18.4[1] and, therefore, are not considered here.

Upon full consideration of the record, the Commissioner concurs with the Administrative Law Judge that this matter is appropriately dismissed as moot. Petitioner was reinstated with no break in service or loss of compensation or benefits and she has, therefore, suffered no loss of position and no damage. Further adjudication of this matter is to no avail as all petitioner is left with here is a theoretical issue which has no practical effect. (See *Maureen Price v. Board of Education of the Township of Washington, Burlington County*, Commissioner's Decision No. 25-08, decided January 23, 2008; Also See *Wood v. Board of Education of the Borough of Pemberton, Burlington County*, Commissioner's Decision No. 209-03, decided May 1, 2003)

[1] "Within 13 days from the date the judge's initial decision was mailed to the parties, any party may file written exceptions with the agency head.***" (*N.J.A.C.* 1:1-18.4(a))

Accordingly, the recommended decision of the OAL is adopted for the reasons clearly presented therein and the instant petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

Lucille Davy

COMMISSIONER OF EDUCATION

Date of Decision: 4/23/08

Date of Mailing: 4/24/08

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6129-07

AGENCY DKT.N O. 184-6/07

MICHELLE GAMBINO,

Petitioner,

v.

BOARD OF EDUCATION OF
THE TOWNSHIP OF MAPLE SHADE,
BURLINGTON COUNTY,

Respondent

Richard A. Friedman, Esq., for the petitioner (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Stephen J. Mushinski, Esq., for the respondent (Parker McCay, attorneys)

Record Closed: March 10, 2008 Decided: March 17, 2008

BEFORE **SOLOMON A. METZGER**, ALJ:

This matter arises out of a reduction in force instituted by the Maple Shade Board of Education. Petitioner sought a hearing and the matter was transmitted by the Department of

Education to the Office of Administrative Law as a contested case, pursuant to *N.J.S.A.* 52:14F-1 to -23. Respondent has filed a motion to dismiss the petition as moot.

The facts for purposes of the motion are undisputed. Petitioner is a tenured teacher of Spanish in the Maple Shade School District. By notice dated May 11, 2007 the district informed her that her position would be eliminated. She filed a petition of appeal on June 28, 2007 claiming entitlement to a teacher of Spanish position. On August 6, 2007 the Board offered petitioner employment for the 2007/08 school year, which allowed her to continue without any break in service or diminution in benefits and salary. This is the substance of the record.

Petitioner acknowledges that on reinstatement she suffered no damages from the RIF. Nonetheless, she believes that the seniority determination made under N.J.S.A. 18A:28-12, must be reviewed. This position is at variance with longstanding administrative precedents in the area, *Price v. Bd. of Ed. of Washington Township*, 1/23/2008, http://www.nj.gov/education/legal; *Wood v. Bd. Of Educ., Borough of Pemberton, Commr's Decision No. 209-03, decided May 1, 2003)*; *Andreula v. Bd. Of Ed., City Of Hoboken, OAL Dkt. EDU 6537-84 (12/18/84), aff'd Comm'r of Ed. (1/31/85)*. When a tenured staff member reinstated after a RIF has lost nothing, there is nothing to be gained from a review of the seniority issue, the dynamics of which may change with future circumstances. I am persuaded therefore that this case is moot.

Based on the foregoing, it is **ORDERED** that this petition be **DISMISSED.**

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

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

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

3/17/08
DATE

SOLOMON A. METZGER, ALJ

Date Received at Agency:

MAR 2 0 2008

3/17/08
Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

/cad

Dombroski, Colleen

From: System Administrator
To: EDU3; EDU2
Sent: Monday, March 17, 2008 9:27 AM
Subject: Delivered: EDU 6129-07 Gambino

Your message

To: EDU
Subject: EDU 6129-07 Gambino
Sent: 3/17/2008 9:27 AM

was delivered to the following recipient(s):

EDU3 on 3/17/2008 9:27 AM
EDU2 on 3/17/2008 9:27 AM

#190-08

OAL DKT. NO. EDU 10542-07
AGENCY DKT. NO. 379-12/07

M.A., on behalf of minor child, D.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.

Upon review, the Commissioner notes that, although the parties have resolved their respective claims, they have done so without bringing the terms of such resolution to the record. Consequently, the Commissioner has reviewed this matter as a withdrawal and has determined to approve it pursuant to *N.J.A.C.* 1:1-19.2.

Accordingly, for the reasons set forth above, the Initial Decision of the OAL – finding that the parties no longer wish to pursue their dispute before the Commissioner and recommending dismissal of all claims – is adopted as the final decision in this matter.

IT IS SO ORDERED.

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 4/23/08
Date of Mailing: 4/24/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 10542-07

AGENCY DKT. NO. 379-12/07

M.A. ON BEHALF OF D.L.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY

Respondent.

M.A., on behalf of D.L., petitioner, pro se

Elizabeth Farley Murphy, Esq., on behalf of respondent (Wilentz, Goldman & Spitzer, attorneys)

Record Closed: March 20, 2008 Decided: March 25, 2008

BEFORE **RONALD W. REBA**, ALJ:

This matter arises out of petitioner challenging the Woodbridge Township Board of Education residency determination and respondent counterclaims for tuition. I **CONCLUDE** that the matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that this matter be **DISMISSED**.

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

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

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

MARCH 25, 2008
DATE

Ronald W. Reba
RONALD W. REBA, ALJ

Date Received at Agency:

4-1-08

MAR 27 2008

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

/cad

WILENTZ, GOLDMAN & SPITZER P.A.
90 Woodbridge Center Drive
Post Office Box 10
Woodbridge, New Jersey 07095
(732) 636-8000
Attorneys for Respondent
Woodbridge Township Board of Education

M.A. o/b/o D.L., Petitioner, v. WOODBRIDGE TOWNSHIP BOARD OF EDUCATION, Respondent.	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION BEFORE THE COMMISSIONER OF EDUCATION AGENCY REFERENCE NO. 379-12/07 OAL DKT NO. EDUOS 10542-2007S STIPULATION OF DISMISSAL

It is hereby stipulated and agreed that all claims in the within matter are hereby dismissed without prejudice and without costs against either party.

Mildred Acevedo
MILDRED ACEVEDO

3-17-08
Date

WILENTZ, GOLDMAN & SPITZER P.A.
Attorneys for Respondent
Woodbridge Township Board of Education

BY: Elizabeth F. Murphy
ELIZABETH FARLEY MURPHY

3/17/08
Date

#3014903

194-08

AGENCY DKT. NO. 59-2/08

EMILY DIAZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MAHWAH, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

This matter was initiated by way of petition of appeal filed with the Commissioner of Education (Commissioner) on February 20, 2008. On February 26, 2008, the parties were directed to submit briefs discussing whether the Commissioner has jurisdiction over the issues articulated in the petition. After thorough consideration of the parties' undisputed factual representations and their legal arguments, the Commissioner is not persuaded that the jurisdictional grounds necessary for her adjudication of this case are present.

The "First Cause" of the petition recites that petitioner, a tenured teacher, is the "target of a disciplinary proceeding before the superintendent's designee." This allegation is made in reliance on a "Notification of Concern – Level 2" to petitioner from her World Language Supervisor, Mimi Lezanski, discussing petitioner's actions in pressuring a student to intervene in a dialogue between petitioner and Lezanski about petitioner's teaching methods. In claiming that she is entitled to legal counsel of her choosing at all meetings concerning the "Notification of Concern," petitioner references Article 11 (Grievances), Sec. C (3) of the collective bargaining agreement (CBA) between respondent and its staff. That provision states

that the grievant "shall have the right to representation of his/her own choosing at the Superintendent's level and above in the procedure, after first having discussed the grievance with his/her supervisor, if relevant, and then his/her principal." Petitioner also claims a violation of the constitutional rights of substantive and procedural due process.

The "Second Cause" alleges that petitioner is not being provided with certain documents, such as a letter or letters written by the student from whom petitioner requested assistance. Petitioner has, however, attached an "Exhibit B" to the petition, which is a letter from respondent's counsel to petitioner's counsel, stating that although petitioner did not have the right to legal counsel at meetings regarding the Notice of Concern, she could access her personnel file and provide her counsel with copies of documents contained therein.

At the outset, the petitioner is reminded that the Commissioner has no jurisdiction over contractual disputes. *Integrated Security Technology v. Board of Education of the Township of Hardyston, et al.,* Commissioner Decision No. 433-07, November 7, 2007; *Vitacco v. Lincoln Park Board of Education,* Commissioner Decision No. 312-98, July 17, 1998. Thus, she will make no findings on the meaning or application of Article 11 of the CBA.

Second, the facts before the Commissioner reveal that the "process" which has taken place regarding petitioner is set forth in Article 12 of the CBA, entitled "Notification of Concern." This article of the CBA addresses concerns "about any aspect of an employee's responsibilities outside the instructional and evaluation process." As stated above, the Commissioner cannot be the arbiter of controversies that arise concerning the rights and responsibilities of the parties under such contractual provisions as Article 12 of the CBA.

Third, there are no facts before the Commissioner that would support the need for adjudication of constitutional issues. In petitioner's letter brief dated March 26, 2008, she has stated that her petition does not appeal the increment withholding which was apparently imposed upon her for the 2007-2008 school year. Nor have any tenure proceedings been filed against her. Thus, there are currently no property or other fundamental rights in jeopardy. Due process rights are consequently not implicated.

Further, the Commissioner does not have jurisdiction to adjudicate constitutional issues unless they are inextricably intertwined with specific violations of school law (*N.J.S.A.* 18A:1-1 *et seq.*) – the area of the Commissioner's expertise. *Valent v. New Jersey State Board of Education*, 114 *N.J. Super.* 63, 69 (Ch. Div. 1971). As petitioner has identified no specific violations of particular provisions of the education laws, the Commissioner has no grounds upon which to address constitutional claims.

Accordingly, the petition is dismissed.

IT IS SO ORDERED.*

Lucille R Davy

COMMISSIONER OF EDUCATION

Date of Decision: 4/25/08

Date of Mailing: 4/25/08

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

191-08

OAL DKT. NO. EDU 3746-08
AGENCY DKT. NO. 73-3/08

JEANNETTE E. GABRIEL,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY,	:	
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 4/23/98

Date of Mailing: 4/24/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO.EDU 03746-08

Agency Docket No.73-3/08

JEANNETTE T. GABRIEL,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF THE CITY OF PLAINFIELD

Respondent.

Michael T. Barrett, Esq. appearing on behalf of petitioner (Bergman & Barrett)

Ronald C. Hunt, Esq., appearing on behalf of respondent (Hunt, Hamlin & Ridley)

Record Closed: March 27, 2008 Decided: March 31, 2008

BEFORE **WALTER M. BRASWELL**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on March 24, 2008 for resolution as a emergent relief case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A hearing was scheduled and conducted on March 27, 2008 at which time the parties settled the matter. A copy of the Settlement Agreement is attached hereto.

March 31, 2008
DATE

Walter M Braswell
WALTER M. BRASWELL, ALJ

Date Received at Agency:

4-3-08

Mailed to Parties:

APR 3 2008
DATE

DIRECTOR AND
ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

ljb

192-08

OAL DKT. NO. EDU 9786-07
AGENCY DKT. NO. 268-9/07

E.T. on behalf of minor children, N.S. and J.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner finds that she cannot approve the Settlement Agreement because it is signed by the Superintendent of the Bayonne School District, and neither the file nor the agreement includes a Board resolution approving the agreement and designating the superintendent to sign it on the Board's behalf; nor, in the alternative, is the agreement signed by the Board attorney as the Board's duly authorized representative in litigation.

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

IT IS SO ORDERED.*

Lucille Edley

COMMISSIONER OF EDUCATION

Date of Decision: 4/24/08

Date of Mailing: 4/24/08

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 09786-07

AGENCY DKT. NO. 268-9/07

E.T. on behalf of minor children N.S. and J.S.,

Petitioners,

v.

BAYONNE BOARD OF EDUCATION,

Respondent.

E.T. on behalf of minor children N.S. and J.S., pro se

Robert J. Merryman, Esq., appearing for respondent Bayonne Board of Education (Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: April 1, 2008 Decided: April 4, 2008

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

This matter was transmitted to the Office of Administrative Law (OAL) on September 21, 2007, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

An oral argument was scheduled on September 28, 2007. The attached Settlement Agreement was submitted on April 1, 2008, indicating the terms of agreement which are incorporated herein by reference.

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

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

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

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

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

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

4/4/08
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency: 4-9-08

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APR 9 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

tbj

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STATE OF N.J.
LAW
2008 APR -1 P 9:52

SETTLEMENT AGREEMENT

The Bayonne Board of Education ("Board") and Elizabeth Torres ("Torres"), on behalf of her two minor children, N.S. and J.S., hereby agree as follows:

(1) Based upon the settlement terms set forth below, Torres agrees to dismiss with prejudice the Petition of Appeal filed with the New Jersey Department of Education, with OAL Docket Number EDU-09786-07 and Agency Docket No. 268-9/07 and agrees to release and waive any claim she may have against the Bayonne Board of Education that was brought or which could have been brought in her petition of appeal.

(2) The Bayonne Board of Education agrees to allow Torres' two children, N.S. and J.S., to continue to attend the before school program offered at the Lincoln School at no charge to Torres for the remainder of the 2007-2008 school year.

Patricia L. McGeehan
Dr. Patricia McGeehan, Superintendent
Bayonne School District

Dated:

Elizabeth Torres
Elizabeth Torres

Dated: 3/15/08

S:\RJM\Bayonne Board of Ed\General BOE matters\E.T. Emergent RElief Petition\MEMORANDUM OF AGREEMENT.doc

193-08

OAL DKT. NO. EDU 1170-06
AGENCY DKT. NO. 375-12/05

BRIAN LUKE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner observes that neither the file nor the Settlement Agreement contains a copy of the Board of Education's resolution approving the settlement. Nor is the agreement signed by the Board attorney, who is the Board's duly authorized representative in litigation.[1] The Commissioner consequently cannot approve the within settlement.

Further, Sections 3, 4, 8 and 14 of the Settlement Agreement recite that the various provisions will take effect upon the execution of the Settlement Agreement and the approval of same by the Board. Thus, these provisions indicate that the parties anticipated that certain conduct would occur on dates preceding consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves same.

[1] The Board attorney's acknowledgement that Glenn Garrison is the person who signed the settlement agreement does not satisfy the requirement that the agreement be accompanied by a ratifying Board resolution or executed by the board attorney.

In light of the foregoing, the Commissioner hereby remands this matter to the OAL for revision of the Settlement Agreement to include either the Board attorney's signature or a board resolution approving the settlement and designating Glenn Garrison to sign on behalf of the Board. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.[2]

Lucille Edar /

COMMISSIONER OF EDUCATION

Date of Decision: 4/24/08

Date of Mailing: 4/24/08

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 01170-06

AGENCY DOCKET NO. 375-12/05

BRIAN LUKE,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,

Respondent.

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

Mark A. Tabakin, Esq., for respondent (Weiner Lesniak)

Record Closed: March 4, 2008 Decided: March 6, 2008

BEFORE **CARIDAD F. RIGO**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on January 10, 2007, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

Several hearings and telephone conferences were scheduled. During the April 13, 2007 telephone conference the parties advised that the matter was settled subject to Board approval. On March 4, 2008 the OAL received a fully executed settled which is attached herewith.

Having reviewed the contents of the attached Stipulation of Settlement, I **FIND**:

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

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

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

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

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

March 4, 2008
DATE

CARIDAD F. RIGO, ALJ

Date Received at Agency: 3-10-08

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

MAR 10 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

ljb

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2008 MAR -4 P 4:5

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is made and entered into between the **Board of Education of the City of Englewood** (the "Board") and Brian Luke (Luke or Petitioner), collectively, "the Parties".

WHEREAS, Petitioner filed a Petition of Appeal with the Commissioner of Education under Agency Ref No.: 375-12/05 and Docket No. EDU-01170-2006N, claiming improper withholding of employment and adjustment increments for the 2004-2005 and 2005-2006 school years.

WHEREAS, The Board has filed an Answer to the petition denying Petitioner's claims that resulted in the matters being referred to the O.A.L. for disposition as a contested case where it was listed for trial.

WHEREAS, Petitioner continues to be employed by the Respondent as a full-time teaching staff member in the Board's employ.

WHEREAS, the Board and Petitioner, now mutually agree to settle the matters and allegations in dispute; and

WHEREAS, all parties have been afforded the opportunity to consider the terms of this Agreement with advice of counsel and/or a representative of their choice;

NOW, THEREFORE, in consideration of the promises and the mutual covenants herein contained, and for other good and valuable consideration, the parties hereby agree as follows:

1. The **"Board"**, as used herein, shall at all times mean the Board of Education of the City of Englewood, its affiliates, predecessors, successors and assigns of any and all of them, their present and former directors, officials, officers, representatives, associates, partners, servants, employees, agents, attorneys, and successors, whether in their individual or official capacities, and all other persons, firms, corporations, associations, partnerships or any other entity connected therewith.

2. **"Petitioner"**, as used herein, shall mean BRIAN LUKE and his successors-in-interest, heirs, administrators and assignees.

3. In consideration of the mutual promises set forth herein and for other valuable consideration, within thirty (30) business days of the Board's receipt of an executed copy of this Settlement Agreement, the Board shall restore the annual and adjustment increments withheld from Petitioner so that his current salary will be $97,307 effective September 1, 2007. Respondent shall pay Petitioner, in a lump sum, $3800 plus the pro rata portion of the $97,307 annual salary for 2007-2008 that he has not received to date. Respondent shall withhold all appropriate taxes and pension contributions from said lump sum payment and shall report Petitioner's corrected salary to the New Jersey Division of Pensions.

4. In consideration for the restoration of the annual and adjustment increments references above, Luke agrees to submit his irrevocable resignation of employment as a

teaching staff member of the Englewood School District effective June 30, 2010. Said resignation shall be deemed accepted by the Board upon execution of this agreement.

5. For the period through June 30, 2010, Luke shall continue in his current teaching assignment with the District. Except as set forth below, the District agrees to take no other action to affect Luke's employment with the District through the date of his resignation set forth herein. If however, Luke clearly demonstrates his inability to perform his duties in a professional manner or satisfy the minimum standards of performance for licensure as a teaching staff member, the Board may exercise its managerial rights as are provided by law.

6. This Settlement Agreement is contingent on and subject to approval and ratification by the Board.

7. This Settlement Agreement contains the full agreement of the Board and Brian Luke as respects the resolution of the issues raised in the above-referenced Petition of Appeal before the Commissioner of Education.

8. Petitioner will withdraw the Petition of Appeal under the docket numbers, with prejudice, upon the receipt of a fully executed settlement agreement from the Board with a copy of the Resolution approving the same. Petitioner will likewise release the Respondent from all employment related statutory or contractual claims existing at the time this settlement agreement is executed save for any pending workers

compensation actions. This release shall not include the release of claims governed by public policy.

9. If any term, provision or condition of this Settlement Agreement is held invalid or unenforceable by a court of competent jurisdiction, such holding shall be without effect upon the validity or enforceability of any other provision, term or condition of this Settlement Agreement other than the consideration set forth in paragraph 3, 4 and 5.

10. This Settlement Agreement shall be construed and interpreted in accordance with the laws of the State of New Jersey.

11. The parties agree to cooperate fully and execute any and all supplementary documents and to take all additional actions that are necessary or appropriate to effect the terms of this settlement agreement.

12. This Settlement Agreement may be executed in counterparts, each of which shall be deemed to be an original copy, but all of which together shall be deemed one and the same instrument.

13. This Settlement Agreement contains the entire Agreement between the Petitioner and the Board with regard to the matters set forth in it. It shall be binding upon and inure to the benefit of their officials, officers, directors, representatives, employees, associates, partners, agents, servants and successors in interest and enforceable in any court of competent jurisdiction.

14. This Settlement Agreement shall become effective immediately following approval by the Board and execution by all the following parties.

Dated: January , 2008

WITNESS:

Bd-Secretary

Dated: January , 2008

BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD

Bd President

BRIAN LUKE

STATE OF NEW JERSEY, COUNTY OF BERGEN

SS.:

I CERTIFY that on January__ ,2008 ,

Glenn Garrison personally came before me and acknowledged under oath, to my satisfaction, that he is the persons:

(a) named in and personally signed this document; and

(b) signed, sealed and delivered this document as his or her act and deed.

Mark Tabakin
Atty At Law State of NJ

STATE OF NEW JERSEY, COUNTY OF BERGEN

SS.:

I CERTIFY that on January 28 ,2008

BRIAN LUKE personally came before me and acknowledged under oath, to my satisfaction, that he is the persons:

a) named in and personally signed this document; and

b) signed, sealed and delivered this document as her act and deed.

VANESSA B. JULIANO
NOTARY PUBLIC OF NEW JERSEY
Commission Expires 4/10/2012

195-08

#195-08

OAL DKT. NO. EDU 8552-07
AGENCY DKT. NO. 277-9/07

DR. GLENN T. GRAY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF BEVERLY, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 4/25/08
Date of Mailing: 4/25/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8552-07
AGENCY DKT. NO. 277-9/07

DR. GLENN T. GRAY,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF BEVERLY, BURLINGTON COUNTY.
Respondent.

Beth L. Finkelstein, Esq., for petitioner

Stephen J. Mushinski, Esq., for respondent (Parker McCay, attorneys)

Record Closed: March 26, 2008 Decided: March 27, 2008

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

This matter, involving petitioner's claim that the Board denied him a contractually required 5.25% salary increase, was transmitted to the Office of Administrative Law (OAL) on October 19, 2007, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

A telephone conference was conducted on January 17, 2008, at which time the parties represented that settlement negotiations were ongoing. On March 13, 2008, the parties submitted a copy of the settlement agreement. After review of this settlement, I requested clarification as to some of the terms. On March 26, 2008, I received the additional documentation I requested.

I have reviewed the terms of the settlement (J-1), Board Resolution (J-1), along with the explanatory documentation I requested (C-1), and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures. The Board has passed a resolution approving the settlement.

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

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

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

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

March 27, 2008
DATE

ANA C. VISCOMI, ALJ

Date Received at Agency:

APR -3 2008

DATE

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

/cs

STIPULATION OF SETTLEMENT

WHEREAS, Dr. Glenn T. Gray (hereinafter " Dr. Gray" or "you") has been employed by the Board of Education of the City of Beverly, County of Burlington, (hereinafter "Board") as a tenured Superintendent of Schools; and

WHEREAS, a dispute arose between Gray and the Board concerning salary increases resulting in the filing of a Petition of Appeal entitled Glenn T. Gray v. Board of Education of the City of Beverly, OAL Docket No. EDUOA 08552-2007S and,

WHEREAS, the petition filed by Dr. Gray alleged that the Board had improperly withheld negotiated salary increments which had been previously approved by the previously sitting Board on May 16, 2006 for a period of three years; and

WHEREAS, Dr. Gray has been employed by the Board in the position of Superintendent since January 1976 and has life-time tenure in said position; and

WHEREAS, Dr. Gray and the Board have mutually agreed to resolve the matters in dispute and other aspects of Dr. Gray's employment by the Board; and

WHEREAS, the Board has agreed to retroactively remit the disputed salary adjustments, and effective midnight, September 30, 2008, Dr. Gray intends to resign from his employment; and **WHEREAS,** Dr. Gray will continue to fulfill all his responsibilities as Superintendent, as directed by the Board, until the effective date of his resignation; and

WHEREAS, the Board will continue to employ him in that capacity; and

WHEREAS, consideration for the above guarantee of employment and salary adjustments, the parties have agreed to settle and terminate any and all disputes between them by executing this Stipulation of Settlement ("Settlement")

IT IS HEREBY AGREED by and between Dr. Gray and the Board as follows:

1. For and in consideration of the undertakings of the Board set forth herein, and intending to be legally bound, Dr. Gray does hereby remise, release and forever discharge the Board and its officers, members, employees and agents its and their respective successors and assigns, heirs, executors and administrators, of and from any all manner of action and causes of action, suits, debts, claims and demands whatsoever in law or in equity, which he ever had, now has or hereafter may have, or which his heirs, executors or administrators hereafter may have by reason of any matter, cause or thing whatsoever, from the beginning of his employment with the Board to the date of these presents, and particularly, but without limitation, of the foregoing general terms, any and all claims arising from or relating in any way to Dr. Gray's employment relationship and/or withholding of salary increases, including but not limited to, any claims which have been asserted or could have been asserted or could be asserted now or in the future under any and all federal, state, or local laws and any common law claims or hereafter recognized and any and all claims arising out of Dr. Gray's employment with the Board, with the following exceptions: claims arising under the Workers Compensation Act, N.J.S.A. 34:15-1 et seq., the Teachers Pension and Annuity Fund Act, N.J.S.A. 18A:66-1 et seq., the right to obtain continued medical coverage under the Consolidated Omnibus Reconciliation Act of 1976 (COBRA) in accordance with paragraph 10 hereof; rights Dr. Gray has for indemnification by the Board under N.J.S.A. 18A:16-6 and 6.1, and claims arising from the breach of this Settlement. Dr. Gray is unaware of any factual basis for any such claims at this time. Specifically, Dr. Gray hereby consents to irrevocably and unconditionally release and discharge the Board and its agents, employees and servants (collectively "Releasees"), from any and all obligations, claims, demands, judgments, or causes of action of any kind whatsoever in tort, contract, by statute, or on any other basis for compensatory, punitive, or other damages, expense,

reimbursements or costs of any kind, including but not limited to any and all federal, state and local law claims which Dr. Gray has or may have as of the date of signing this Settlement, whether statutory or common law, including, but not limited to claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Civil Rights Act of 1866, the Age Discrimination in Employment Act of 1967, the Employee Retirement Income Security Act of 1974, the Americans With Disabilities Act, Executive Orders 11246 and 11141, the New Jersey Law Against Discrimination, the New Jersey Conscientious Employee Protection Act, and all federal, state and local law claims, whether statutory or common law, including but not limited to, claims of personal injury, breach of contract, unlawful discharge from employment, defamation, malicious interference with economic advantage, or discrimination on the basis of age, ancestry, atypical hereditary cellular or blood trait, liability for service in the Armed Forces of the United States, color, creed, handicap, marital status, national origin, nationality, sex, race, sexual orientation or veteran's status, and/or claims growing out of any legal restrictions, express or implied, or the Board's right to control or terminate the employment of its employees. If you sign this Settlement, you will have three (3) days from the date you sign it to withdraw your consent to the terms of this Settlement.

2. The Board, for and in consideration of the undertakings of Dr. Gray set forth herein, and intending to be legally bound, does hereby remise, release and forever discharge Dr. Gray and his heirs, executors and administrators, of and from any and all manner of actions and causes of actions, suits, debts, claims and demands whatsoever in law or in equity, which it ever had, now has, or hereafter may have, or which the officers, members, employees and/or agents of the Board, its successors and assigns, hereafter may have by reason of any manner, cause or thing whatsoever, from the beginning of Dr. Gray's employment with the Board to the date of these

presents, and particularly, without limitation, of the foregoing general terms, any claims arising from or relating in any to Dr. Gray's employment relationship, withholding of his salary increases and/or termination of Dr.. Gray's employment relationship and/or affiliation with Board, including but not limited to, any claims which have been asserted or could have been asserted or could be asserted now or in the future under any and all federal, state or local laws in any common law claims now or hereafter recognized, and any and all claims arising out of Dr. Gray's employment with Board except for claims arising from the breach of this Settlement.

3. The Board hereby agrees, in accordance with the resolution dated, May 16, 2006, that it shall increase Dr. Gray's 2007-2008 salary to $118,738.50, plus additional compensation for his duties as Business Administrator of $12,600.00 for a total of $131,338.50 retroactive to July 1, 2007; and effective July 1, 2008 increase Dr. Gray's salary to $124,942.36, plus additional compensation of $12,600.00 for his duties as Business Administrator, for a total of $137,542.36. The retroactive compensation due for 2007-2008 shall be paid in lump sum with applicable deductions within 30 days of the final approval of this Settlement by the Commissioner of Education or her designee at which time all necessary payroll adjustments including pension payment adjustments shall be made by the Board.

4. The Board hereby approves Dr. Gray's use of accumulated vacation days from August 1, 2008 until September 30, 2008.

5. The Board agrees to pay Dr. Gray in nine (9) equal monthly payments of $4,376.00 commencing October 1, 2008 through June 30, 2009, the sum of $39,384.00 which represents settlement of payments due under the Board resolution dated May 16, 2006 by payments to Dr. Gray. Dr. Gray will be issues a 1099 for such payments at the end of each federal tax year, and any other reporting and withholding required by law.

6. On or about July 1, 2009, the Board shall pay Dr. Gray a lump sum payment of $15,000.00 representing the settlement sum for all of Dr. Gray's accumulated sick leave benefits accumulated during the course of his employment by the Board. Dr. Gray will be issued a W-2 for such payment at the end of the 2009 federal tax year, and any other reporting and withholding required by law.

7. On or about July 1, 2010, the Board shall pay Dr. Gray a lump sum payment of $17,190.00 representing the settlement sum for all remaining vacation time accumulated by Dr. Gray during the course of his employment by the Board. Dr. Gray will be issued a W-2 for such payment at the end of the 2010 federal tax year, and any other reporting and withholding required by law.

8. For all settlement sum payments made pursuant to Paragraphs 5, 6, and 7 to Dr. Gray under this Settlement, the Board shall not be responsible for any employer payroll taxes, unless otherwise required by law.

9. Dr. Gray's service shall be considered seamless for all purposes, specifically including, but not limited to pension, longevity, seniority and tenure.

10. Following the effective date of his resignation, Dr. Gray will be entitled to receive insurance coverages for himself and his family upon paying the appropriate premiums under COBRA.

11. Dr. Gray agrees that he shall resign and no longer be employed by the Board as of midnight on September 30, 2008. Dr. Gray's irrevocable letter of resignation which will be conditioned upon the approval of this Settlement by the Commissioner of Education or her designee is attached hereto and incorporated herein as **Exhibit "A"**. Dr. Gray further agrees that his signature on this Settlement constitutes an acknowledgment that he is relinquishing all

present and future rights to employment and reemployment with the Board as of midnight on September 30, 2008. The letter of resignation shall be held in escrow until this Settlement is approved.

12. Following the effective date of Dr. Gray's resignation, in the event that Dr. Gray dies before the term of this Settlement is completed, payment for his unused accumulated sick and vacation and other settlement compensation as listed in paragraphs 5, 6 and 7 will be made to his estate.

13. By entering into this Settlement, neither party is making any admission with respect to any of the issues raised by the respective parties in this matter.

14. Each party is to bear their own cost and attorneys fees.

15. Dr. Gray further agrees and covenants that neither he nor any person, organization or other entity on his behalf, will file, charge, claim, sue or cause or permit to be filed, charged or claimed, any action for legal or equitable relief (including damages, injunctive, declaratory, monetary or other relief) involving any matter occurring at any time in the past up to the date of this Settlement.

16. The Board agrees and covenants that neither it nor anyone on its behalf will file, charge, claim, sue or cause to permit to be filed, charged or claimed, any action for legal or equitable relief (including damages, injunctive, declaratory, monetary or other relief) involving any matter occurring at any time in the past up to the date of this Settlement.

17. Dr. Gray and the Board agree and acknowledge that the Settlement and the parties described herein and the settlement and termination of any claims that the parties have against each other, as set forth herein, is not and shall not be construed to be an admission of any

violation of any federal, state or local statute or regulation or of any duty owed by and between the parties.

18. By signing this Settlement, the parties certify that they have had the opportunity to discuss this Settlement with counsel. They are fully satisfied with the services of their counsel with respect to both this Settlement and all other aspects of this case and they enter into this Settlement knowingly, willingly and without any coercion or improper inducement.

19. This Settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and the agreements contained herein shall become effective only upon receipt of said approval. Until receipt of said approval, the parties agree to maintain the status quo with Dr. Gray continuing to fulfill his responsibilities as Superintendent of Schools and the Board continuing to employ him and direct him in said capacity as required by law. Upon receipt of said approval, Dr Gray will cause to be filed a withdrawal with prejudice, of the matter currently pending before the Office of Administrative Law and docketed as shown above.

20. This Settlement shall be binding upon all successors, agents and assigns of the Board, and the obligations enumerated here will remain in full force and effect in the event that the Beverly School District is subject to regionalization and/or consolidation.

21. In the event that any portion of this Settlement is determined to be illegal, the parties agree in advance, to reform the Settlement so that each party receives the full benefit of the bargain.

22. By signing this Settlement, each signator represents that he or she is a party or has been duly authorized by a party to sign that party's behalf.

23. The parties agree that this Settlement may be signed and counterparts and facsimiles of signatures will have the same force and effect as original signatures.

Intending to be legally bound hereby, Dr. Gray and the Board execute this Settlement this 12TH day of MARCH, 2008.

Witness:

STEPHEN J. MUSHNICK
ATTY AT LAW OF N.J.

Glenn T. Gray
GLENN T. GRAY

Attest:

BOARD OF EDUCATION OF
THE CITY OF BEVERLY

DANA SARAGNESE, Secretary

Robert D. Thibault, President

EXHIBIT "A"

GLENN T. GRAY, ED.D.
385 JACOBSTOWN COOKSTOWN ROAD
NORTH HANOVER, NEW JERSEY 08562

March 12, 2008

Mr. Robert Thibault, President
Beverly City Board of Education
601 Bentley Ave.
Beverly, New Jersey 08010

Dear Mr. Thibault and
Members of the Board:

With this letter I hereby resign from the position of Superintendent of Schools, effective October 1, 2008, pursuant to the Stipulation of Settlement dated March 12, 2008.

This resignation is expressly contingent upon the Board's fulfillment of all of the terms and conditions of the Stipulation of Settlement and the approval of the Stipulation of Settlement by the Commissioner of Education. Further, in the event that the Board fails to adopt, execute and perform any of its obligations under the Stipulation of Settlement, or the Contract of Employment, this resignation shall be null and void.

Very truly yours,

Glenn T. Gray

Glenn T. Gray, Ed.D.
Superintendent

RESOLUTION OF THE BOARD OF EDUCATION OF THE CITY OF BEVERLY AUTHORIZING APPROVAL OF STIPULATION OF SETTLEMENT AND ACCEPTING RESIGNATION OF DR. GLENN T. GRAY

WHEREAS, Dr. Glenn T. Gray ("Dr. Gray") has been employed by the Board of Education of the City of Beverly ("Board of Education") as Superintendent of Schools since 1976 and has acquired lifetime tenure in said position; and

WHEREAS, a dispute arose between Dr. Gray and the Board of Education concerning salary increases which has resulted in the filing of a Petition of Appeal entitled Glenn T. Gray v. Board of Education of the City of Beverly, OAL Docket No. EDUOA 08552-2007S ("Litigation"); and

WHEREAS, Dr. Gray and the Board of Education have mutually agreed to resolve all matters included in the Litigation, as well as other aspects of Dr. Gray's employment with the Board of Education; and

WHEREAS, the agreement between the parties resolving the above matters is contained in a Stipulation of Settlement which requires the approval of the Office of Administrative Law and the Commissioner of Education; and

WHEREAS, as part of agreeing to the Stipulation of Settlement, Dr. Gray has submitted his resignation as Superintendent of Schools which is contingent upon the Stipulation of Settlement being approved by the Board of Education, Office of Administrative Law and Commissioner of Education; and

WHEREAS, Dr. Gray and the Board of Education, have therefore agreed to submit the Stipulation of Settlement to both the Office of Administrative Law and the Commissioner of Education; and

WHEREAS, the Board of Education deems resolution of the above matters to be in the best interest of the Board of Education and the School District.

NOW, THEREFORE BE IT RESOLVED by the Board of Education of the City of Beverly as follows:

1. The Stipulation of Settlement which is attached hereto and made part hereof and the terms and conditions contained therein are hereby accepted and approved by the Board of Education.

2. The President of the Board of Education is authorized to execute the Stipulation of Settlement on behalf of the Board of Education.

3. Authorization is hereby given for the Board of Education attorney to submit the Stipulation of Settlement to the Office of Administrative Law and the Commissioner of Education for approval.

4. The Board of Education hereby accepts the resignation of Dr. Gray as Superintendent of Schools effective midnight, September 30, 2008, which is subject to receipt of the aforesaid approvals.

5. All resolutions or parts of resolutions inconsistent with the provisions hereof are repealed to the extent of such inconsistency.

AYES	NAYS	ABSTENTIONS
4	-0-	-0-

CERTIFICATION

STATE OF NEW JERSEY)
) ss
COUNTY OF BURLINGTON)

I, Dan Saragnese, Board Secretary of the Board of Education of the City of Beverly, do hereby certify the foregoing resolution entitled "Resolution of the Board of Education of the City of Beverly Authorizing Approval of Stipulation of Settlement and Accepting Resignation of Dr. Glenn T. Gray" to be a true copy of a resolution duly adopted by the Board of Education of the City of Beverly at its regularly scheduled public meeting held at 7:00 p.m. on March 12, 2008 at the Beverly City School, 601 Bentley Avenue, Beverly, New Jersey.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Board of Education of the City of Beverly this 12TH day of MARCH, 2008.

Dan Saragnese, Board Secretary

202-08

OAL DKT. NO. EDU 5050-08
AGENCY DKT. NO. 92-3/08

J.A.O. on behalf of minor child, A.O.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY,	:	DECISION ON
	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this matter, including the audio tape of the emergent hearing in the Office of Administrative Law (OAL) held on April 15, 2008,[1] and the Order issued by the Administrative Law Judge (ALJ) on April 16, 2008 have been reviewed. Upon independent consideration of the foregoing, the Commissioner adopts the Order as final, and returns the case to the OAL for any and all proceedings necessary to bring the underlying matter to a conclusion.

IT IS SO ORDERED.[2]

Lucille Davy
COMMISSIONER OF EDUCATION

Date of Decision: 5/02/08

Date of Mailing: 5/05/08

[1] At the hearing, the ALJ granted petitioner's oral motion to amend her petition to seek the reinstatement of A.O. into the general education program of respondent's school district. The original petition had appeared to object to the transfer of A.O. from one school to another.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

EMERGENT RELIEF

OAL DKT. NO. EDU 5050-08

AGENCY DKT. NO. 92-3/08

J.A.O. on behalf of minor child, A.O.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY,

Respondent.

Alan L. Krumholz, Esq., for petitioner J.A.O. on behalf of minor child, A.O.
(, attorneys)

Allan C. Roth, Esq, for respondent West New York Board of Education
(Roth Horowitz, LLC., attorneys)

Record Closed: April 15, 2008 Decided: April 16, 2008

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

BACKGROUND

J.A.O., the mother of A.O. a fourth grade student in the West New York Public School System filed a pro se petition seeking what appeared to be on its face, a

transfer of her son from one public school in West New York to another public school in West New York.

This matter was forwarded to the Office of Administrative Law as an emergent matter and scheduled for hearing.

On April 15, 2008, the return date of the emergent application, A.O. retained an attorney.

The inartful drawing of the original petition led Mr. Krumholz to request an amendment of the emergent application.

The original emergent application as forwarded by the Commissioner characterized the emergent relief being sought as an appeal of the transfer of A.O. from one school to another. The facts however indicated that on March 18, 2008, one day prior to J.A.O. signing her petition of appeal, her son A.O. had been suspended as a result of what was contended to be an act of violence he perpetrated against another student.

According to the Board of Education of the Town of West New York ("Board") the procedures delineated in N.J.A.C. 6A:16-7.3 were being implemented which resulted in the scheduling of an informal hearing for March 25, 2008.

In two letters following the scheduling of the informal hearing, one dated March 25, 2008 and the second dated April 2, 2008, the procedural and substantive elements of this case were disclosed to J.A.O.

J.A.O. and her son did not attend the informal hearing on March 25, 2008 but did appear for the scheduled Board hearing on April 9, 2008.

Despite their appearance on that date, the Board decided to adjourn the scheduled hearing contending that the matter could be resolved or at least discussed and pursued further after the emergent application was heard at the OAL.

The emergent application as amended by Mr. Krumholz sought to have A.O. reinstated in public school and the suspension terminated.

A review of documents indicates that there is a prior history that exists with respect to disciplinary matters and A.O. and there also appears to have been an incident on the date of the suspension, March 18, 2008, which had been reviewed on the date of the informal hearing, March 25, 2008.

N.J.A.C. 6A:16-7.3(10)iii states that:

> A formal hearing before the District Board of Education, which, at a minimum, shall:
>
> > iii. take place no later than 30 calendar days following the day the student is suspended from the general education program.

It is not disputed that A.O. was suspended on March 18, 2008 and that the 30-day period for a Board hearing had not run. It was in fact the contention of the Board that a hearing was scheduled for April 16, 2008 at which point a recommendation would be made to the Board concerning A.O.'s suspension.

In essence, the emergent relief application was denied because it was premature. The code provisions delineating procedures to be followed by the Board have been adequately followed although J.A.O. has refused out of school educational services that the Board offered to provide to her son. She indicates that she is home schooling him at present.

Since the 30 day period for Board action has not passed, the emergent application is premature and therefore **DISMISSED**.

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

April 16, 2008

DATE

JEFFREY A. GERSON, ALJ

sej

207-08

#207-08

IN THE MATTER OF THE TENURE	:	
HEARING OF CHANDLER DENNIS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF SOUTH ORANGE-	:	DECISION
MAPLEWOOD, ESSEX COUNTY.	:	
	:	

SYNOPSIS

The Board certified tenure charges consisting of ten counts of conduct unbecoming against Chandler Dennis – a tenured physics teacher – for alleged inappropriate conduct towards a minor female student, material breach of public trust and professional responsibility, and other just cause.

The ALJ found that respondent was guilty on two counts of conduct unbecoming a teacher, based on: 1) the birthday gift to his minor student, and 2) the clandestine email account he established so that he and his minor student could secretly communicate. The ALJ additionally found that the penalty of removal from respondent's teaching position too severe a sanction given the circumstances herein; he concluded that only a portion of Charge Four and Charge Five of the certified tenure charges have been sustained, the other charges are dismissed, and the appropriate total penalty for the sustained charges is the forfeiture of seventy days of salary. The ALJ ordered respondent reinstated to his position as a tenured physics teacher, with restoration of any pay or benefits withheld except for the aforesaid seventy-day penalty.

Upon independent review of the record, the Commissioner adopted the Initial Decision with modification as to penalty. The Commissioner ordered that respondent shall not be dismissed from his tenured employment, but shall forfeit the 120 days of salary withheld following certification of tenure charges. In so doing, the Commissioner emphasized the necessity to impress upon respondent the seriousness of the conduct in which he engaged.

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

May 8, 2008

OAL DKT. NO. EDU 5080-07
AGENCY DKT NO. 83-3/07

IN THE MATTER OF THE TENURE	:	
HEARING OF CHANDLER DENNIS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF SOUTH ORANGE-	:	DECISION
MAPLEWOOD, ESSEX COUNTY.	:	
	:	

The record and Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions and respondent's reply thereto – submitted in accordance with the prescriptions of *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in reaching her decision herein.

The Board excepts to the Administrative Law Judge's (ALJ) findings and analysis of law on charges 1, 2, 3, 5, 6, 7, 9 and 10, in large measure replicating arguments advanced in its post-hearing submission to the ALJ. It cites extensively to the testimony of its witness, B.S., and advances the analysis and conclusion which – it purports – inevitably result from such testimony, particularly in light of the District's responsibility to protect its students from predatory behavior before such danger materializes. The Board charges that the ALJ made multiple erroneous legal conclusions to dismiss proven tenure charges because – by arbitrarily analyzing the charges individually rather than in the aggregate – he failed to recognize that each of the charges was part of a larger pattern of suggestive comments, interactions and behaviors that respondent engaged in while attempting to exploit his teacher/student relationship with B.S. It points out that such a clear pattern of conduct placed B.S. in a position of grave danger.

(Board's Exceptions at 17-18) As to penalty, the Board urges that respondent's pattern of predatory behavior warrants no less than termination from his position.

In reply, respondent strongly supports the correctness and propriety of the ALJ's decision:

> ...when reviewing the Initial Decision and what follows, it is clear that Dennis was judged on what he was shown to have done, rather than what the Board suggests he allegedly attempted, but did not in fact do. The Initial Decision properly reflects the overall assessment of the witnesses' stories in light of its rationality, internal consistency and the manner in which it 'hangs together' with the other evidence. (citation omitted) (Respondent's Reply Exceptions at 7)

Upon a comprehensive review of the record of this matter – which included transcripts of the hearing conducted at the OAL on August 3, 14, September 7, October 15 and November 14, 2007, along with the parties' exception submissions – the Commissioner adopts the recommended decision of the OAL as modified below.

Initially, the Commissioner recognizes that in this, as in all tenure matters, the Board bears the burden of proving each of its charges of unbecoming conduct against respondent by a preponderance of the competent, relevant and credible evidence. The Commissioner further recognizes that the outcome of this particular matter with regard to the proving of the charges is predominantly dependent on witness credibility. This being the case – and the ALJ having had the opportunity to assess the credibility of the various witnesses who appeared before him, and having made findings of fact based upon their testimony – the standard governing the Commissioner's review is clear and unequivocal:

> The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by

> sufficient, competent, and credible evidence in the record. (*N.J.S.A.* 52:14B-10(c))

Upon a reasoned review of the record with this governing standard in mind, the Commissioner cannot conclude that the ALJ's credibility assessments and resultant fact-finding were without the necessary level of support and, as such, the Commissioner must substantially adopt the Initial Decision with regard to the truth of the Board's charges.

In summary, the Commissioner concurs with the ALJ – for the reasons comprehensively presented in his decision – that the Board did not meet its burden of proof of demonstrating unbecoming conduct against respondent on Charge 1, alleging that respondent invited B.S. on a date with him to New York so they could go to a racetrack during the summer of 2007; Charge 2, alleging that respondent offered B.S. Hershey Kisses with the comment that he was giving her the candy in lieu of an actual kiss, which could get him in trouble; Charge 3, alleging that respondent complimented B.S.'s appearance by saying that he liked it when she wore her hair down, that he was jealous when he saw her with a boy, and that he could not wait until she was eighteen; Charge 6, alleging that the establishment of the e-mail account (described in Charge 5) for B.S. without her knowledge or consent constituted a violation of B.S.'s privacy and was a material breach of respondent's professional responsibility; Charge 7, alleging that in connection with the establishment of the e-mail account (described in Charge 5), respondent placed a note in B.S.'s pocketbook which constituted a violation of her privacy; Charge 9, alleging that the events described in Charges 1 to 8 evidence an attempt to create an improper relationship that constituted a breach of the public trust; and Charge 10, alleging that

Charges 1 to 9 collectively constitute a pattern of "sexually inappropriate behavior" that sought to take advantage of the teacher/student relationship.[1]

As such, at the completion of fact-finding as to the truth of the Board's charges, the ALJ concluded – and the Commissioner concurs – that the only sustained charges of unbecoming conduct against respondent was that portion of Charge 4 which alleges that respondent's sending of a birthday card and gift certificate for a nail salon to B.S. for her birthday was inappropriate and Charge 5 which alleges that respondent created a clandestine e-mail draft communication system exclusively for himself and B.S., and that he composed the message reflected in Exhibit P-3 – excluding the controversial paragraph, the authorship of which the ALJ found, and the Commissioner agrees, has not been established.

Turning to the appropriate penalty to be imposed in this matter, the Commissioner is particularly cognizant that it has long been recognized that – by virtue of the unique position they occupy – educators must be held to an enhanced standard of behavior. As was succinctly stated in *In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional*, 1972 *S.L.D.* 302, 321

> [Teachers] are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. *This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment.*
> (Emphasis added)

It is without question that establishment of a surreptitious e-mail account to privately communicate with a minor female student and gifting this student with a card and a present for her birthday evidenced inordinately poor judgment on the part of this mature teacher and was

[1] It is noted that Charge 8 was dismissed at the conclusion of the Board's case at the OAL.

undoubtedly inappropriate, unprofessional, and unbecoming conduct. In fashioning a penalty, the Commissioner finds it necessary to balance the totality of the record here with the need to stress most emphatically to this respondent and to other educators that such behavior cannot be permitted in the school environment. In this regard, the Commissioner is in accord with the ALJ that the charges actually proven in this matter do not warrant the extreme penalty of respondent's dismissal from his tenured position. However, the Commissioner cannot agree with the ALJ that forfeiture of 70 days salary is sufficient to impress upon respondent the seriousness of the conduct in which he engaged. Rather, given the necessity to assure that respondent learns the need for self-restraint, prudence and controlled behavior in his interactions with students under his charge, the Commissioner finds it appropriate here that he suffer the loss of the 120 days of salary withheld, pursuant to *N.J.S.A.* 18A:6-14, following the certification of tenure charges.

Accordingly, the recommended decision of the OAL is adopted for the reasons expressed therein except as to penalty. Respondent shall not be dismissed from his tenured employment, but shall forfeit the 120 days of salary withheld following certification of the within tenure charges.

IT IS SO ORDERED.[2]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 5/08/08

Date of Mailing: 5/09/08

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 05080-07
AGENCY DKT. NO. 83-3/07

SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,

Petitioner,

v.

CHANDLER DENNIS,

Respondent.

Sidney A. Sayovitz, Esq., and **Galen G. Medley,** Esq., for petitioner (Schenck, Price, Smith & King, attorneys)

Sheldon Pincus, Esq., for respondent (Bucceri & Pincus, attorneys)

Record Closed: February 5, 2008 Decided: March 24, 2008

BEFORE **JAMES A. GERAGHTY**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On March 19, 2007, the School District of South Orange and Maplewood, New Jersey, certified ten tenure charges under the Tenure Employees Hearing Act against Columbia High School Physics Teacher Chandler Dennis (hereinafter "respondent" or

"Dennis") for conduct unbecoming a teaching staff member which entailed inappropriate conduct towards a female student, material breach of public trust and professional responsibility, and other just cause, all of which occurred during the winter/spring 2006 school semester. Respondent Dennis appealed to the Commissioner of Education who referred the matter to the Office of Administrative Law ("OAL") on April 27, 2007. N.J.S.A. 52:14B-1.1 et seq. and N.J.S.A. 52:14F-1.1 et seq. On May 31, 2007, the undersigned issued an Order that the New Jersey Department of Children & Families Institutional Abuse Investigation Unit ("IAIU") grant respondent's counsel access to documents related to its investigation of the complaint in the instant matter. After in camera review, on July 3, 2007, the undersigned issued a Protective Order concerning redaction of the involved documents.

Meanwhile, the IAIU had investigated the School District complaint of child abuse or neglect. The IAIU determined that the complaint was "unfounded" within the meaning of N.J.A.C. 10:129-1.3. At the first OAL hearing on August 3, 2007, respondent moved to dismiss all charges based on a statutory provision that requires a school district to remove references to a complaint from a school employee's personnel records if that complaint was determined to be unfounded, and that it should not be used against the employee for any purpose including discipline. N.J.S.A. 18A:6-7a. The tribunal denied the motion because the investigation involved an unfounded complaint of sexual abuse. However, respondent's alleged conduct towards the student could be inappropriate and otherwise constitute misconduct on the strength of which the matter proceeded.

There were five hearings at the OAL from August 3, 2007 through November 14, 2007. The Board's witness at the first hearing was Columbia High School Principal Dr. Lovie Lilly who explained how the matter came to the school administration's attention and the action taken. On August 14, 2007, B.S., the involved student, testified concerning the interactions between herself and respondent, specifically the substance of the charges against him. On September 7, 2007, A.W., B.S.'s boyfriend, testified in support of the charges. Thereafter, respondent introduced a series of teachers as character witnesses to include Thomas Whittaker, Jr., Melissa Cooper, and Carolyn

Moran. Jeffrey Gifford, a former student, likewise testified for respondent. On October 15, 2007, DYFS worker Omgeri Aminga testified for respondent. Later that date, respondent Dennis testified. His testimony concluded November 14, 2007.

The parties received the final hearings transcripts December 20, 2007. Both parties submitted post-hearing briefs on or before January 21, 2008. The parties submitted reply briefs on February 4 and 5, 2008. The record closed February 5, 2008.

STATEMENT OF THE ISSUES

The issue is whether petitioner has met its burden of establishing that respondent engaged in inappropriate behavior towards a female student in various respects individually and collectively constituting conduct unbecoming a teaching staff member.

STATEMENT OF FACTS

Summary of Charges

During the 2005-2006 school year, Dennis recruited B.S., one of his Physics students, to serve as a classroom assistant. Early in the winter/spring semester 2006, B.S. became the object of allegedly inappropriate attention from Dennis resulting in the following charges.

Charge 1 - Dennis invited B.S. on a date with him to New York so they could go to a racetrack during the summer of 2007.

Charge 2 - Dennis had a practice of giving his aides candy. However, he offered B.S. Hershey Kisses with the comment that he was giving her the candy in lieu of an actual kiss which could get him in trouble.

Charge 3 - Dennis complimented B.S.'s appearance saying he liked it when she wore her hair down, that he was jealous when he saw her with a boy, and that he could not wait until she was eighteen.

Charge 4 - In December 2005, Dennis gave B.S. and other of his students Christmas gifts including a Santa hat with earphones and candy. In February 2005, Dennis sent B.S. a birthday card with a gift certificate to a nail salon. The card was addressed "To My Niece" as "Uncle" and "Niece" were private nicknames utilized by the two.

Charge 5 - Dennis established a clandestine e-mail account for B.S. so that they could communicate privately during the summer. Dennis surreptitiously left a note in B.S.'s pocketbook with instructions to access the account. He left a message for B.S. explaining how she could leave a draft message for him to retrieve, and vice versa, without e-mails actually being sent. Dennis left one message for B.S. which stated in part:

> I know this is sneaky but folks would not understand a friendship (or more) between a 17-year-old lady and a middle-aged man. People calling you "puta" and sending me to jail or wanting to beat me up!.

Charge 6 - The establishment of the e-mail account as described in Charge 5 for B.S. without her knowledge or consent constituted a violation of B.S.'s privacy and was a material breach of Dennis' professional responsibility.

Charge 7 - In connection with the establishment of the e-mail account as described in Charge 5, Dennis placed a note in B.S.'s pocketbook which constituted a violation of her privacy.

Charge 8 - Dennis afforded B.S. access to his school computer. On one occasion when they were alone, B.S. discovered pornography on the computer.

Charge 9 - The events described in Charges 1 to 8 evidence an attempt to create an improper relationship that constituted a breach of the public trust.

Charge 10 - Charges 1 to 9 collectively constitute a pattern of "sexually inappropriate behavior" as it seeks to take advantage of the teacher/student relationship.

OAL HEARING

At the August 3, 2007 hearing, School Principal Dr. Lovie Lilly testified concerning how the incidents involving student B.S. and respondent Dennis came to her attention. On June 16, 2006, she met with teachers Thomas Whittaker and Melissa Cooper as well as Michael Healey, an administrator, who reported that B.S. told them of events that were "disturbing" her involving Dennis who she believed "liked her." (T1-45).[1] B.S. gave Mr. Whittaker a piece of paper on which there was an e-mail address and password. She said Dennis had given it to her so that they could communicate. B.S. explained to Whittaker that she or Dennis were to leave a draft message in the e-mail address and that either party could access the message without the need to have it actually transmitted across the wire. T1-46. Mr. Whittaker seemed troubled about reporting the matter to Dr. Lilly because he and Dennis were colleagues and friends. Ms. Cooper stated that B.S. had come to her accompanied by her cousin, J.C., another female student at the school. B.S. told Ms. Cooper that Dennis gave her a candy kiss, "since I can't kiss you." T1-54. B.S. also told Ms. Cooper too that she was uncomfortable around Dennis. Dr. Lilly stated that she reported these matters to the

[1] Transcripts are referenced chronologically by number and page, e.g., T1-45, the August 3, 2008 hearing transcript at page 45. The August 14 hearing transcript would be T2, etc.

assistant superintendent of schools as well as to the Division of Youth & Family Services ("DYFS") and the Maplewood Police Department.

Dr. Lilly testified that she interviewed B.S. with Assistant Principal Janice McGowan on June 19, 2006. B.S. told her that Dennis invited her to go to New York to a racetrack and that he had given her the e-mail account and explained how it would operate without actually transmitting messages. B.S. also told her that Dennis said that they had a "platonic" relationship and that he could not wait until she was eighteen-years old. In addition, she stated that Dennis sent her a gift certificate to a nail salon for her birthday in a card on which he had written "From your Uncle." T1-66. B.S. said that she "felt funny" about the gift and that her mother told her "to be careful of Mr. Dennis." T1-66. B.S. also told Dr. Lilly about the Hershey Kisses from Mr. Dennis. In addition, she reported that Dennis complimented her about her hair and that he expressed jealousy about her talking with boys at the school. B.S. explained the e-mail account where she and Dennis would "park" messages without transmitting them. B.S. told her that he said she should delete the drafts after reading them because people would not understand their relationship. T1-68. B.S. reported that Dennis had given her his school computer password despite a school policy against student access to the school database system. B.S. said that she saw pornography on one occasion when she logged onto the computer and that Dennis stated that he did not know how the pictures got there. T1-70. Dr. Lilly said that during the interview B.S. appeared frightened and that she found it difficult to discuss the matter. She also told Dr. Lilly that she did not want Dennis to get into trouble, that she wanted this to go away, but that she wanted him to stop. T1-71.

Dr. Lilly testified that in her opinion Dennis should not return to the school because he crossed a line by committing unprofessional behavior. T1-85.

At the beginning of the August 14, 2007 hearing, the tribunal disposed of two motions to dismiss made by respondent at the August 7, 2007 hearing. Respondent argued that the Board Resolution certifying the tenure charges was passed improperly in public session rather than in executive session, citing N.J.A.C. 6A:3-5.1(b)(7). The

tribunal denied the motion because the discrepancy was a procedural irregularity that did not prejudice respondent. Moreover, the Board cured the defect by rescinding the public resolution and then adopting a resolution in executive session.

The second motion to dismiss was based on the IAIU finding that the child abuse complaint was unfounded. Accordingly, the School District was required to remove any reference to the complaint and investigation from the employee's personnel records and the complaint should not be used against the employee for any purpose relating to employment. N.J.S.A. 18A:6-7a. The tribunal denied this motion too because the findings report stated that the investigation involved a sexual abuse complaint. Stating that there was no sexual genital contact between the student and the teacher, the report concluded that the student was not harmed. However, mentioning the surreptitious e-mail account, and the pornography B.S. observed on Dennis' computer, the report stated ". . . interactions and behavior placed [B.S.] at some risk of harm but were not to the degree required by statute to find sexual abuse." (Exhibit R-43). Nevertheless, the charges, except for Charges 8 and 10, were not based upon sexual abuse as such, but rather on other inappropriate misconduct. Actually, most of the charges were based on inappropriate behavior constituting conduct unbecoming. Therefore, based on the IAIU "unfounded" finding, this initial decision is not predicated in any way on sexual abuse or neglect in view of the statutory proscription. In a comparable case involving the consequences of an IAIU unfounded finding of sexual abuse, the Appellate Division explained that, the finding notwithstanding, respondent's actions may be otherwise actionable. Stated differently, disciplinary proceedings were within the discretion of the school district. In the Matter of Physical Abuse Concerning A.I, 393 N.J. Super. 114 (App. Div. 2007). The tribunal denied the motion. T2-7.

B.S. testified that she graduated from Columbia High School in June 2007. During the 2005/2006 school year, she was a student in respondent's Physics class. B.S. did not previously know Dennis but knew of him from her older sister who had been his student. A few months into the school year, Dennis began to compliment B.S. about her hair. Since their relationship had become friendly, she "opened up to Mr. Dennis [feeling like he] was more - of a friend than a teacher and I told him about it if I

had a problem with my boyfriend . . . ." (T2-17) She testified that Dennis told her that he became "jealous" if she talked about or was with boys. She said that he expressed jealousy a few times. Dennis told B.S. that their relationship was "different" and that "... he felt different for me than other students, that he never felt like this for another girl." T2-19. She testified that at first his remarks did not bother her until the end of 2005 when she realized that his remarks had made her "uncomfortable." T2-20-22. She stated that he told her that they had a "platonic relationship." T2-21. She stated that Dennis told her "plenty of times" not to worry and that "nothing would happen" because she was underage. T2-22. He also told her that he couldn't wait until she became eighteen and he planned to take her to bet on horses. At Christmas he gave all his students a Santa hat with earphones and a candy cane. For her birthday on February 20, 2006, he gave her a gift certificate to a nail salon in an anonymous card addressed "To My Niece." Previously she had told him she patronized the involved salon and they had gotten into the habit of referring to each other as niece and uncle. T2-24. She said that she didn't know whether he ever gave birthday gifts to other students. She stated that he gave her Hershey Kisses on several occasions during one of which he told her that he gave her the candy ". . . because he wanted to kiss me and he couldn't." T2-27.

B.S. testified that she was one of Dennis' student assistants and consequently he favored her in certain ways such as not disciplining her for lateness. Also, he allowed her to use his school computer, for example, to check students' attendance. Also, Dennis gave her his computer password. T2-34. B.S. testified that on one occasion when she had accessed to his computer to check on pictures from a student trip she discovered pornography and described it as what might be recognized as Karma Sutra pictures. The pictures were in a folder saved to his computer. Dennis said that he did not know how these pictures got on his desktop.

At the end of the semester Dennis told B.S. that he wanted to keep in touch with her. He said that he could take her to bet on horses and go on a cruise around New York. T2-40. B.S. testified that Dennis' said that the prospective cruise and racetrack date was, "to be just me and him and that this was between us." T2-42. At this time he also told her not to be scared, "that nothing was going to happen." Further, he said that

he could not do anything because she was not eighteen. T2-44. B.S. said that Dennis previously had made remarks about not being able to wait until she turned eighteen but that he never said what he expected to happen.

B.S. testified about the e-mail account. Her boyfriend, A.W., found a paper with the e-mail address while rummaging through her handbag. B.S. said that she did not recognize the piece of paper but did recognize Dennis' handwriting on it. B.S. did not have access to a computer at the time. A.W. took the paper home, went to the site and discovered a draft message that he read to her over the phone. She summarized what A.W. told her, that is, that the message should be a secret as well as the method by which they would stay in contact. In addition, the message purportedly stated that nobody would understand a friendship between a middle-aged man and a teenager. Moreover, if she wanted to write back to him she should leave a draft at the site and delete the one that she saw from him. T2-54-55. B.S. identified P-3, the text of that message that had been shown to her at the prosecutor's office. She testified that she understood that A.W. accessed the message that was in a draft folder and e-mailed it to himself. She was not present when he did this.

B.S. stated that she overheard a conversation between Dennis and another teacher during which Dennis was describing an episode in which a teacher had an improper relationship with a student. Dennis noticed B.S. and her friend J.C. enter the classroom and offered them cookies. At some point he stated "I would never do something like that." T2-69. J.C. said to B.S. that it was time for them to go. B.S. testified that she believed that he made the remark for her benefit.

B.S. testified that her girlfriend, J.C., "influenced" her to tell somebody about Dennis' actions towards her. J.C. had told her "if you don't tell, you know, somebody, that I'm going to – I'm going to tell." T2-76. B.S. decided to tell her poetry teacher, Mr. Whitaker, as she knew Whitaker and Dennis were friends. She did not tell Dr. Lilly because she did not want Dennis to get in trouble. B.S. testified that she hoped Whitaker would talk to Dennis whom she understood to be his best friend and colleague at the school and explain to him that she felt uncomfortable that their relationship that

she described as changing from student-teacher to a friendship to one in which Dennis seemed to have developed " feelings like he started to get attracted to me more and more." T2-79.

On cross-examination, B.S. explained that she had been shy at the beginning of the school year but in time was more at ease with Dennis and had begun to disclose personal problems or feelings with him. She said that she was comfortable with him for most of the school year until near the end, about June 2006, when J.C. and another friend expressed their views that his behavior towards her had become inappropriate.

On cross-examination, B.S. also testified that when she began to fall behind in her grades she asked Dennis for extra help during her study period which was right before physics class. He agreed but, as it happened, Dennis never actually helped her with physics. Rather, she would go on the computer or just stay in the room. T2-127-128.

B.S. disclosed to Dennis that she had a serious health problem that required a brief hospital stay. She asked him to keep the information confidential. At about that time Dennis told her that a female family member of his was likewise seriously ill.

During her cross-examination, B.S. stated that Dennis told her mother about the uncle/niece sobriquets, and that he complimented her appearance "a few times." T2-145. She did not remember viewing an internet site with Dennis when she was selecting gifts for her boyfriend. T2-166. She did not remember a conversation where she disclosed to Dennis planning a weekend trip with her boyfriend. T2-167. She stated that A.W. told her he did not edit the e-mail. Other students had access to Dennis' computer. T2-193. B.S. did not see Dennis give candy kisses to other students. T2-194.

On redirect, B.S. was asked if there was anything about the e-mail message (Exhibit P-3) that led her to believe it was composed by Dennis. She responded:

The Chika, well, Mr. Dennis like he said, his wife was Hispanic. So he tried to speak Spanish on occasions with me and the – he tried to say "punta" he spelled the word – incorrectly.

Question: What's the word?

Answer: P-U-N-T-A and he -

Question: That's a Spanish word?

Answer: Yes.

Question: And what did it say?

Answer: That he put P-U-T-A.

Question: Okay.

Answer: Another clue is that it said "middle aged man" which is – he asked me about the Puerto Rican Day parade which I told him about that I was going to. Another clue was the Chika. The – clue where (sic) not to tell anybody and this is between us. He told me that before in the classroom and he repeated it in the e-mail. So I knew that it was him.

Question: What does "punta" mean?

Answer: It means a bad word.

Question: It's a bad word?

Answer: Yeah.

Question: Okay, it is

Answer: It's b-i-t-c-h (T2-206, 207)

B.S.'s boyfriend, A.W., testified at the September 7, 2007 hearing. He stated that on June 13, 2006 he discovered the note with the e-mail account name and password in her handbag. At B.S.'s behest, he accessed the e-mail address on his computer at home. At the OAL hearing he identified Exhibit P-3 as the message that he found at that e-mail address. He explained that he called B.S. and read her the message. He then forwarded it to an address of his. He stated that he did not alter the message. He also stated that at the time he was concerned, but not angry, and that he told B.S. to notify the principal about it.

At that juncture, petitioner rested.

Respondent moved to dismiss all the charges because petitioner had not made a prima facie case. T2-56-58. Respondent then renewed the motion but confined it to Charges 7 and 8, that is, Dennis having surreptitiously put the note with the e-mail address in B.S.'s pocketbook thus violating her privacy, and allowing her to discover pornography on his computer. The tribunal denied the motion as to the e-mail account note inasmuch as there is sufficient evidence for a prima facie case that Dennis created the note and placed it in B.S.'s pocketbook. The court granted the motion as to Charge 8 because of the DYFS finding that allegations of sexual abuse or neglect were unfounded. Accordingly, no misconduct charge can be predicated upon sexual misconduct. T2-66-67. Therefore, Charge 8 was dismissed.

Respondent's first witness was Geoffrey Gifford, a sophomore at Pace University. While a high school student at Columbia High School, he studied physics with Dennis and was one of his assistants. At the time Dennis gave him a Christmas gift and a graduation gift. He testified that Dennis gave gifts to other student assistants. Gifford also testified that Dennis dispensed candy to the class. Mr. Gifford continued as a character witness, stating that he never saw Dennis engage in inappropriate conduct towards a student.

Language Arts teacher Thomas Whitaker then testified. He described the visit by B.S. and J.C at his office during which B.S. gave him a paper with an e-mail address on it. She told him that her boyfriend saw the paper and was "upset." He reviewed an affidavit he gave to the Essex County Prosecutor concerning the interview and in response to questions from counsel stated that B.S. never accused Dennis of touching her and that she did not want to get Dennis in trouble. (Exhibit R-40). He also said that she told him that Dennis gave her candy, "instead of a kiss." Whitaker too acted as a character witness and opined that he thought that Dennis is fit to teach " . . . and I think our children would be best served with someone like Mr. Dennis in the building." T2-111.

Social Studies teacher Melissa Cooper testified for respondent. She identified her Prosecutor's Office statement (Exhibit R-39), that she had given previously. She described her interview with B.S. and J.C. during which B.S. told her about the Hershey Kisses and the e-mail. She stated that B.S. said "It's not a big deal" but that it was J.C. who insinuated that there was something inappropriate. T2-141. Later, after she had reported the meeting to Dr. Lilly, the girls came to her and complained about it. T2-143. Ms. Cooper testified that she knew that J.C. had behavioral problems, that is, " . . . she was significantly involved in a lot of conflicts between students." T2-147. Finally, she testified that she believed Dennis was one of the best teachers in the school and that he truly cares about kids. T2-155. The witness went on to state that she reported the matter to the principal to "nip it in the bud." Having expressed admiration for Dennis her remark suggested that she did not want to see his reputation damaged by false accusations.

Special Education teacher Carolyn Moran testified for respondent. She said that she saw Dennis give students candy including Hershey Kisses. T2-176. Also, she saw him compliment students on their work and on their appearance. She stated that, in terms of gender, Dennis' motivational techniques were even-handed. On cross-examination she admitted that she knew nothing of the relationship between B.S. and Dennis.

At the end of the testimony counsel moved into evidence without objection, the bulk of the documents that had been marked but not already admitted. For example, R-1 through R-32 and R-43 to R-45. T2-192-193.

At the October 15, 2007 hearing, IAIU Investigator Omgeri Aminga testified for respondent. He stated that he interviewed B.S. in the presence of her parents. He also interviewed Dennis who disclosed the e-mail account he had created for B.S. so that they could share medical information. Dennis told the investigator that B.S. had "full knowledge" of the e-mail account. B.S. had denied disclosing health information to Dennis. Also, Mr. Aminga stated that the prosecutor's office already had closed out

their parallel investigation. He stated that the prosecutor's office found no evidence of e-mails on Dennis' computer. T4-20. In fact, as to the account he set up for B.S., Dennis told the investigator "Yes, I set up an e-mail account but never used it." T4-26.

Mr. Aminga testified that he found no evidence of sexual contact between Dennis and B.S. but that Dennis had placed B.S. at some risk of harm. T4-38.

After colloquy between the tribunal and counsel, Chandler Dennis testified. After describing his credentials and methods as a physics teacher, including complimenting students on their appearing and dispensing candy, Dennis testified that near the end of the first semester in 2005, B.S. began to miss class. She told Dennis about an illness and asked him to keep the matter confidential. He also testified that she did not come to him for tutoring. He admitted sending her the birthday card with a gift certificate and using the aunt/niece nicknames with her.

Dennis said that he and B.S. discussed her health intermittently. Members of his family too had health issues which he disclosed to her. For example, he told her that his wife had terminal brain cancer.

Dennis explained that B.S. was one of many students, including faculty, who had access to the internet on his computer. However, they had to use their own account number and password. T4-139-140.

B.S. discussed A.W. with Dennis. On one occasion Dennis had given her permission to browse on the computer and she showed him a gift catalog web page displaying apparel that she contemplated buying A.W. for his birthday. Dennis testified that he complimented her on choosing the gift and stated words to the effect that he was jealous that he was not getting such a gift. T4-143. Dennis testified that he never stated that he was jealous of B.S. or of her boyfriend. He disclosed an instance where he saw her with a boy who had his arm around her and he asked her if she thought A.W. would be jealous. B.S. made light of it. Dennis testified that there was no further discussion regarding jealousy. He also testified that he never actually met A.W.

On another occasion the subject of A.W.'s birthday arose. B.S. stated that in addition to whatever gifts she was going to give him, she contemplated spending the weekend with him and " . . . give up her virtue to him." T4-146. Dennis said he realized that the conversation had suddenly shifted to sex and that he had never discussed it with her before. He saw her remark as a "red flag" and tried to extricate himself. He recalls that his response to her then was:

> I wish you wouldn't drop something like this on me when you're seventeen. I wish you had waited until you were eighteen to make – this is a serious decision. This is – you know, you – you want to be ready – when you do this. You – you need to have protection,
>
> * * *
>
> I really wish you weren't under age and kind of dropping it on me and I think your parents would tell you the same thing. This is a beautiful thing that you want to do, but it's – you know, that's something I wish you'd get a little older, give this some more thought."

T4-147.

Dennis testified that he never otherwise made a remark about B.S. becoming eighteen or that he couldn't wait for her to become eighteen.

During the annual Great Adventure field trip, Dennis received word that his eighty three year-old mother had taken a fall and broke her arm. Also, her cancer had spread and she was now exhibiting signs of dementia. T4-148. He was advised to put her in hospice. Apart from the usual distress that would accompany such news, Dennis also was concerned because his sister who took care of their mother's financial affairs likewise was in the hospital. On May 15, 2006, Dennis received a call from a doctor who wanted him to make a decision about hospice care. He took the call in his classroom while B.S. was present. She overheard the conversation and closed the classroom door to give him some privacy. He testified that while on the phone he opened the door twice rather than be alone in the classroom with a female student. T4-

150. He admitted to having been upset and that she tried to console him verbally. In this respect he recalled having said to her:

> I really, really wish we could just get away, run away, get away from the situation for a day, from all these problems.
>
> * * *
>
> I – something I've done once or twice is take – there's a cruise that leaves from New York and goes to Monmouth Park Racetrack.
>
> * * *
>
> The cruise is chilly. My phone doesn't ring when I've done it. Phone doesn't ring. When you get down there you sit at the lunch tables and you bet or don't. You sit in the sun. You forget out [sic] your worries for a day.
>
> * * *
>
> Wouldn't that be great to do something like that.

T4-151-152.

She responded that it sounded like fun. He then testified that he thanked her for listening and that he felt much better. The subject of a cruise or racetrack never came up again.

Dennis testified that several days after B.S. overheard his conversation with the doctor about hospice for his mother, he told B.S. that they had a "platonic relationship" and that they were friends. He explained the meaning of the term, that it did not entail a physical relationship, that it was not that type of friendship. T4-154.

During a subsequent conversation, B.S. expressed concern about Dennis' wife and that she would like to know how she was doing. Dennis told her that it would make sense if they kept in contact because he was interested in the progress of her health. He stated that he offered to get B.S. an e-mail account and she agreed. He pursued the matter and established an e-mail account with Yahoo as well as a user ID and password for her. T4-158. He testified that he gave B.S. a piece of paper with that information and that she accepted it. There was no actual discussion. He stated that

he composed a draft message. The message was worded the same as that reflected in Exhibit P-3. However, Dennis denied composing the penultimate paragraph. He said that he wrote "I saw you – I saw you at the Puerto Rican Day Parade yesterday." He said that he did not actually send the message but left it on the site as a draft. He stated that, upon reflection, he decided to delete the draft because of a recent event at the school which resulted in a faculty member in litigation for improper contact with a student.

Dennis testified about the Hershey Kisses. He said that he distributed them in various classes to male and female students. When distributing the candy he would make a facetious remark such as not to tell anyone that Mr. Dennis gave you a kiss. The students would laugh. T4-166-167. Dennis testified that he gave B.S. Hershey Kisses and said that she accepted the candy and never expressed any discomfort with it. He testified that he had distributed candy to students for six or seven years.

Dennis categorically denied ever telling B.S. that he had feelings for her unlike those he had for any other girl, that she had nothing to worry about, and that nothing would happen because she was under age. T4-168-169. He testified that he never had nor suggested that there ever should be any physical contact between himself and B.S. He also stated that he never asked her on a date to a New York racetrack.

On cross-examination, Dennis explained that he had been disciplined by having his increment withheld by the school Board because of his participation in what can only be described as a campaign to undermine or remove the prior principal. He had written a letter to parents criticizing her. (Exhibit P-4).

Dennis admitted that in the draft e-mail he urged B.S. to keep this means of communication secret. T4-225. He explained that the health information he expected they would exchange was confidential – not for third parties. He stated that he recommended communicating with drafts because they can be edited before sending. He admitted that the draft messages were not to be sent. Also, with this system, messages could not be traced. He stated that that feature of the communication

system was significant because he did not want third parties to see the messages because of the case involving a different teacher who had gotten into trouble because of e-mails. He stated, "that no matter how innocuous that something like this could get in trouble." T4-232. Dennis testified that he deleted the message within twenty-four hours because he thought it was foolish in that actually there was no need for confidentiality. While denying that he authored the penultimate paragraph, Dennis admitted that the message conveyed in the first three paragraphs, " . . . to ask a child to have a secret between you" is "inappropriate." T4-236. As to the paragraph:

> I know this is sneaky, but folks would not understand the friendship (or more) between a 17-year-old lady and a middle-aged man. People calling you "puta" and sending me to jail or wanting to beat me up."

T4-238 and (Exhibit P-3).

Dennis testified that he suspected A.W. edited the message by adding that paragraph.

On cross-examination, counsel probed A.W.'s purported choice of words. He asked Dennis why A.W. would refer to his girlfriend as a "seventeen year-old lady" and Dennis as a "middle-aged man." Dennis responded that the former did not sound like "teenage words" and the latter reference did not seem like one that would have been chosen by A.W. inasmuch as people refer to him, Dennis, as old and that he considers himself to be old. T4-241-242.

Dennis' cross-examination continued on November 14, 2007. He reiterated his denial of having invited B.S. to a racetrack. He clarified previous testimony explaining why he deleted the draft e-mail message. Basically, he testified as to what were his then ruminations to the effect that the information in the message was redundant and that there was not anything that he needed to be concerned about. T5-35. He also spoke about litigation involving his prior discipline in which the court held that his verbal attacks on the previous principal were not protected speech. T5-41.

Respondent was the last witness. The Court received four documentary exhibits from the School District and fifty documentary exhibits from the respondent.

FACTUAL DISCUSSION AND FINDINGS

This matter was initiated when Columbia High School Junior, B.S., told her teacher, Mr. Whittaker that her physics teacher, respondent Chandler Dennis, had said or done things that made her uncomfortable. She was accompanied by another student and close friend, J.C., whom she always referred to as her cousin. Later the same day B.S. and J.C. visited J.C.'s teacher Melissa Cooper. At J.C.'s behest, B.S. told Ms. Cooper about some of the circumstances which caused her to feel uncomfortable about Dennis. Mr. Whittaker and Ms. Cooper repaired to the principal, Dr. Lovie Lilly, to report the information they received. Dr. Lilly summoned B.S. and interviewed her. During these meetings, as reported by the involved teachers and principal, B.S. displayed a reluctance to discuss the events involving Dennis but did so at the urging of J.C.

Following school protocol, Dr. Lilly contacted DYFS and the Maplewood police both of which investigated the matter. The DYFS IAIU found that allegations of sexual abuse were unfounded, but that the investigation uncovered circumstances which might have been detrimental to B.S. The police found no criminal activity and the County Prosecutor took no actions. Nevertheless, the School District brought ten charges of misconduct against Dennis all of which involved allegedly inappropriate behavior towards his student, B.S., a seventeen-year-old minor, which were said to constitute conduct unbecoming a teacher. During the hearings, the tribunal dismissed charge eight that Dennis left pornographic images on his computer which were discovered by B.S. Dennis denied doing so but admitted that his student assistants had internet access on his computer. Accordingly, assuming arguendo that B.S. actually found said images, someone other than Dennis could have placed them on his desktop photograph folder. Though the charge remained unproven, the tribunal dismissed it because of the IAIU unfounded finding which vitiated any charge involving allegedly sexual misconduct.

Seven of the other nine charges involved discreet acts or statements which expressly or implicitly reflect an attempt on the part of Dennis to create other than a student/teacher relationship with B.S. To the point, although those charges did not allege sexual misconduct, that is, the School District did not claim that Dennis was, to use the vernacular, hitting on B.S., his conduct suggested that he was setting the stage for what could have become a romantic relationship. Stated differently, again, in the vernacular, the charges infer that he was coming on to her. Dennis denied the charges and offered explanations for remarks of his that were taken out of context, misconstrued, or reported inaccurately so as to create a false impression. The parties agreed upon very little.

Teacher tenure cases are reviewed de novo at the OAL. The school district has the burden of proof by a preponderance of the believable evidence.

Charge One - B.S. testified that Dennis asked her to accompany him on a cruise to a race track. Dennis denied ever asking her on what could be characterized as a date. He explained that during May 2006 B.S. visited him in his classroom and over heard his telephone discussion with a doctor about hospice care for his terminally ill mother. At the time Dennis's wife and sister were seriously ill. Seeing Dennis' distress, B.S. commiserated with him. Dennis testified that he then told B.S. how nice it would be to get away from it all and escape personal problems at least for one day. He related how he had gone on a cruise to a race track for that purpose. His remarks to her, as he testified, were in the subjunctive rather than an actual invitation. B.S. responded that it sounded like a nice idea and left it at that. The matter never arose between them again. Dennis' version of the episode seemed credible. In any event, no one overheard the conversation so neither version could be substantiated. Accordingly, I **FIND** the School District failed to meet its burden of proving that Dennis asked B.S. on a boat ride to a New York race track or to anywhere else.

Charge Two – B.S. testified that Dennis gave her candy kisses accompanied by a remark to the effect that he would like to kiss her but he cannot because she is only

seventeen. She stated that he said that to her twice. Dennis said that it had been his custom for several years to give candy including Hershey kisses to his students including his student assistants. B.S. was one of his assistants. He stated that he distributed the candy as a morale booster. Both male and female students received the candy. Teacher Carolyn Moran corroborated his testimony. Dennis testified that, as to both male and female students, he would say facetiously that the students should not tell anyone that he is giving them a kiss because they would not understand.

Given that B.S. could not repeat Dennis' words to her verbatim, and that no one overheard him, it appears that she either misunderstood or took out of context any remark he might have made about giving her a kiss while distributing the Hershey Kisses. She never complained about the candy and testified that it never occurred to her that anything wrongful might have occurred until she discussed it late in the semester with J.C.

I **FIND** that Dennis distributed Hershey Kisses to B.S. and to other students but that the District failed to meet its burden of proving that its distribution was accompanied by any inappropriate remarks.

Charge Three - This charge covers a variety of allegedly inappropriate remarks Dennis made to B.S. to include statements that he could not wait for her to turn eighteen, that he was jealous when she was with other boys, and that he liked it when she wore her hair down. These remarks might be characterized as flirtatious. Dennis denied making them. He stated that the subject of her age came up only when she was on the internet seeking a gift for her boyfriend and told Dennis how she contemplated spending a birthday weekend with him and giving up her virginity. Dennis stated that he was shocked and made uncomfortable by this disclosure and advised her against taking that step. He said that she should wait until she was eighteen before she made such a decision and that he believed her parents would give her the same advice. Dennis testified that the only remark he made to B.S. which included the word jealousy occurred at that time when she showed him on-line clothing that she contemplated purchasing her boyfriend A.W. for his birthday. Dennis made complimentary remarks

and observed that he was jealous that he was not getting a like gift. At another time, seeing B.S. with another male schoolmate, he remarked whether A.W. would be jealous. B.S. responded in a manner that indicated that she did not take his remarks seriously. These two uses of the term jealous, in context, were not in any sense improper.

Dennis admitted complimenting B.S. and other students on their appearance. Teacher Carolyn Moran corroborated that such remarks were made to both male and female students in public rather than in private.

I **FIND** that Dennis complimented B.S. about her appearance in circumstances that did not suggest any impropriety or, as insinuated by the charge, as a tactic in a subtle campaign to establish or lay the groundwork for an inappropriate relationship with B.S. Accordingly, as to inappropriate remarks, the School District has failed to meet its burden of proof.

Charge Four - The School Board alleges that Dennis inappropriately gave B.S. a Christmas gift and a birthday gift. Dennis explained that he routinely gave small gifts of token value to his assistants and to other students. He gave such gifts to his student assistants at Christmas. The gift to B.S. was no different than the others. The birthday gift in February 2006 might have been unusual but not unprecedented. Former student Gifford testified about an occasion when Dennis purchased a gift for a handicapped student who could not attend the Great Adventure class trip. Nevertheless, the nail salon gift certificate (of undetermined value) with the niece/uncle birthday card is troublesome. Apart from holiday gifts, Dennis was not in the habit of indiscriminately presenting gifts to his students. Rather, he gave such gifts for special reasons. B.S. disclosed the gift to her parents who did not complain and then she thanked Dennis for the gift. At the time, B.S. did not express any discomfort. However, the question is not B.S.'s reaction, but rather whether it was appropriate for Dennis, her teacher, to give her a birthday gift. Apparently, at least to Dennis, the teacher/student relationship had become a friendship. Later Dennis was to pointedly describe the relationship as platonic to underscore that it was not romantic. However, although the gift appeared to

be innocuous, it was inappropriate for Dennis to cultivate a relationship with B.S. which was other than teacher/student. Therefore, I **FIND** that Dennis gave B.S. Christmas and birthday gifts, that the former was not inappropriate, but that the latter was inappropriate.

Charges Five, Six and Seven all relate to some aspect of the e-mail incident. Dennis' conduct was allegedly inappropriate because the e-mail account was clandestine and its creation for B.S. without her consent violated her privacy. Moreover, Dennis' allegedly putting the note with the address and password in B.S.'s pocketbook likewise violated her privacy.

As a threshold matter, there is nothing about the events surrounding the e-mail that constitute an invasion of privacy. Dennis testified that he suggested creating the e-mail account as a way for B.S. and himself to communicate during the summer concerning her health and that of Dennis' family members, and that B.S. did not object. He admitted establishing the account and stated that he gave her the paper with the e-mail address and password. B.S. stated that she was unaware of the paper which A.W. found in her purse. Even if B.S.'s version of events was accurate, it had nothing to do with B.S.'s privacy. Therefore, I **FIND** that the School District did not sustain its burden of proof regarding Charges Six and Seven.

Dennis admitted creating the e-mail account and the rather clumsy communication method he proposed for B.S. and himself. Apparently, the parties were to communicate by leaving draft messages on the website. In that way, each could access the draft messages and delete them after reading. Also, either party could leave new draft messages at the site without actually sending anything. In this way, no e-mail would be sent and there would be no message trail evidencing the communications. Clearly, Dennis did not want anyone to access these messages. He explained that only health information would be exchanged and therefore privacy was important. Dennis denied composing the penultimate paragraph:

> I know this is sneaky but folks would not understand a friendship (or more) between a 17-year-old lady and a middle aged man. People calling you "puta" and sending me to jail or wanting to beat me up!

(Exhibit P-3). The last paragraph with the single sentence about B.S.'s presence at the Puerto Rican Day Parade is obscured. It would have been necessary to scroll down to see it.

Dennis stated he deleted the message within twenty-four hours of posting. However, during that time A.W. accessed it and mailed it to a new account he created for himself. A.W. denied editing the message in any respect. Nevertheless, Dennis' categorically denied authoring the above quoted paragraph. If Dennis composed the paragraph, it is highly incriminating because he at once admits that the process is "sneaky" and that there was or might be a "friendship (or more)" between himself and B.S. The "more" suggests a romance. Also, Dennis admitted that it would be unusual for A.W., a twenty-year-old, to refer to his girlfriend as a "seventeen year old lady." It would also likewise be odd for him to refer to Dennis as "a middle aged man." Although Dennis referred to himself as an old man, if he had composed the paragraph, it is more likely that he would have described himself more positively. The last sentence clarifies things. If anyone would refer to B.S. as "puta" or "punta" because of her relationship with Dennis, it would have to be because of an understanding that the relationship had become physical. Also, the remark that such a relationship would cause people to want to beat him up or have him incarcerated can only refer to an illicit physical relationship with a minor.

Despite his denial, A.W. might have composed the paragraph as a spiteful way of incriminating Dennis. It is difficult to believe, as A.W. testified, that he was not angry when he saw the message, but only concerned. Even without the incriminating paragraph, the message could be interpreted as an effort on the part of Dennis to maintain an inappropriate relationship with "Chica." On the other hand, if Dennis composed the paragraph, it is understandable that he would want to delete it upon reflection. He testified as to a variety of circumstances that suggested an awareness on his part that a relationship between a teacher and a minor student could lead to

trouble. His characterization as his relationship with B.S. as platonic, his opening the classroom door twice while alone with B.S. during the emotional telephone discussion with a doctor about hospice care for his mother, and his loud reference to another teacher's fall for having such a relationship, only underscores his concern. Also, B.S.'s testimony concerning Dennis' remarks about her turning eighteen, if substantiated, would also indicate that Dennis was showing restraint because he knew that he was, in a manner of speaking, playing with fire. However, as to this critical paragraph, the evidence is at an equipoise concerning its authorship.

Despite the importance and focus on the one message Dennis left and quickly removed from the e-mail site, the fact that he created a secret mechanism to communicate with B.S. was inappropriate. A teacher has no business secretly communicating with one of his students between their junior and senior year regardless of the purported subject of the communications. It was wrong for Dennis to create the account, and as to this specification, the School District has met its burden of proof.

Therefore, I am constrained to **FIND** that the School District has sustained its burden of proof that Dennis created a clandestine e-mail draft communication system exclusively for himself and B.S., and that he composed the message reflected in Exhibit P-3. However, the evidence fails to establish that he authored the penultimate paragraph.

Charge Nine - The Board alleges that Dennis attempted to create an improper relationship with B.S. If all or most of the charges were sustainable, that might be a fair conclusion. But most were not sustainable. The upshot is that what was a student/teacher relationship became a familiar less formal friendship. It was not until the end of the semester that B.S. found herself uncomfortable after being counseled by J.C. and A.W. It is only the controversial paragraph in the draft e-mail, which the School District did not prove was authored by Dennis, that would have evidenced the alleged attempt. None of the proven facts support this allegation. Although the clandestine e-mail account was improper, it did not, by its nature, affect what was already a friendship between Dennis and B.S. Even here, the secret communication

system would not have given Dennis an "advantage," private or otherwise, vis-à-vis B.S. Therefore, I **FIND** that the School District has failed to meet its burden of proof as to Charge Nine.

Charge Ten - Petitioner alleges that the totality of Charges One through Nine demonstrate a pattern of sexually inappropriate behavior. Inasmuch as petitioner failed to meet its burden of proof regarding Charges One, Two, Three, Four in part, Six, Seven, Eight, and Nine, I **FIND** that it has similarly failed to substantiate Charge Ten. Also, the IAIU "unfounded" investigatory finding vitiates the charge.

LEGAL AUTHORITY AND ANALYSIS

A tenured New Jersey public school employee shall not be dismissed or reduced in compensation during good behavior except for, among other things, unbecoming conduct after a hearing by the Commissioner or the Commissioner's appointee upon written charges. N.J.S.A. 18A:6-10. Tenure protects teachers from dismissal for political, or unfounded reasons. Spiewak v. Rutherford Board of Ed., 90 N.J. 63 (1982). It is axiomatic that teachers stand in loco parentis in relation to the students under their charge.

Unbecoming conduct is not defined in the statute. However, the courts have stated that, ". . . the touchstone is fitness to discharge the duties and functions of one's office and position." In re Tenure Hearing of Grossman, 127 N.J. Super. 13 (App. Div. 1974), certif. den. 65 N.J. 292 (1974). For this purpose, the Commissioner considers the nature and gravity of the offenses, evidence of provocation, extenuation, or aggravation, and any harm or injury to discipline and the proper administration of the school system. In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967). The Commissioner upheld the termination of a male teacher who made romantic advances towards female students. In re Tenure Hearing of Robert Mantone, 93 N.J.A.R. 2d (EDU) 322 (1993). In that case there was no physical contact.

Charges must be dismissed if the weight of the evidence neither supports them nor demonstrates unfitness. In re Tenure Hearing of John M. Nies, Chatham Township, Morris County, 1963 S.L.D. 172. When the evidence is in equipoise, the party with the burden has failed. In re Tenure Hearing of Elbert Smith, Hudson County Area Vocational Technical School, 96 N.J.A.R. 2d (EDU) 903.

If tenure charges are sustained, the penalty may be dismissal or reduction in compensation. In a case in which a teacher made sexually provocative remarks which indicated a prurient interest in the student, the Commission upheld removal. Board of Education of the Township Parsippany-Troy Hills v. Hess, 97 N.J.A.R. 2d (EDU) 34. On the other hand, a teacher who made comments regarding a student's appearance and actually touched students was not removed. In that case, the penalty was forfeiture of 120 days' pay as well as withholding increments for two years. In the Matter of the Tenure Hearing of William Blust, School District of Watchung Borough, EDU 00386-03S, Initial Decision, (April 5, 2004). Similarly, a teacher's improper remarks towards female students including comments about condoms cost him six-months' salary plus withholding of two increments. In re Tenure Hearing of Henry Allegretti, School District of the City of Trenton, EDU 6408-99, Initial Decision, (February 4, 2000), modified, Comm'r. (March 22, 2000), affd., State Board of Ed. (August 4, 2000).

Of the ten charges against respondent, petitioner was able to sustain only one regarding the clandestine e-mail account and part of the charge involving a birthday gift. Although the birthday gift was inappropriate in a student/teacher relationship, it was only of questionable propriety in what otherwise might be characterized as a benign friendship. Without any suggestion that Dennis' intent was either prurient or predatory, he did cross the line in terms of an inappropriate relationship with a student. Dennis' testimony was replete with remarks that suggested his awareness of the potential for wrongdoing and the need for restraint and rectitude. Nevertheless, the gift was inappropriate and constituted conduct unbecoming a teacher.

The clandestine e-mail episode was far more serious. Here too, without any suggestion of predatory intent or harm to the student, the entire scheme, even if well

intentioned, was highly inappropriate. A teacher should not be establishing a secret communication system with a student, especially without the knowledge and consent of her parents. Dennis' testimony reveals his ambivalence about the mechanism. At first, he seemed to feel that the matter was insignificant but within a short time withdrew his message from the draft folder. He realized that he had definitely crossed the line and tried to take back the message. But it was too late. Nevertheless, the content of the message notwithstanding, it is the creation of the surruptitious e-mail account that was inappropriate. The only palliating factor is that B.S., the person for whom the message was intended, never saw it. She never would have seen it if A.W., for whom it was not intended, did not obtain access. Finally, importantly, B.S. would never have gone to Mr. Whittaker without badgering from J.C. and the insistence of A.W. The teachers with whom she spoke as well as Dr. Lilly all observed her reluctance and discomfiture at disclosing what became the allegations against Dennis. Remarks to various parties indicated that she wanted the matter to go away and that she did not want to make trouble for Dennis. Also, it never occurred to her to be uncomfortable until the end of the second semester. It is noteworthy that when B.S. told her mother that she thought Dennis "liked her," her mother did not seem particularly concerned and took no action, but merely told her to be careful.

CONCLUSIONS

Based on the foregoing findings of fact, legal authority, and legal discussion, I **CONCLUDE** that Chandler Dennis committed misconduct involving his minor student B.S. in two respects: (1) he gave her a birthday gift which was beyond what might have been appropriate in a student/teacher relationship, and (2) he established a clandestine e-mail account so that he and B.S. could secretly communicate. Both these actions constituted conduct unbecoming a teacher. However, I further **CONCLUDE** that under the totality of the circumstances, that removal is far too severe a sanction that should be reserved for egregious harmful or potentially harmful misconduct. It was inappropriate here. Nevertheless, discipline is warranted. Accordingly, I **CONCLUDE** that for so much of Charge Four involving the inappropriate birthday gift, Dennis should forfeit ten days' salary. I also **CONCLUDE** that, as to Charge Five involving the clandestine e-mail account, Dennis should forfeit sixty days' salary. Therefore, the total penalty arising out of this matter is withholding or forfeiture of seventy days' salary.

DISPOSITION AND ORDER

Based on the foregoing findings of fact and conclusions of law, I **DECIDE** this matter in part in favor of petitioner and sustain so much of Charge Four that concerns an inappropriate birthday gift, and Charge Five involving the creation of a clandestine e-mail account for secret communications. The other charges are **DISMISSED.** I **ORDER** Chandler Dennis reinstated to his position as a tenured Physics teacher at Columbia High School with restoration of any pay or benefits that have been withheld except for the withholding or forfeiture of seventy days' salary as aforesaid.

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

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

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

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

3/24/08
DATE

JAMES A. GERAGHTY, ALJ

Date Received at Agency: 3-24-08

Mailed to Parties:

DIRECTOR AND
ADMINISTRATIVE LAW JUDGE

MAR 27 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

pb

APPENDIX

Witnesses

For Petitioner:

Dr. Lovie Lilly, High School Principal
B.S., student Columbia High School
A.W., B.S.'s boyfriend

For Respondent:

Jeffrey Gifford, former student Columbia High School
Thomas Whittaker, teacher Columbia High School
Melissa Cooper, teacher Columbia High School
Carolyn Moran, teacher Columbia High School
Omgeri Aminga, IAIU Investigator
Chandler Dennis, respondent

Exhibits

For Petitioner:

P-1	Maplewood Police Incident Report
P-2	Dr. Lilly Report
P-3	June 12, 2006 draft e-mail
P-4	Aminga Report - Same as R-43
P-5	School Board Letter re Increment Withholding
P-6	Dennis Letter to parents regarding Principal Pollack

For Respondent:

R-1	Dennis Teacher Evaluation June 23, 2006
R-2	Dennis Evaluation June 26, 2003
R-3	English Department Chair April 15, 2003 Thank You Letter to Dennis
R-4	Dennis Evaluation Report July 1, 2002
R-5	School Superintendent September 18, 2002 Memo regarding Dennis article
R-6	Principal Congratulatory Letter to Dennis regarding publication
R-7	Dennis MLKA Resignation Letter
R-8	Dennis Evaluation Report June 27, 2000
R-9	Dennis June 27, 2000 Interim Supervisory Report
R-10	Evaluation Letter June 21, 1999
R-11	Dennis Interim Supervisory Report June 25, 1999
R-12	Dennis Evaluation Report June 25, 1999
R-13	Advisory Letter on Student Activities
R-14	Dennis Evaluation Report May 15, 1997
R-15	Tenure Recommendation

R-16 Reappointment Recommendation
R-17 Dennis Interim Supervisory Report February 28, 1997
R-18 Dennis Interim Supervisory Report January 23, 1997
R-19 Dennis Interim Supervisory Report October 18, 1996
R-20 Dennis Interim Supervisory Report October 18, 1996
R-21 Dennis Evaluation Report September 1, 1997
R-22 Dennis Interim Supervisory Report January 25, 1996
R-23 Dennis Interim Supervisory Report March 7, 1996
R-24 Dennis Interim Supervisory Report November 6, 1995
R-25 Dennis Interim Supervisory Report October 6, 1995
R-26 Reappointment Recommendation March 24, 1995
R-27 Dennis Interim Supervisory Report March 21, 1995
R-28 Dennis Interim Supervisory Report March 8, 1995
R-29 Provisional Teacher Program Evaluation February 27, 1995
R-30 Provisional Teacher Program Evaluation November 30, 1994
R-31 Dennis Interim Supervisory Report December 9, 1994
R-32 Hollywood Physics Manual
R-33 Memorandum and Order in Dennis et al v. Board of Education et al
R-34 B.S. Affidavit
R-35(a) June 12, 2006 e-mail (same as P-3)
R-35(b) Same as R-35(a) except message scrolled down
R-36 B.S. Statement to Prosecutor's Office
R-37 Dr. Lilly Affidavit
R-38 Dr. Lilly Report
R-39 Melissa Cooper Prosecutor's Office Statement
R-40 Thomas Whittaker Prosecutor's Office Statement
R-41 Minerva Santos (B.S.'s mother) IAIU Screening Summary
R-42 Minerva Santos IAIU Screening Summary continued
R-43 IAIU Finding
R-44 IAIU Findings Letter to Dennis
R-45 IAIU Findings Report to Minerva Santos
R-46 IAIU Investigator Response to Report Findings
R-47 IAIU Unusual Incident Report
R-48 School Board Letter to Dennis regarding dismissal
R-49 School Board Certificate of Determination
R-50 School Board Directive 8462 regarding child abuse and/or neglect

#209-08

209-08

OAL DKT. NO. EDU 5189-08
AGENCY DKT. NO. 108-4/08

NORTH HUDSON ACADEMY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON APPLICATION FOR EMERGENT RELIEF
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	
RESPONDENT.	:	

The record of this matter, the audiotape of proceedings at the Office of Administrative Law (OAL) and the recommended order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to meet the requisite standards for the granting of emergent relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) and *N.J.A.C.* 6A:3-1.6. Initially, the Commissioner concurs, for the reasons expressed in the order, that petitioner has failed to show that it will suffer irreparable harm if the Commissioner does not permit it to charge its sending districts the requested higher tentative tuition rate for the 2008-09 school year. The Commissioner further notes that applicants for emergent relief must also demonstrate a likelihood of success on the merits of the underlying appeal and show that the balance of interests and equities under the circumstances rests in their favor – neither of which petitioner can be found to have done where the Department appears to have acted reasonably and consistent with law, and where the relief requested by petitioner would compromise the Department's ability to ensure that adjustments to sending district tuition are limited to allowable costs.

Accordingly, for the reasons expressed therein and above, the order of the ALJ – denying the petitioner's application for emergent relief – is adopted as the final decision in this interim matter, and petitioner's claims shall now proceed to hearing on the merits.

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 5/08/08

Date of Mailing: 5/09/08

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON EMERGENT RELIEF

OAL DKT. NO. EDU 05189-08

AGENCY DKT. NO. 108-4/08

NORTH HUDSON ACADEMY,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,

Respondent.

Robert S. Feder, Esq., for the petitioner

Sookie Bae, Esq. Deputy Attorney General, for the respondent (Anne Milgram, Attorney General of New Jersey, attorney)

The North Hudson Academy, petitioner, brings this action seeking emergency relief under N.J.A.C. 6A:3-1 et seq. seeking a higher tentative tuition rate for the 2008-2009 school year pursuant to N.J.A.C. 6A:23-4.2. On April 14, 2008, the Commissioner of Education received petitioner's application for emergent relief. The Commissioner of Education transmitted the matter to the Office of Administrative Law on April 16, 2008. On April 22, 2008, oral argument was presented before the undersigned.

Petitioner is a non-profit private school for students with disabilities, who provided education and related special services for severely emotionally disturbed children primarily from Hudson County. For 19 years, petitioner has rented a facility from St. Brigid's Roman Catholic Church, at a rate of $72,000.00 for the 2007-08 year. In early 2007, petitioner was notified that the Archdiocese of Newark was going to sell St.

Brigid's and that petitioner's lease would be cancelled as of August 2008. In November 2007, petitioner agreed to purchase the facility for approximately $3.2 million dollars, which was secured mostly through mortgages and loans with a yearly interest of $240,000.00. In order to close the budget gap, petitioner requested a higher tentative per diem tuition rate, an increase from the current $183.60 to $224.27 for the 2008-09 year. Petitioner now seeks to have the per diem rates increased through emergency relief.

The Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, allow "emergency relief" to be granted "where authorized by law and where irreparable harm will result without an expedited decision granting or prohibiting some action or relief connected with a contested case." N.J.A.C. 1:1-12.6. The New Jersey Supreme Court has held that in order to be entitled to emergency or injunctive relief, a party must demonstrate that (1) irreparable harm will result if relief is not granted; (2) the legal right underlying the claim is settled; (3) the moving party has a reasonable probability of ultimate success on the merits; and (4) the relative hardship between the parties in granting or denying the relief. Rinaldo v. RLR Inv., LLC, 387 N.J. Super. 387, 395 (App. Div. 2006) (citing Crowe v. De Gioia, 90 N.J. 126, 132-34 (1982). While elaborating on the first prong of the Crowe test, the Court stated that "harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages." Crowe, 90 N.J. at 132-3. However, this is not a complete bar on claims seeking monetary awards based on emergency relief since "pecuniary damages may be inadequate because of the nature of the injury or of the right affected." Ibid.[1]

In order to satisfy the first prong, the prospect of future harm cannot be purely speculative. "Concerns that 'may' lead to irreparable harm are not enough." Peregoy v. Peregoy, 358 N.J. Super. 179, 203 (App. Div. 2003). This requirement was born out in

[1] Cf. Parks v. Commerce Bank, N.A., 377 N.J. Super. 378, 387 (App. Div. 2005) (injunctive relief is granted where the underlying basis of the claim is monetary harm, since not granting the injunction "would significantly undermine the business's economic relationships" and "such a loss is not susceptible to monetary quantification.")

a case similar to the matter at hand, Bd. of Educ. of the Borough of Englewood Cliffs v. Bd. of Educ. of the City of Englewood, EDU 1086-86, State Bd. of Educ., Decision on Motions (June 3, 2005) <http://lawlibrary.rutgers.edu/oal/search.html>. In that case, the Englewood Board sought $6 million from the Commissioner of Education to cover a budgetary shortfall. The shortfall was alleged to have been borne out of the New Jersey Supreme Court's requirement that Englewood continue its sending/receiving relationships so as to effectuate racial balance and diversity. As support for their motion of emergent relief, the Englewood Board argued that without the funding it would be left without top administrators, numerous programs would fail, 318 students would be "dispossessed of their education," and the first graduating class would be "denied the opportunity to complete their program." Englewood, EDU 1086-86, <http://lawlibrary.rutgers.edu/oal/search.html>. In denying the emergency relief, the State Board held that Englewood "has failed to demonstrate that it will suffer irreparable harm if it is not afforded the relief it seeks." Ibid. The State Board held that the "scenario presented" by Englewood was "speculative" and that nothing showed that Englewood would be required to dismantle the Court ordered program without emergency funding. Ibid.[2]

In the instant matter, based upon arguments presented and the documents submitted, North Hudson claims that not granting emergency approval of the rate increase will result in financial hardship. However, the temporary financial hardship does not equal irreparable harm in this case. First, the budget shortfall of the difference between the rent on the property from the previous year and the estimated costs for maintaining the property related to the purchase is based on speculative costs attributed to the acquisition of the church property. North Hudson makes numerous "assumptions" in order to calculate the "allowable cost" related to the property costs. North Hudson calculates the property tax based off of the total sale price of the property, $3.2 million, not the official assessment of the property. North Hudson also attributes $180,000, nearly one-third of the estimated $550,000 "allowable cost," to an

[2] The State Board also put a great deal of weight on the fact that Englewood knew for months about the impending shortfall and did not take adequate steps to propose an adequate budget.

estimated depreciation rate of the property. These amounts are purely speculative and do not, by themselves, support a finding of irreparable harm and the granting of emergency relief. Furthermore, petitioner has the right to recoup any legitimately incurred allowable costs after submitting audited financial statements to respondent. N.J.A.C. 6A:23-4.9. Therefore petitioner faces no irreparable harm, and I so **CONCLUDE**.

Since North Hudson has not shown that the failure to increase the tuition rate on an emergency basis would result in irreparable harm, the motion for emergent relief is **DENIED**.

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

April 23, 2008

DATE

JOANN LASALA CANDIDO, ALJ

ljb

210-08

#210-08

OAL DKT NO. EDU 8888-07
AGENCY DKT. NO. 269-9/07

DAVID SHUSTER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF GLOUCESTER, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Lucille T Davy

COMMISSIONER OF EDUCATION

Date of Decision: 5/09/08

Date of Mailing: 5/09/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8888-07

AGENCY DKT. NO. 269-9-07

DAVID SHUSTER,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF GLOUCESTER, CAMDEN COUNTY,

Respondent.

Michael C. Damm, Esq., for petitioner (Selikoff & Cohen, attorneys)

Leonard J. Wood, Esq. for respondent (Wade, Long, wood & Kennedy, attorneys)

Record Closed: March 19, 2008 Decided: March 20, 2008

BEFORE **DONALD J. STEIN**, ALJ:

This matter was transmitted to the Office of Administrative Law on November 8, 2007, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

March 20, 2008
DATE

DONALD J. STEIN, ALJ

Date Received at Agency:

MAR 27 2008
DATE

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/bdt

SELIKOFF & COHEN, P.A.
307 Fellowship Road, Suite 314
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Attorneys for David Shuster, Petitioner

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DAVID SHUSTER,

Petitioner,

v.

GLOUCESTER CITY BOARD OF EDUCATION,

Respondent.

BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY

OAL Docket No. EDUOR 08888-2007S
Agency Ref. No. 269-9/07

SETTLEMENT AGREEMENT

This Settlement Agreement is entered into by and between the Gloucester City Board of Education ("Board") and its tenured employee, Petitioner David Shuster; and,

WHEREAS Petitioner has been continuously employed by the Board on a full time basis since approximately September of 2000, having been a Health and Physical Education Teacher and Athletic Trainer through June of 2004, and beginning from September of 2004 through June of 2007 having been appointed solely as a Health and Physical Education Teacher; and,

WHEREAS during the aforesaid time periods, Petitioner held the appropriate certificates for the subjects he taught issued by the New Jersey State Board of Examiners, specifically Certification as a Health and Physical Education Teacher and as an Athletic Trainer; and,

WHEREAS Petitioner has served for the requisite period of time prescribed by *N.J.S.A.* 18A:28-5 and, thus, holds tenure status as a teacher and certain seniority rights; and,

WHEREAS Petitioner, at the start of the 2007-2008 school year, was assigned to the position of "Teacher: ISS (In School Suspension)" and continues in that position; and,

WHEREAS the Board represents that it has formally approved the job description for that position, Exhibit "A," which requires New Jersey State Certification meaning a teaching certification issued by the New Jersey State Board of Examiners; and,

WHEREAS pursuant *Dowding v. Monroe Township Board of Education*, State Board of Education, 90 *S.L.D.* 1711 and *N.J.A.C.* 6A:9-5.5(b) a copy of the job description for the position was sent to the Acting Camden County Superintendent of Schools, H. Mark Stanwood, by way of

correspondence dated December 13, 2007 (Exhibit "B"); and,

WHEREAS the Acting Camden County Superintendent, by way of correspondence date December 21, 2007 (Exhibit "C"), replied stating that: 1) the position as described in the job description was appropriately titled; 2) that he did not need to approve of the title since "it is recognized in the Coding Manual for Certificated Staff Report and the Editlink document of job codes and their respective authorizing licenses"; and, 3) "candidates holding any valid, standard instructional license may be assigned to such a position, relative to any relevant collective bargaining agreements"; and,

WHEREAS, based upon the above, inasmuch at it appears that Petitioner has been placed in a position that requires a teaching certificate and that he holds such a certificate, this being in accordance with his tenure rights and pursuant to the New Jersey Administrative Code;

NOW THEREFORE, the matter and dispute having been amicably adjusted by and between the parties and having fulfilled the public interest, it is hereby stipulated and agreed that provided the Commissioner of Education concurs as set forth above: 1) that the position as described in Exhibit "A" is appropriately titled; 2) that the title need not be approved since it is recognized or the Commissioner otherwise approves same; 3) that the requirements for the position are a valid, standard instructional certificate issued by the New Jersey State Board of Examiners; and 4) that Petitioner's certificate as a Health and Physical Education Teacher meets the requirements for the aforesaid position to which he has been assigned, the parties agree that the Petition of Appeal may be dismissed.

The parties further agree that should the Commissioner fail to approve this Settlement Agreement without modification, they will make every reasonable effort to reform it to meet her objections; and,

The parties further agree that should the Commissioner fail to approve this Settlement Agreement and it cannot be reformed to meet her objections and/or the matter is referred to hearing, this Settlement Agreement shall be of no force and effect.

It is further agreed and the parties state they have been fairly and adequately represented and advised at all stages of these proceedings, that they are fully satisfied with the services of

their counsel and that they have voluntarily, without coercion, with a full understanding of their rights and the ramifications of this Settlement Agreement entered into it on their own accord.

By signing this Agreement, each signatory represents that he or she is a Party or has been duly authorized by a Party to sign on that Party's behalf.

Both parties fully understand that the Settlement Agreement is subject to the approval of the Commissioner of Education.

The parties agree that this Agreement may be signed in counterparts and that facsimiles of signatures will have the same force and effect as original signatures.

Intending to be legally bound hereby, the parties execute the foregoing Agreement as set forth below.

SELIKOFF & COHEN, P.A.
Attorneys for David Shuster

MICHAEL C. DAMM, ESQ.
Dated: 3/11/08

WADE, LONG, WOOD
& KENNEDY, LLC
Attys for Gloucester City Bd. of Ed.

LEONARD J. WOOD, ESQ.
Dated: 2/12/08

WITNESS

Louise V. Llewellyn

BOARD PRESIDENT
Dated: 02/12/08

GLOUCESTER CITY BOARD OF EDUCATION

Margaret McDonnell

BOARD SECRETARY
Dated: 2/13/08

DAVID SHUSTER
Dated: 3/6/08

The Gloucester City BOE has authorized and consented to the terms of this settlement

Leonard J Wood

211-08

LINDA MARTELL-DIMAIO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DENNIS, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner was employed as a teaching staff member in respondent's district during the 2006-07 school year. She contended that although she received a notice of intent to terminate her employment from the Superintendent of Schools in June 2007, she was never officially terminated by the Board as required by statute and should receive back pay. The parties filed cross motions for summary decision, and the facts of the matter are not in dispute.

The ALJ found that: *N.J.S.A.* 18A:27-4 specifies that only the Board of Education may remove an employee, by a majority vote of the full board; such Board action did not occur in this matter until January 5, 2008; petitioner's termination was therefore not effective until that date; petitioner is entitled to back pay from the date of her last pay, October 17, 2007, until the date the Board officially terminated her; and petitioner's termination afforded her neither entitlement to a statement of reasons nor an informal appearance before the Board. Accordingly, the ALJ ordered that petitioner be awarded back pay from October 17, 2007 to January 5, 2008, and that she not be afforded a statement of reasons for her termination or an informal appearance before the Board.

The Commissioner concurred with the ALJ that petitioner is due back pay for the period specified above. While noting that the ALJ had determined that petitioner could not rely on *N.J.S.A.* 18A:27-4.1(b) as support for a request for a statement of reasons for her termination and an informal meeting with the respondent board of education, the Commissioner determined that such requests for relief were not raised in the petition or addressed in the prehearing order. Consequently they were not addressed by the Commissioner. Respondent was ordered to award back pay to petitioner for the period commencing October 17, 2007 through January 5, 2008.

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

May 9, 2008

OAL DKT. NO. EDU 10500-07
AGENCY DKT. NO. 339-11/07

LINDA MARTELL-DIMAIO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DENNIS, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed with the Commissioner of Education (Commissioner). For the reasons set forth in the Initial Decision, the Commissioner concurs with the Administrative Law Judge's (ALJ) conclusion that petitioner is due back pay for the period commencing October 17, 2007 and continuing through January 5, 2008 – the day upon which respondent passed a resolution ratifying petitioner's termination.

The Commissioner acknowledges that the ALJ determined that petitioner cannot rely on *N.J.S.A.* 18A:27-4.1(b) as support for a request for 1) a statement of reasons for her termination and 2) an informal meeting with the respondent board of education. However, since these two requests for relief were not raised in the petition or addressed in the prehearing order, they need not be addressed by the Commissioner.

Accordingly, the Commissioner adopts the portion of the Initial Decision in which petitioner is awarded back pay for the period beginning October 17, 2007 and ending on January 5, 2008.

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 5/09/08

Date of Mailing: 5/09/08

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
(On Cross-Motions for Summary Decision)
OAL DKT. NO. EDU 10500-07
AGENCY DKT. NO. 339-11/07

LINDA MARTELL-DiMAIO,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF DENNIS, CAPE MAY COUNTY,
Respondent,

Ned P. Rogovoy, Esq., for petitioner

James F. Schwerin, Esq., for respondent (Parker McCay, P.A.)

Record Closed: March 14, 2008 Decided: March 28, 2008

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The petitioner requested a fair hearing and the matter was transmitted to the OAL on December 26, 2007, to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The parties filed cross motions for summary decision. The facts are undisputed.

FACTUAL DISCUSSION

Petitioner was employed as a teaching staff member in respondent Dennis Township Board of Education's ("Board") district during the 2006-2007 school year. On May 3, 2007, the Board approved petitioner for reemployment for the 2007-2008 school year, and on May 4, 2007, the Superintendent of schools, George Papp, notified petitioner in writing of the Board's action. On May 11, 2007, petitioner accepted. On June 7, 2007, she executed a memorandum accepting her salary for the 2007-2008 school year, subject to any change negotiated in a new Collective Bargaining Agreement. The memorandum, which both parties agree constitutes a contract for employment, contained the following language:

> Termination of Employment. Title 18A:28-8 Notice of intention to resign required within sixty (60) days' notice, in writing, for tenured personnel. Notice of termination or resignation required within thirty (30) days' notice, in writing, for non-tenured personnel.

On June 15, the Superintendent notified petitioner in writing as follows:

> At the June 28, 2007 Board of Education Meeting, I will be notifying the Board of your termination of employment. You will begin the 30 days of contractual notice on Tuesday, September 4, 2007. Your last day of work will be Tuesday, October 16, 2007.

The Board took no action on petitioner's termination until January 5, 2008. At that time, Board passed a resolution ratifying petitioner's termination retroactive to June 15, 2007.

Petitioner now asserts that her termination was not effective until the Board acted on January 5, 2008. She further argues that she is entitled to a statement of reasons for her termination and an informal appearance before the Board. The Board counters that the Superintendent's action of June 15 was sufficient to effectuate the

termination; no Board action was required. Alternatively, the Board contends that its retroactive resolution of January 5, 2008 is dispositive.

LEGAL ANALYSIS

1. The Termination

The controlling statute in this matter is N.J.S.A. 18A:27-4.1a, which states in pertinent part:

> A board of education *shall* appoint, transfer *or remove* a certificated or non-certificated officer or employee only upon the recommendation of the chief school administrator and *by a recorded roll call majority vote of the full membership of the board*....(Emphasis added)

The language of the statute is clear on its face. An employee may only be removed by a recorded roll call majority vote of the full membership of the Board. In this case, such Board action did not occur until January 5, 2008.

The Board cites two cases in support of its contention that the action of the superintendent was sufficient to effectuate petitioner's termination. Neither applies to the facts before me.

In Kufel v. Board of Education of the Union County Vocational-Technical School District, 96 N.J.A.C. 2d (EDU) 14 (1995), the Superintendent of Schools served a notice of termination on petitioner on March 15, 1995. The termination was to be effective sixty days later on May 14, 1995. On March 16, 1995, one day later, the Board of Education passed a resolution approving the termination.

In considering these facts, the Administrative Law Judge held:

> Since the Board ratified Gagliardi's action one day after he notified Kufel, I CONCLUDE that, for all intents and

> purposes, it was the Board which notified, suspended and terminated petitioner on March 15, 1994.

The Board's action in Kufel took place one day after the Superintendent served the notice of termination, and fifty nine days *prior to* the date of termination. In the present case, the Board failed to act prior to the final termination date of October 16, 2007, but instead waited until January 5, 2008.

But the court in Kufel went on to state:

> According to Rockefeller, supra, subsequent ratification was probably not even necessary.

Rockefeller v. River Edge Board of Education, 75 S.L.D. 898 (1975) is the second case relied upon by the Board. The Board contends that Rockefeller held the action of the Superintendent terminating an employee required no ratification by the Board. The above-quoted equivocal language in Kufel affords at least some support for that proposition.

But such an interpretation of Rockefeller is erroneous. The facts of Rockefeller are as follows. On October 8, 1973, the Board of Education determined to terminate petitioner "during a private work session" and directed the superintendent to notify her. The superintendent did so on October 9, 1973, advising that petitioner's last day of work would be December 10, 1973. Thereafter, on November 19, 1973 the Board passed a formal resolution terminating petitioner.

The hearing examiner found that the Superintendent had acted based upon the action of the Board at the October 8, 1973 private work session. Therefore, the Board, and not the superintendent terminated petitioner. The Commissioner affirmed.[1]

[1] I note that the Board's action in Rockefeller took place in 1973, prior to the enactment of the Open Public Meetings Act in 1975. Such board action at a "private work session" would be of dubious validity under present law.

Therefore, Rockefeller does not stand for the proposition that the action of the superintendent alone is sufficient to terminate petitioner.

N.J.S.A. 18A:27-4.1a specifies that only the Board of Education can remove an employee, and only by a majority vote of the full board. Such Board action did not occur herein until January 5, 2008. Accordingly, petitioner's termination was not effective until at least that date.

The next question becomes, precisely what is the effective date of the termination?

The individual employment contract requires thirty days notice of termination be given. Petitioner may argue that the Board's action of January 5 constituted the only valid notice she received, and therefore she is entitled to pay from October 17, 2007, through February 4, 2008, thirty days pay after the January 5, 2008 Board action.

I reject such a scenario. Petitioner received actual notice of her prospective termination on June 15, 2007. She has known what would happen to her since that date and has had the opportunity to plan how she would address her termination. The notice requirements of the contract were satisfied as soon as the Superintendent advised petitioner that her employment would end.

Consequently, petitioner's entitlement to pay ended when the Board perfected her termination by passing the resolution of January 5, 2008. Petitioner is entitled to back pay from the date of her last pay until the date the Board terminated her. That time period commenced October 17, 2007, and ended January 5, 2008.

2. Reasons and Informal Appearance

Petitioner also claims entitlement to a statement of reasons for her termination and an informal appearance before the Board. She relies upon N.J.S.A. 18A:27-4.1b, which states in pertinent part:

> A board of education shall renew the employment contract of a certificated or non-certificated officer or employee only upon the recommendation of the chief school administrator and by a recorded roll call majority vote of the full membership of the board. The board shall not withhold its approval for arbitrary and capricious reasons. A nontenured officer or employee *who is not recommended for renewal* by the chief school administrator shall be deemed nonrenewed. Prior to notifying the officer or employee of the nonrenewal, the chief school administrator shall notify the board of the recommendation not to renew the officer's or employee's contract and the reasons for the recommendation. An officer or employee whose employment contract is not renewed shall have the right to a written statement of reasons for nonrenewal pursuant to section 2 of P.L.1975, c.132 (C.18A:27-3.2) and to an informal appearance before the board. The purpose of the appearance shall be to permit the staff member to convince the members of the board to offer reemployment.
>
> [Emphasis added.]

Again, the statutory language is unequivocal. The procedure for providing reasons and an informal appearance only applies when a nontenured officer or employee is "not recommended for renewal."

Such is not the case here. Petitioner was recommended for renewal and was in fact renewed. Thereafter she was terminated under the applicable provision of her employment contract. The termination afforded her neither entitlement to a statement of reasons nor an informal appearance before the Board.

ORDER

I **ORDER** that petitioner be awarded back pay for the period October 17, 2007, through January 5, 2008.

I **ORDER** that petitioner not be afforded a statement of reasons for her termination or an informal appearance before the Board of Education.

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

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

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

March 28, 2008
DATE

BRUCE M. GORMAN, ALJ

Date Received at Agency: 3-28-08

APR - 2 2008

Mailed to Parties:

[redacted] AND
[redacted] LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

/sd

#212-08

~~212~~
212-08

OAL DKT. NO. EDU 3427-07
AGENCY DKT. NO. 26-1/07

SUSAN DE CARLO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 5/09/08

Date of Mailing: 5/12/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3427-07

AGENCY DKT. NO. 26-1/07

SUSAN DE CARLO,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,

Respondent.

Jennifer Borja, Esq., for Petitioner (Timothy R. Smith & Associates, LLC, attorneys)

Joseph L. Roselle, Esq., for Respondent (Schwartz, Simon, Edelstein, Celso & Kessler, LLC, attorneys)

Record Closed and Decided: March 26, 2008

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

This matter was transmitted to the Office of Administrative Law ("OAL") from the Department of Education on March 21, 2007, for hearing as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

After numerous settlement discussions, a settlement was reached.

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

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

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

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

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

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

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

March 26, 2008
DATE

Maria M. La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Date Received at Agency:

3-31-08

Mailed to Parties:

DIRECTOR ALJ
OFFICE OF ADMINISTRATIVE LAW JUDGES

MAR 31 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER LLC
44 Whippany Road, Suite 210
P.O. Box 2355
Morristown, NJ 07962
Tel. (973) 301-0001; Fax (973) 993-3152
Attorneys for the East Orange Board of Education.

2008 MAR 26 A 9:18
OFFICE OF ADMIN. LAW

SUSAN DECARLO, Petitioner, vs. EAST ORANGE BOARD OF EDUCATION, Respondent.	:	BEFORE THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY OAL DOCKET NO. EDU3427-07 AGENCY DOCKET NO. 26-1/07 ADMINISTRATIVE ACTION **STIPULATION OF SETTLEMENT AND RELEASE**

This Stipulation of Settlement and Release is made by and between the East Orange Board of Education (hereinafter the "Board") with administrative offices located at 715 Park Avenue, East Orange, New Jersey, 07017 and Susan DeCarlo, whose address is 82 Edgewood Avenue, West Orange, New Jersey 07052 (hereinafter the "Petitioner"). In consideration of the mutual promises and undertakings contained in this Stipulation of Settlement and Release and for good and valuable consideration, the receipt of which is hereby acknowledged, the undersigned parties state:

WHEREAS, on May 4, 2006, Petitioner was employed by the Board as a teaching staff member; and

WHEREAS, Petitioner was charged with a criminal action for certain acts alleged to have occurred on or about May 4, 2006, while Petitioner was in the employ of the Board; and

WHEREAS, on September 25, 2006, the criminal complaint against Petitioner was dismissed; and

WHEREAS, the Petitioner filed a Petition of Appeal with the Commissioner of Education on or about January 18, 2007, pursuant to N.J.S.A. 18A:16-6.1, seeking reimbursement from the Board for Petitioner's attorneys' fees and costs associated with the legal defense of the criminal action with which Petitioner had been charged; and

WHEREAS, on or about March 15, 2007, the Board filed its answer to the Petition of Appeal with Affirmative Defenses; and

WHEREAS, the parties have determined that it is in their respective best interests to enter into this Stipulation of Settlement and Release to avoid the need for further litigation;

NOW, THEREFORE, in consideration of the mutual promises and covenants, the parties agree as follows:

1. The Board will pay to the Petitioner the sum of Seven Thousand Four Hundred Eighteen Dollars and Forty Three Cents ($7,418.43) in full and complete satisfaction of the amount Petitioner is claiming to be due and owing to her from the Board for Petitioner's attorneys' fees and costs.
2. This settlement amount will be paid directly to the trust account of Petitioner's legal counsel, Timothy Smith, Esq., of Timothy R. Smith & Associates, LLC, 76 South Orange Avenue, Suite 211, South Orange, New Jersey, 07079, following the approval of this Stipulation of Settlement and Release by the Commissioner of Education.
3. Petitioner, in consideration of this Agreement, hereby releases the Board, individually and collectively, and its agents, servants and employees from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings, and

judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought, or could be brought, arising under or relating in any way to the subject matter set forth in the Petition of Appeal now and forever, except to enforce the terms of this Stipulation of Settlement and Release.

4. Petitioner acknowledges that she has reviewed this Stipulation of Settlement and Release with her own independent legal counsel and that she enters into it without duress, and of her own free will and volition. She further acknowledges that she fully understands the terms of this Stipulation of Settlement and Release and the duties and obligations enumerated herein.
5. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of this matter hereby withdraws, with prejudice, the above-docketed Petition of Appeal.
6. Nothing contained in this Stipulation of Settlement and Release should be construed as an admission of wrongdoing by either party and neither party shall be considered a prevailing party for any reason.
7. This Stipulation of Settlement and Release is conditioned upon approval of the Board.
8. The Board President is authorized to execute this Stipulation of Settlement and Release on behalf of the Board.
9. This Stipulation of Settlement and Release contains the entire agreement between the parties, and no other representations, whether verbal or in writing shall be binding upon them.
10. All terms of this Stipulation of Settlement and Release are deemed material. This instrument may not be altered, amended, modified or revoked except by a new

instrument executed in writing by the parties.

11. This Stipulation of Settlement and Release is an agreement which is to be construed in accordance with the laws of the State of New Jersey.

IN WITNESS WHEREOF, the parties, or their duly authorized representatives, do set forth their hands and seal as of the date(s) set forth below.

FOR THE RESPONDENT EAST ORANGE BOARD OF EDUCATION:

By: _____
Bibi Stewart-Garvin, Board President

By: _____
, Witness

Date: _____

PETITIONER:

_____
Susan DeCarlo

Date: 1-8-2008

Sworn and subscribed before me this
8 day of January, 2007

_____
Notary Public

ZINOVIA HATZIPETROS
A Notary Public of New Jersey
My Commission Expires APRIL 13, 2009

EXTRACT FROM THE MINUTES OF A MEETING
OF THE BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, NEW JERSEY
AS RECORDED IN THE OFFICIAL MINUTE BOOK

2008 MAR 26 A 9:18
OFFICE OF ADMIN LAW

The Board of Education of the City of East Orange in the County of Essex, New Jersey convened a Regular Meeting on Tuesday, February 5, 2008 at 6:15 p.m.

The following members of the Board were present:

Ms. Belinda Jackson, Mr. J. Garfield Jackson, Jr., Mr. Everett Jennings, Mr. Vernon Pullins, Jr., Mr. Arthur L. Wright, and Mrs. Bibi Stewart Garvin

The following resolution was offered by Mr. Vernon Pullins, Jr., duly seconded by Ms. Belinda Jackson and adopted by the Board of Education:

Resolution - Employee Indemnification

RESOLVED: that the Board hereby approves the Settlement Agreement/Release in the employee indemnification matter, Susan DeCarlo v. East Orange Board of Education, OAL Dkt. No. EDU3427-07, which is currently before the Commissioner of Education, in the amount of $7,418.43.

BE IT FURTHER RESOLVED: that the Board President is hereby authorized to execute the Settlement Agreement/Release in the above matter on behalf of the Board and a copy thereof shall be in included in the permanent minutes of this meeting.

`OLL CALL: AYES: 5
ABSTENTIONS: 1
EXCUSED: 1

STATE OF NEW JERSEY}
} ss
COUNTY OF ESSEX}

I, Victor R. Demming, Secretary of the Board of Education, of the East Orange Board of Education, in the County of Essex, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of said district, fully called and held on Tuesday, February 5, 2008, has been compared by me with the original minutes as officially recorded in my office in the minute book of said East Orange Board of Education, original minutes so far as the same related to the subject matter referred to in said extract, in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 28th day of February 2008.

Victor R. Demming
Victor R. Demming, Board Secretary

213-08

OAL DKT. NO EDU 249-08
AGENCY DKT. NO. 376-12/07

T.H. on behalf of minor child, J.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No transcript of the March 3, 2008 hearing has been provided.

A letter from J.R.'s mother was received on April 11, 2008. The Commissioner may not rely on its contents because the letter was filed beyond the time allowed by *N.J.A.C.* 1:1-18.4 for exceptions and was not submitted by the petitioner.

After careful and independent review, the Commissioner adopts the Initial Decision as the final decision in this case. The petition is hereby dismissed, and respondent's decision not to provide J.R. with a free public education in its schools stands.[1] As respondent did not file a counterclaim for tuition or provide proofs upon which to calculate tuition, no tuition reimbursement is currently due.

IT IS SO ORDERED.[2]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 5/09/08
Date of Mailing: 5/09/08

[1] The instant decision is no bar to the family's future ability to apply to enroll J.R. in respondent's schools if they establish residence in respondent's district.

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

213-08

T.H. on behalf of minor child, J.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a resident of the Borough of Somerville – contested respondent's determination that her grandson, J.R., is ineligible to attend school in respondent's district, claiming that J.R. resides with her in Somerville. Respondent Board did not file a counterclaim for tuition.

The ALJ found that: J.R. is not properly domiciled in respondent's school district as required under *N.J.S.A.* 18A:38-1(a) and is therefore not entitled to attend Somerville Borough schools free of charge; petitioner does not support J.R. gratis, as the mother and stepfather make weekly contributions toward his support; there is no basis upon which to conclude that a family or economic hardship exists in this case; and tension and arguments among family members is not a legal basis to assert a claim of entitlement to attend public schools free of charge. The ALJ recommended dismissal of the petition.

Upon a full and independent review, the Commissioner adopted the Initial Decision as the final decision in this matter, noting that no tuition is due at this time as respondent Board did not file a counterclaim or provide proofs regarding tuition rates in the district.

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

May 9, 2008

213-08

OAL DKT. NO EDU 249-08
AGENCY DKT. NO. 376-12/07

T.H. on behalf of minor child, J.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No transcript of the March 3, 2008 hearing has been provided.

A letter from J.R.'s mother was received on April 11, 2008. The Commissioner may not rely on its contents because the letter was filed beyond the time allowed by *N.J.A.C.* 1:1-18.4 for exceptions and was not submitted by the petitioner.

After careful and independent review, the Commissioner adopts the Initial Decision as the final decision in this case. The petition is hereby dismissed, and respondent's decision not to provide J.R. with a free public education in its schools stands.[1] As respondent did not file a counterclaim for tuition or provide proofs upon which to calculate tuition, no tuition reimbursement is currently due.

IT IS SO ORDERED.[2]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 5/09/08
Date of Mailing: 5/09/08

[1] The instant decision is no bar to the family's future ability to apply to enroll J.R. in respondent's schools if they establish residence in respondent's district.

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

213-08

T.H. on behalf of minor child, J.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a resident of the Borough of Somerville – contested respondent's determination that her grandson, J.R., is ineligible to attend school in respondent's district, claiming that J.R. resides with her in Somerville. Respondent Board did not file a counterclaim for tuition.

The ALJ found that: J.R. is not properly domiciled in respondent's school district as required under *N.J.S.A.* 18A:38-1(a) and is therefore not entitled to attend Somerville Borough schools free of charge; petitioner does not support J.R. gratis, as the mother and stepfather make weekly contributions toward his support; there is no basis upon which to conclude that a family or economic hardship exists in this case; and tension and arguments among family members is not a legal basis to assert a claim of entitlement to attend public schools free of charge. The ALJ recommended dismissal of the petition.

Upon a full and independent review, the Commissioner adopted the Initial Decision as the final decision in this matter, noting that no tuition is due at this time as respondent Board did not file a counterclaim or provide proofs regarding tuition rates in the district.

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

May 9, 2008

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 249-08
AGENCY DKT. NO. 376-12/07

T.H., O/B/O OF MINOR CHILD J.R.,

Petitioner,

v.

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

Respondents.

T.H., petitioner, pro se

Michael J. Rogers, Esq., for respondent Board of Education of the Borough of Somerville, (McDonald & Rogers, attorneys)

Record Closed: March 4, 2008 Decided: March 25, 2008

BEFORE **DANIEL B. MC KEOWN,** ALJ (t/a):

Petitioner is a resident of the Borough of Somerville, Somerset County, and has been for the past 40 years or so. Her grandson, J.R., who had been living with his mother and stepfather in Hillsborough, came to live with her during November 2007 because of "problems" he was having with his mother and stepfather. In a petition filed before the Commissioner of Education on or about January 7, 2008, petitioner seeks an Order to have her grandson attend the public schools operated by the Borough of

Somerville Board of Education (Board) free of charge. Petitioner makes claim that J.R. is entitled to such attendance under N.J.S.A. 18A:38-1 (b) because he resides with her in the Borough of Somerville, ostensibly because if he continued to live with his mother and stepfather in Hillsborough "a family or economic hardship" would be created. N.J.S.A. 18A:38-1(b)(1).

The Board says petitioner failed to carry her burden of persuasion to show that J.R. is entitled to free education in its public school district. Pending disposition of this matter, J.R. continues in attendance at the Borough of Somerville public schools. The Board did not file a counterclaim for tuition against petitioner.

A hearing was conducted March 3, 2008, at the Office of Administrative Law, Mercerville New Jersey, after which the record. The conclusion is reached in this Initial Decision that J.R. is not eligible to attend the Borough of Somerville public schools by reason of N.J.S.A. 18A:38-1 (b), or by any legal authority, free of charge.

FACTS

Except as otherwise noted, the facts established by a preponderance of credible evidence in the record are these.

1. Petitioner, T.H., is the maternal grandmother of J.R.

2. It is undisputed that petitioner has been a life long resident, 40 years plus, of the Borough of Somerville.

3. J.R. is 16 years of age.

4. Up until on or about November 2007, J.R. had been residing with his mother and stepfather in Hillsborough, Somerset County, New Jersey

5. Until in or about November 2007 J.R. attended the Hillsborough High School. J.R.'s mother testified J.R. requires special education which, she says he received at Hillsborough.

6. J.R.'s mother attends community college. The evidence shows that sometime in November 2007 she was in her Hillsborough bedroom at her computer working on a school paper. J.R.'s stepfather entered the bedroom and began to distract her from the school task at hand. The stepfather's attempt at distraction was resisted by mother, and the noise of the argument soon resulted in J.R. entering the bedroom to see what was the matter.

7. J.R. testified he heard a "loud bang" and then entered his mother's bedroom to see what was the matter.

8. The stepfather testified he did not appreciate J.R. entering the bedroom, and told him so. J.R. reacted to what he perceived to be a physical assault on his mother's person, and the stepfather reacted to J.R.

9. During the stepfather/son reaction to each other over mother telling stepfather to leave her alone because she had to get the paper done for class, J.R. was "poked" in the eye.

10. Stepfather testified that it is a "lie" for anyone to say he poked his stepson, J.R., in the eye. He says he loves his wife and he loves his stepson. In furtherance of his claim that he did not poke J.R. in the eye, stepfather notes no physician was called, nor was J.R. taken to the hospital.

11. While mother says stepfather is very strict with J.R., she did call the Somerville police because in her view the poke in the eye was deliberate and, I infer, she became fearful for her safety and the safety of her son, J.R.

12. While the police quieted the disturbance at the house, there were no arrests made, no complaints were filed against anyone, and no report was filed with any State child protection agency.

13. Shortly after this disturbance, J.R. called his grandmother, petitioner, and asked her if he could stay with her. She responded in the affirmative.

14. In the meantime, it is noted mother and stepfather have been together for 10 years.

15. Mother says J.R. and stepfather argue, and she acknowledges J.R. has had problems getting along with her as well.

16. Mother explains that J.R. is staying with his grandmother, petitioner, because he wants to live with his grandmother. Mother is quick to note that she intends to move to Somerville very soon at which time J.R. would then resume living with her and stepfather.

17. Petitioner testified that despite the fact her daughter has the financial resources necessary to support J.R., she agrees to allow him to live with her because of the problems he has getting along with mother and stepfather. Petitioner also recites that J.R. had some unspecified difficulties getting along with his peers at Hillsborough High School.

18. Mother is employed by Somerset County, while stepfather is employed by a new car dealership in the area.

19. Stepfather testified he and his wife, J.R.'s mother, give petitioner $50-60 a week in support of J.R.

20. While petitioner agrees to J.R. living with her temporarily until his mother, her daughter, finds a place to buy in Somerville, she is emphatic that she does not want legal custody.

21. Mother says the present lease she and stepfather has does not expire until August 2008. She says their intention is to look for a house to purchase in Somerville. Stepfather says he will not purchase a house merely to purchase a house. The house, he says, must be of value and reasonably priced.

22. Mother testified she is to begin family counseling and she intends to have her son and stepfather enroll as well. Mother visits with J.R. at petitioner's home on weekends, while J.R. and stepfather talk on the telephone.

23. In the meantime and shortly after J.R. took up residence with petitioner, she took him to the Somerville public schools to be enrolled as eligible for free public school attendance by virtue of his residing with her.

24. Petitioner was advised by someone at the district's administrative offices that J.R. is not eligible for free public school attendance solely because he lives in her house. However, school authorities did allow J.R. to be enrolled in its schools pending disposition on the issue of eligibility by the Commissioner of Education.

25. J.R. has been enrolled in the Somerville Schools since on or about the end of November 2007. Petitioner filed a Pro Se Residency Appeal dated December 5, 2007, before the Commissioner of Education seeking a determination that J.R. is eligible to attend the Somerville public schools free of charge by virtue of his living with her.

25. Petitioner recites in her appeal that J.R. should be allowed to attend Somerville public schools free of charge for these reasons:

> Not legal guardian – his mom will be moving to Somerville in 6 months. I took him out of the home – problems with step father.

ANALYSIS

The statute governing attendance free of charge at a local school district is N.J.S.A. 18A:38-1, et seq.:

N.J.S.A. 18A:38-1 provides that:

Public schools shall be free to the following persons over five and under 20 years of age:

a. Any person domiciled who is domiciled within the school district.

b. (1) Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that intends so to keep and support the child gratuitously for a longer time than merely through the school term * * * and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district . . .

If in the judgment of the board of education the evidence does not support the validity of the claim by the resident, the board may deny admission to the child. The resident may contest the board's decision to the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner on the validity of the claim and shall heave the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection . . .

No child shall be denied admission during the pendency of the proceedings before the commissioner. In the event the child is currently enrolled in the district, the student shall not be removed from school during the 21-day period in which the resident may contest the board's decision nor during the pendency of the proceedings before the commissioner. If in the judgment of the commissioner the evidence does not support the claim of the resident, he shall assess the resident tuition for the student prorated to the time of the student's ineligible attendance

> in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner win which orders of the commissioner are enforced . . .

Paragraph a. of the statute entitles a child to a free public school education in the district in which they are domiciled. The domicile of an unemancipated child is the domicile of the parent, custodian, or guardian. P.B.K. v. Board of Educ. of The Borough of Tenafly, 343 N.J. Super. 419 (*App. Div.* 2001).

In this case, the 'parent' for purposes of the statute is the mother whose domicile is Hillsborough Township in Somerset County. Therefore, under paragraph a. of the statute, J.R. is not entitled by reason of domicile to attend the Somerville Borough public schools free of charge because his domicile is not that of his grandmother even though he lives with her. J.R.'s domicile is that of his mother, which is in Hillsborough.

The administrative rule, N.J.A.C. 6A:22-3.1 (a), provides that a student is entitled to attend school free of charge if the student is domiciled within the district. Subparagraph 1 of the same rule states that a student is domiciled in the school district when he or she is living with a parent, or legal guardian whose permanent home is within the district. Such is not the case here. Petitioner is neither the parent nor the legal guardian of J.R., although her permanent home is in Somerville Borough.

Consequently, J.R. is not entitled by law to attend for free of charge the Somerville Borough public schools by reason of domicility within the Borough. J.R. is not domiciled within the Borough.

Paragraph b., subparagraph (1), of the statute would allow J.R. to attend the Somerville Borough public schools if certain conditions were met. That part of the statute reads:

> Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if her were such other person's own child, upon filing by such other person with the secretary of the board of education of the district . . . a sworn

> statement that he is domiciled with the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term . . . and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district.

N.J.A.C. 6A:22-3.2 (a) 1 instructs that an otherwise eligible student, kept in the home of a person other than the student's parent or legal guardian, is entitled to attend school free of charge in that school district if:

> i. The student's parent or guardian has filed, together with documentation to support its validity, a sworn statement that he or she is not capable of supporting or providing care for the student due to family or economic hardship and that the student is not residing with the other person solely for the purpose of receiving a free public education.

The same rule, at (a) 4 allows:

> 4. A student shall not be deemed ineligible under this subsection solely because a parent or legal guardian gives gifts or makes limited contributions, financial or otherwise, toward the welfare of the student, provided that the resident keeping the student received no payment or other remuneration from the parent or guardian for regular maintenance of the student.

Petitioner has the burden of persuasion to demonstrate that J.R. is entitled to attend the Somerville Borough schools free of charge based on paragraph (b) (1) of the preceding statute and the cited administrative rules.

The evidence is that mother and stepfather contributes $40 to $60 a week for the support of J.R. While there are no hard and fast rules regarding what constitutes a "limited contribution" for the maintenance of a child, a regular $40 to $60 a week contribution is more than a "limited" contribution by any reasonable standard. Essentially, mother and stepfather are paying for the support of J.R. while at petitioner's

home and, consequently, the conclusion must be drawn that petitioner does not support J.R., *gratis*, as is required by the statute.

In addition, the evidence shows mother spends weekends visiting with J.R. at petitioner's home and J.R. spends time on the telephone with stepfather. I **FIND** no basis upon which to conclude a family or economic hardship exists as the root of the problem this family has getting along with each other. J.R. did not seek to move to his grandmother's because mother and stepfather have economic woes. He sought to stay with grandmother because of the tension and arguments that emerged in his presence or because of his presence with stepfather and with mother. Arguments between and among family members are not unique to this family. However, that family members have a difficult time getting along with each other is not a legal basis to assert a claim of entitlement to attend public schools free of charge.

It is noted the evidence shows it is likely J.R. is in need of special education and that he may require certain related services towards reaching a meaningful free and appropriate public education. Without knowing more, and without reaching a conclusion, it does appear anger management for J.R. and the entire household may be of assistance.

CONCLUSIONS

I CONCLUDE petitioner failed in the burden to demonstrate by a preponderance of credible evidence that J.R. is entitled to attend the Somerville Borough public schools free of charge under N.J.S.A. 18:38- b (1). The record is absent of evidence to show there is hardship borne out of economic considerations or any other hardship based on the facts presented. In addition, the record shows petitioner does not support J.R. *gratis* contrary to the requirement of law.

Therefore, the inference is drawn that the purpose for J.R. living with petitioner in Somerville Borough instead of with his mother in Hillsborough is as a matter of convenience for mother. Mother removes J.R. from the household because of the

friction generated when he is present, and not because he alone creates the friction, but which neither she nor the stepfather seem capable of presently addressing. A side benefit to the matter of convenience is to allow J.R. to attend free of charge the Somerville Borough public schools rather than the Hillsborough schools. Such facts do not constitute a legal entitlement to attend public schools free of charge.

Having concluded petitioner failed to show J.R. is eligible for a free public school attendance at the Somerville Borough public schools by reason of domicile, or, on any other basis, the appeal filed by petitioner is hereby **DISMISSED.**

It is so **ORDERED**

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

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

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

March 25, 2008
DATE

DANIEL B. MCKEOWN, ALJ

Date Received at Agency:

MAR 27 2008
DATE

3-25-08

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

/lam

DOCUMENTS IN EVIDENCE

None

214-08

OAL DKT. NO. EDU 4102-08
AGENCY DKT. NO. 128-5/08

D.M.S.,[1] ON BEHALF OF MINOR CHILD, E.B. AND GREGORY HECK,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON APPLICATION FOR EMERGENT RELIEF
BOARD OF EDUCATION OF THE PINELANDS REGIONAL SCHOOL DISTRICT, OCEAN COUNTY, AND THOMAS PROCOPIO,	:	
RESPONDENTS.	:	

The record of this matter – including the audiotape of proceedings – and the recommended order of the Office of Administrative Law (OAL) have been reviewed.

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) that petitioners have demonstrated entitlement to emergent relief pursuant to *Crowe v. DeGioia, supra,* and *N.J.A.C.* 6A:3-1.6. Initially, for the reasons set forth at length in the ALJ's order, the Commissioner agrees that petitioners have demonstrated a likelihood of success on the merits of the underlying appeal and that the balance of interests and equities under the circumstances rests in petitioners' favor. Moreover, the Commissioner agrees that petitioners have met the threshold standard of irreparable harm notwithstanding that prom attendance is a privilege rather than a right, since the opportunity to participate cannot be regained once lost and dismissal of petitioners' emergent application on this basis alone would,

[1] This matter was originally docketed, and transmitted to the Office of Administrative Law on an emergent basis, under the caption ***D.B.**, on behalf of minor child, E.B.*, based upon counsel's representation regarding the name of E.B.'s parent. Because it was subsequently clarified that the name of E.B.'s parent is actually D.M.S., the case caption has been amended accordingly.

as noted by the ALJ, effectively insulate the school district's actions from any meaningful review.[2]

Accordingly, the recommended Order of the OAL granting petitioner's application is adopted for the reasons expressed therein and above. Because the present decision fully disposes of all issues in dispute between the parties, no further proceedings are necessary, and this matter is, therefore, dismissed with the request that the Clerk of the OAL return the file to the agency pursuant to *N.J.A.C.* 1:1-3.3.

IT IS SO ORDERED.[3]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: May 9, 2008

Date of Faxing: May 9, 2008

[2] In so holding, the Commissioner is cognizant of the well-established principle that a prohibition from attending events of this type does not, in and of itself, rise to the necessary level of irreparable harm so as to warrant extraordinary remedy. However, harm is "irreparable" when there can be no adequate after-the-fact remedy in law or in equity, and monetary damages cannot adequately redress the intangibles of a lost experience after the event is over. In cases denying similar applications for emergent relief, the irreparable nature of the harm and the degree or severity of the harm have frequently been addressed together; they are, however, two separate factors, and it is on the basis of the *severity* of the harm – which pertains to the weighing of interests – and not its irreparable nature that applications of this sort typically fail. *Martin A. Domacasse v. Board of Education of the North Warren Regional School District, Warren County*, decided by the State Board April 17, 1996; *L.J. on behalf of minor child, S.J., and David Wickham v. Board of Education of the Township of Manchester, Ocean County*, decided by the Commissioner May 2, 2003.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON APPLICATION FOR EMERGENT RELIEF
OAL DKT. NO. EDU 04102-08
AGENCY DKT. NO. 128-5/08

D.B. ON BEHALF OF MINOR CHILD E.B. AND GREGORY HECK,
Petitioner,
v.
BOARD OF EDUCATION OF PINELANDS REGIONAL SCHOOL DISTRICT,
Respondent.

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

This is an emergency application in which the petitioners, parent of a E.B., a child who is a junior in the respondents high school, and a eighteen-year-old who was to accompany E.B. to her junior prom at 8 p.m. this evening, seek relief from the Commissioner of Education because they were informed that Mr. Heck will not be permitted to accompany Ms. B. to the prom. This information was conveyed to Ms. B. at school. No written document incorporating any reasons for this decision has been produced and testimony received from school principal Procopio indicates that no such document exists. The Board has a written policy, part of the student handbook, that provides that the administration reserves the right "to deny admittance to any person not currently enrolled at Pinelands." Mr. Heck graduated from Pinelands last year and is now a freshman in college. Mr. Procopio testified that he informed the student and her

mother that the reason Mr. Heck could not attend the prom was because of an arrest which Procopio knew about from the newspaper and had some apparently hearsay information received from a school employee. At this hearing, Procopio identified two other alleged reasons why Heck was barred. One involved an allegation made some time ago that involved a claim that Heck had engaged in some improper sexual conduct; the other that he had been removed from a school basketball game at which he was apparently a spectator. Procopio had no first hand knowledge of the latter matter, learning of it, he testified, from the school's athletic director. As to the alleged sexual matter, he agreed that no charges of any kind have ever been brought as a result of the allegations, no discipline was ever imposed by the school on Heck, who was a student at the school at the time the allegation was made, and despite the existence of the allegation prior to both Heck's senior prom and graduation exercises, the district did not seek to bar him from either event. Also, Procopio agreed that nothing in regard to the allegation has changed since Heck graduated. Thus, since then, as before, no charges have been brought and he has never been confronted with the charges in any formal manner. As for the arrest, a letter from the Prosecutor of Ocean County dated April 17, 2006, produced as evidence in this hearing, shows that the matter was administratively dismissed. No other charges of any sort remain in regard to that arrest.

Applications for emergent relief must demonstrate that the petitioner meets the standards set forth in Crowe v. DeGioia, 90 N.J. 126 (1982). These standards are codified at N.J.A.C. 6A:3-1.6(b).

> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying the petitioner's claim is settled;
>
> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
>
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.
>
> [N.J.A.C. 6A:3-1.6(b)]

Initially, the Board argues that the application for emergent relief should be dismissed because the petitioners cannot point to any irreparable harm that would arise from Mr. Heck's being barred and Ms. B. not being allowed to attend the prom with her chosen escort. But, as I noted to counsel on the record, while traditionally there has been some doubt about this question and agency case law exists that supports both that there is and that there is not irreparable harm, it is clear that the deprivation of the privilege of attendance at the prom does involve significant financial and emotional harm, even if the latter may be of limited duration or extent. More importantly, if the irreparable harm standard always serves to effectuate dismissal of contentions that a school board has acted in an arbitrary and capricious manner in regard to decisions about proms, it appears that there is no practicable means to challenge a Board's decision. While the Commissioner's standard in reviewing the discretionary determinations of school boards is quite strict, and the Board is therefore generally not second-guessed, nevertheless it is appropriate that Board actions be subject to review on the merits rather than be perfunctorily upheld without consideration of the merits because, "the prom is a privilege and no irreparable harm can exist." Therefore, I decline to dismiss the appeal on the basis of the failure of the petitioners to demonstrate irreparable harm and conclude that in fact, irreparable harm has been demonstrated in the unique context of this one-time event.

The Crowe v. DeGoia standards require that the petitioners demonstrate that they have a reasonable likelihood of prevailing on the merits. Here, the sole reason offered the parent of B. and the student, as well as Mr. Heck, was the existence of the arrest. Mr. Procopio testified adamantly that the existence of any arrest was sufficient to bar a non-student, regardless of the nature of the arrest. While it is likely that a policy that barred non-students who had pending arrest matters awaiting disposition would be appropriate, here the fact is that the arrest led to no prosecution of any sort, and indeed the matter was dismissed administratively. Mr. Heck is presumed innocent of criminal charges until proven guilty, but even more that that, here the entire matter has been dismissed. It is arbitrary and unreasonable for the Board to rely on this arrest to bar Heck. As for the other reasons stated at hearing for barring him, it is important to note that while the district has discretion to act, it cannot simply keep adding reasons as it goes along. As for the alleged sexual misconduct, I am well aware that many such

incidents do not go forward to formal charges because the alleged victim chooses not to press the matter. But when no such charges are brought, and no disciplinary charges are brought by the school when the alleged perpetrator is himself still a student, and he is not barred from his prom or graduation because of the allegations and there is no evidence in the record at all regarding the alleged event except for a reference by the principal that he spoke to the alleged victim and her parent and made a classroom adjustment for her, it is entirely unfair and arbitrary for the district to now decide that it will punish Mr. Heck, and not incidentally Ms. B., for an unproven matter to which he has never been called to task. Regardless of rumors, innuendoes, name-calling and the like, the Board must have a more solid footing upon which to act, even where the matter involves a non-student and even where it has discretion in deciding whether to act.

Finally as to the alleged removal from a sporting event, Mr. Procopio had only second-hand knowledge of this and while he claims that the athletic director told him that Heck was unruly and that the athletic director escorted Heck from the event, no other information has been shown about what his conduct supposedly was. Did he yell too much? Did he throw something? Did he swear, did he fight? Nothing exists in writing about the matter; no charges of any sort were filed. And again, this was not a reason for barring him that was offered in the oral discussion with his parent and himself and Ms. B.'s parent.

Based upon the record, I **CONCLUDE** that the petitioner has demonstrated a reasonable likelihood of success at demonstrating that the Board acted in an arbitrary and capricious manner. Further, I **CONCLUDE** that, on balance, the petitioners will suffer more harm if barred under these circumstances than will the Board if Mr. Heck is permitted to attend the prom.

It is well settled law that the Commissioner will not interfere with the discretionary determination of a school board unless the Board has acted in an arbitrary and unreasonable fashion. That is a high test to overcome; here, I **CONCLUDE** that the facts demonstrate that the petitioners have a reasonable likelihood of success in meeting that test. Therefore, I **CONCLUDE** that emergency relief is appropriate and I **ORDER** that the respondent shall permit Mr. Heck to attend the prom with Ms. B.

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

May 9, 2008
DATE

JEFF S. MASIN, ALJ

mjm

215-08

WILLIAM WELTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAFAYETTE, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner contended that he is not required to provide respondent Board with records he retained at the end of his employment as a guidance counselor with the district in June 2007, claiming that the documents are personal memory aids rather than student records. Respondent alleges the records in question are student records which must be retained by the Board. The facts in this matter are not disputed, and the parties filed cross motions for summary decision.

The ALJ sealed Joint Exhibit 1, consisting of copies of the documents in question, and found that: pursuant to *N.J.S.A.* 18A:36-19 and *N.J.A.C.* 6A:32-2.1, the records at issue are student records which must be returned to the Board and not retained by petitioner; only authorized organizations or persons shall have access to student records, and only individuals who are certified school district personnel who have educational responsibility of a student are entitled to access these records; and petitioner holds no such entitlement as he is no longer employed by the Board. The ALJ ordered that the Board's motion for summary decision be granted; that petitioner immediately return to the Board all 199 pages of documents and retain no copies of same.

Upon independent review of the record, the Commissioner concurred with the ALJ and adopted the Initial Decision of the OAL as the final decision in this matter. The Commissioner additionally adopted the ALJ's separate order sealing the parties' Joint Exhibit 1 in this matter.

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

May 12, 2008

JOINT EXHIBIT 1 IS SEALED

OAL DKT. NO. EDU 11970-07
AGENCY DKT. NO. 329-10/07

WILLIAM WELTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAFAYETTE, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions were filed in accordance with the provisions of *N.J.A.C.* 1:1-18.4. The Board did not submit reply exceptions.

Petitioner's exceptions essentially replicate arguments advanced in submissions before the Administrative Law Judge (ALJ) below. In that it is determined that these were considered and addressed in the Initial Decision, they will not be revisited here.

Upon a full and independent review, the Commissioner concurs with the ALJ that summary decision is appropriately granted to the Board as she agrees with his determination that the documents at issue in this matter are student records, and – since petitioner no longer has educational responsibility for the students who are the subject of these records – he possesses no entitlement to access or retain custody of them.

Accordingly, the recommended decision of the OAL is adopted for the reasons stated therein and the instant petition of appeal is dismissed. Also adopted is the ALJ's separate Order sealing the parties' Joint Exhibit 1 in this matter. Petitioner is hereby directed to immediately return the 199 pages of documents comprising the subject matter of this action to the Board of Education of the Township of Lafayette.

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 5/12/08

Date of Mailing: 5/12/08

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 11970-07
AGENCY DKT. NO. 329-10/07

WILLIAM WELTY,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF LAFAYETTE, SUSSEX COUNTY,

Respondent.

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

Bruce W. Padula, Esq., for respondent (Scarinci & Hollenbeck, LLC, attorneys)

Record Closed: March 4, 2008 Decided: March 31, 2008

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

STATEMENT OF THE CASE

Petitioner William Welty, a former guidance counselor employed by respondent Township of Lafayette Board of Education, requests a determination as to whether certain papers retained by him at the conclusion of his employment in June 2007, must be returned to the Board as student records or whether they are excluded from the definition of student records as "information recorded solely as a memory aid, not for the use of a second party" under N.J.A.C. 6A:32-2.1.

PROCEDURAL HISTORY

Petitioner filed his petition with the Commissioner of Education on October 29, 2007. After the Board filed an Answer on November 15, 2007, the Director of the Bureau of Controversies and Disputes of the New Jersey Department of Education transmitted the matter to the Office of Administrative Law (OAL) pursuant to N.J.S.A. 52:14B-1 to –15 and N.J.S.A. 52:14F-1 to –13, which, on November 20, 2007, filed it for determination as a contested case.

On February 15 and March 4, 2007, the parties filed cross-motions for summary decision. By separate order I have sealed Joint Exhibit 1.

STATEMENT OF FACTS

As neither party contends that there are any disputed facts nor challenges the statement of facts set forth in the cross-motions for summary decision I **FIND** the following to be the **FACTS** of this case:

Welty was employed as a guidance counselor by the Board during the 2005-2006 and 2006-2007 school years. When his employment ceased at the conclusion of the 2006-2007 school year, he retained certain documents because he believed they were memory aids rather than student records and, as such did not need to be left with the Board. Board representatives have requested that he return the documents.

The documents consist of 199 pages, which are made part of this record as JT. 1. Welty conceded that the following bate stamped documents were retained in error and were not memory aids generated by him, and he has agreed to return them: 1, 3, 4, 5, 6, 7, 12, 19, 20, 21, 23, 40, 42, 51, 83, 86,96, 134, 145, 153, 157, 159, 160, 161, 165, 171, 173, 185, 186, 187, 188, 189, 190, 192. They consist of preprinted signed permission slips for guidance counselor counseling sessions with named students; letters or e-mails to and from parents or guardians or school staff related to students;

preprinted authorizations for the release or exchange of information; and a student-generated letter.

The remaining documents are, in most instances, typed on a form entitled "Case Notes." Each document identifies a particular student Welty had been assigned to counsel and records the date and time and the observations made at that time. In most cases the notations are initialed. A random sampling of the notes is as follows:

> "Student exhibited lying behavior during lunch period. Issue was brought to the attention of student's teacher, and discipline was decided upon. Student started to cry and it was difficult to calm the student down [Jt-1-2];"

> "Ct (client) met with counselor to begin closure for the year. Ct was tasked with drawing an award for himself doing something he is good at. Ct seemed extremely distracted and didn't want to perform the task [Jt-1-13];"

> "Ct and counselor engaged with other students in a lunch social circle in the counselor's office. Ct and three other students appeared to enjoy the extra attention [Jt-1-24];"

> "Counselor called ct's mother to discuss sticker chart and behavior log. Mother does not feel that the book is working and report the ct feels embarrassed and upset when she was read passages from the book at home [Jt-1-32];"

> "Counselor was approached by outside visitor regarding student making accusations against her brother hitting her. She claimed to outside visitor that there is a bruise on her shoulder and that her brother has a pocket knife that he threatens her with ... Counselor asked teacher to send her to guidance. Alerted nurse, school psychologist and assistant principal to the situation [Jt-1-41];"

"Ct and counselor played a game of checkers to further establish rapport. Ct appeared to enjoy the game and was pretty talkative and engaging [Jt-1-46];"

"Ct reported bullying behavior from a fellow class mate and was distraught about how to handle situation. Counselor advised ct to ignore the student bullying her and discussed how her reactions may give satisfaction to the student when she is bullying her. Ct agreed and will attempt this [Jt-1-48];"

"Mother is worried about the efforts by Ct's teachers to place him into mainstream classes re: his stress levels. Also discussed Ct's behavior at home being diametrically different than his attitude at school [Jt-1-94];"

"Ct met with teaching aide and counselor for lunch socialization session. The discussion focused on a summarization of the last few month's activities in the counselor's office. Counselor gave compliments to ct for having made so much progress and provided closure to the student for the year [Jt-1-162];"

CONCLUSIONS AND LEGAL ANALYSIS

The Board contends that the documents are student records, and, as such, Welty has no right to retain them as he is no longer assigned educational responsibility for these students. Welty contends that they are not student records but rather are personal memory aids not maintained for the purpose of second party review. I **CONCLUDE** that they are student records which must be returned to the Board and not retained by Welty.

The regulations concerning student records flow from the statute upon which they are predicated. N.J.S.A. 18A:36-19 entitled "Pupil records, creation, maintenance and retention, security and access ...." provides:

> The State Board of Education shall provide by regulation for the creation, maintenance and retention of pupil records and for the security thereof and access thereto, to provide general protection for the right of the pupil to be supplied with necessary information about herself or himself, the right of the parent or guardian and the adult pupil to be supplied with full information about the pupil, except as may be inconsistent with reasonable protection of the persons involved, the right of both pupil and parent or guardian to reasonable privacy as against other persons and the opportunity for the public schools to have the data necessary to provide a thorough and efficient educational system for all pupils.

The State Board defines a "student record" as follows:

> "Student record" means information related to an individual student gathered within or outside the school district and maintained within the school district, regardless of the physical form in which it is maintained. Essential in this definition is the idea that any information that is maintained for the purpose of second party review is considered a student record. Therefore, information recorded by any certified school personnel solely as a memory aid, not for the use of a second party, is excluded from this definition.
> N.J.A.C. 6A:32-2.1.

Although there is no additional explanation or description of the information excepted from the definition of "student record," namely, "information recorded solely as a memory aid, not for use of a second party," there is another regulation which persuasively suggests that the very information contained in Welty's case notes are intended to be part of a student's records. N.J.A.C. 6A:32-7.1(h) requires that, "[a]ll anecdotal information ... collected on a student shall be dated and signed by the individual who originated the data." It is clear that the documents Welty continues to contest consist of anecdotal information on specific students. In almost all instances, these notes are dated and initialed by Welty. These documents and the information contained in them were created by Welty in the normal course of performing his assigned duties as a guidance counselor and contain anecdotal information about each student regarding personal and educational issues, interventions and progress. In other

words they consist of observations or short stories about an event involving a particular person. If the State Board had intended such anecdotal information to constitute memory aids not for the use of a second party rather than a student record, there would have been no need to impose a requirement of dating and signing the anecdotal information, and subsection (h) would not have been placed in the regulation dealing with general considerations for student records. If these entries were intended by Welty to be merely personal memory aids not for second party review as he contends, it is unexplainable why he would have initialed and dated almost all of them.

Welty's argument is unavailing that these documents were not maintained for the purpose of second party review. The availability of the information contained in these notes for second party review by Welty's guidance counselor successor is important in order to assist him or her to learn the counseling history of a student, consider maintaining continuity of the counseling, and most effectively counsel the students formerly counseled by Welty. The use of this information as student records is consistent with the statutory mandate to create, maintain and retain "...data necessary to provide a thorough and efficient educational system for all pupils." N.J.S.A. 18A:36-19.

Only authorized organizations, agencies or persons shall have access to student records. N.J.A.C. 6A:32-7.5(a). Individuals with this entitlement are limited to certified school district personnel who have assigned educational responsibility for a student. N.J.A.C. 6A:32-7.5(e)(4). As the documents in issue are student records and as Welty no longer has assigned educational responsibility for the students who are the subject of the documents, Welty no longer has a right to access these records or to retain custody of them.

ORDER

It is hereby **ORDERED** that William Welty's cross-motion for summary decision be **DENIED** and that the cross-motion for summary decision of the Board of Education of the Township of Lafayette be **GRANTED**; and it is further

ORDERED that William Welty's petition for relief be **DENIED**; and it is further

ORDERED that William Welty immediately return to the Board of Education of the Township of Lafayette all 199 pages of documents which are the subject of this proceeding and retain no copies.

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

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

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

March 31, 2008
DATE

Jesse H. Strauss
JESSE H. STRAUSS, ALJ

Date Received at Agency: 3/31/08

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

APR 1 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

id

APPENDIX

Witnesses

None

Exhibits

Joint Exhibit

Jt-1 199 pages of documents **[EXHIBIT SEALED]**

216-08

OAL DKT. NO. EDU 10448-07
AGENCY DKT. NO. 370-12/07

IN THE MATTER OF THE TENURE HEARING OF THOMAS PITEO, NEW JERSEY STATE DEPARTMENT OF CORRECTIONS, ADULT DIAGNOSTIC AND TREATMENT CENTER.	:	COMMISSIONER OF EDUCATION DECISION

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

Upon review, the Commissioner observes that Section 2 of the stipulation of settlement recites that respondent "shall be suspended for an additional five (5) days without pay. This suspension will begin Monday, March 17, 2008, and will continue through Friday, March 21, 2008." This provision indicates that the parties anticipated that certain conduct would occur on dates preceding consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves same.

Notwithstanding the foregoing, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case, provided that the terms set forth in section 2 have been implemented or will be implemented on a date certain which has been agreed upon by the parties. The matter is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/12/08

Date of Mailing: 5/12/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10448-07
AGENCY DKT. NO. 370-12/07

IN THE MATTER OF THE TENURE HEARING OF THOMAS PITEO, NEW JERSEY STATE DEPARTMENT OF CORRECTIONS, ADULT DIAGNOSTIC AND TREATMENT CENTER.

Ellen M. Hale, Deputy Attorney General, for petitioner New Jersey State Department of Corrections (Anne Milgram, Attorney General, attorney)

Rosemarie Cipparulo, Esq., for respondent Thomas Piteo (Weissman & Mintz, attorneys)

Record Closed: April 2, 2008 Decided: April 2, 2008

BEFORE **JOSEPH F. MARTONE**, ALJ:

The New Jersey Department of Corrections, Office of Education Services, brings tenure charges against the respondent for conducting conduct unbecoming a teacher as defined in N.J.S.A. 18A:6-10; N.J.A.C. 4A:2-2.3(a)(11) – Other sufficient cause, Human Resources Bulletin 84-17, as amended, C31 – Violation of the New Jersey Department of Corrections policy prohibiting racial and/or sexual harassment, discrimination and/or retaliation; and Violation of N.J.A.C. 4A:2-2.3(a)(6) – Conduct

unbecoming a public employee, Human Resources Bulletin 84-17, as amended, C-11 - Conduct unbecoming an employee. This matter was transmitted to the Office of Administrative Law on December 21, 2007, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The matter was scheduled for a telephone prehearing on January 31, 2008, and a Prehearing Order issued January 17, 2008, outlining the scheduling of discovery and confirming the hearing dates of March 6 and 31, 2008. On February 4, 2008, at the request of the parties, the March 6, 2008, hearing was adjourned in order to complete discovery and an Amended Prehearing Order was issued with extended discovery deadlines.

An in-person settlement conference was scheduled for February 13, 2008. By letter dated February 11, 2008, counsel for respondent advised that the matter had been settled and the parties were working out the settlement language, and the settlement conference was adjourned. On March 28, 2008, the parties faxed an executed settlement agreement indicating the terms of the settlement, and provided an original copy of the settlement agreement on April 2, 2008, which is attached.

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

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

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

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and N.J.A.C. 6A:3-5.6 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

April 2, 2008
DATE

JOSEPH F. MARTONE, ALJ

Date Received at Agency:

APR - 7 2008

DATE

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

mph

ANNE MILGRAM
Attorney General of New Jersey
Attorney for Petitioner,
Department of Corrections
R.J. Hughes Justice Complex
PO BOX 112
Trenton, New Jersey 08625

By: Ellen M. Hale
Deputy Attorney General
(609)984-2906

Office of Administrative

In the Matter of the Tenure	Agency Dkt. No.: EDUTH 10448-2007S
Hearing of Thomas Piteo, Department of Corrections, Adult Diagnostic and Treatment Center	Agency Ref. No.: 370-12/07
	STIPULATION OF SETTLEMENT

The New Jersey Department of Corrections ("NJDOC" or "Department"), Adult Diagnostic Treatment Center, which is located in Avenel, New Jersey, represented by ANNE MILGRAM, Attorney General of New Jersey, Ellen M. Hale, Deputy Attorney General, appearing; and Thomas Piteo, a tenured employee of the NJDOC represented by Rosemarie Cipparulo, Esq., appearing; by way of this Stipulation of Settlement say:

WHEREAS, the NJDOC initiated the filing of tenure charges against Mr. Piteo, having filed the charges with the Commissioner of Education on or about November 16, 2007; and

WHEREAS, Mr. Piteo was charged with Conduct Unbecoming a Teacher as defined in N.J.S.A. 18A:6-10; N.J.A.C. 4A:2-2.3(a) 11 Other sufficient cause, Human Resources Bulletin 84-17, as amended, C31-Violation of New Jersey Department of Corrections policy

prohibiting racial and or sexual harassment, discrimination and or retaliation and violation of N.J.A.C. 4a:2-2.3 (a)6 - Conduct unbecoming a public employee; and

WHEREAS, the tenure charges alleged that on March 16, 2007, Thomas Piteo, a Teacher I within the New Jersey Department of Corrections, violated the Policy Prohibiting Discrimination, Harassment and Hostile Environments in the Workplace ("Policy") when he sent an electronic mail containing an offensive joke to another Department staff member;

WHEREAS, the Department claims that this was the second violation of the Policy;

WHEREAS, the NJDOC sought the suspension of Mr. Piteo for thirty (30) days without pay for the above set of charges;

WHEREAS, Mr. Piteo disputed the charges;

WHEREAS, the matter was initially referred in December 2007 to the Office of Administrative Law for a plenary hearing;

WHEREAS, a hearing has been scheduled for March 31, 2008;

WHEREAS, Mr. Piteo was suspended with pay from November 8, 2007 to December 10, 2007;

WHEREAS, Mr. Piteo is credited with twenty-five days time served for the violation of the Policy;

WHEREAS, the petitioner has concluded that it may be difficult, time consuming and expensive to prove the tenure charges against Mr. Piteo;

WHEREAS, the parties wish to enter into an amicable resolution of the tenure charges filed against Mr. Piteo;

WHEREAS, Mr. Piteo entered into the agreement with a full understanding of his rights;

WHEREAS, it is in the best interest of the parties and the public to enter into this Stipulation of Settlement. By entering into this settlement agreement, petitioner avoids the excessive costs of litigation; and

NOW, THEREFORE, in consideration of the mutual promises contained herein, the parties agree as follows:

1. Mr. Piteo admits the charges and underlying conduct as set forth above. Mr. Piteo admits that this is the second violation of the Policy.
2. As the penalty, Mr. Piteo shall be suspended for an additional five (5) days without pay. This suspension will begin Monday, March 17, 2008, and will continue through Friday, March 21, 2008.
3. This Agreement shall be part of Mr. Piteo's official personnel file and Mr. Piteo's admission of the noted charges and the penalty imposed by way of settlement may be presented and considered in any subsequent disciplinary action against him.
4. Mr. Piteo agrees to attend a sensitivity training program to be scheduled by the Department.

5. This Agreement constitutes a final and complete resolution of the tenure charges in this matter and fully disposes of all issues in controversy between the parties hereto. Mr. Piteo agrees not to appeal the terms of this Agreement in any administrative, arbitral or judicial forum.

6. Settlement of this matter is justified and in the public interest because it imposes the desired discipline without the need for a contested tenure hearing. The reduction in penalty from a thirty day suspension to twenty-five days credit for time served, with the remaining five day suspension to be without pay is equitable in exchange for eliminating the expense, time and uncertainty connected with a contested tenure hearing.

7. Appellant is aware and acknowledges that the Department of Corrections' policies require petitioner to move for tenure charges seeking Mr. Piteo's removal for a third violation of its Equal Employment Division policy.

8. This Agreement shall only become effective when the Commissioner of Education approves it. Any disapproval by the Commissioner shall not interfere with the rights of either party to pursue this matter further.

This Agreement is made in good faith. The parties have

read the Agreement and freely and voluntarily agree to its provisions.

For the Employee:

Thomas Piteo — Dated: 3/8/2008

Rosemarie Cipparulo, Esq. — Dated: 3/11/08
Weissman & Mintz, LLC

Attorney for Piteo

For the Department of Corrections:

Kenneth Green, Director — Dated: 3/19/08

ANNE MILGRAM
ATTORNEY GENERAL OF NEW JERSEY

DIANNE M. MORATTI FOR — Dated: 3/28/08
By: Ellen M. Hale
Deputy Attorney General

#219-08

219-08

OAL DKT. NO. EDU 3429-07
AGENCY DKT. NO. 19-1/07

KYLE SALES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 5/15/08

Date of Mailing: 5/15/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO.EDU 03429-07

Agency Docket No.19-1/07

KYLE SALES,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,

Respondent.

Jennifer Borja, Esq. appearing on behalf of petitioner (Timothy Smith & Associates, LLC)

Allan P. Dzwilewski, Esq., appearing on behalf of respondent (Schwartz, Simon & Edelstein, Celso & Kessler)

Record Closed: April 2, 2008 Decided: April 2, 2008

BEFORE **JOANN LaSALA CANDIDO**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on March 21, 2007 for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A telephone prehearing was conducted on April 3, 2007 at which time a hearing was scheduled for October 3, 2007. Prior to the date of the hearing another telephone conference was conducted wherein the parties advised that they reached a tentative settlement and requested the October 3, 2007 hearing be adjourned.

The matter was rescheduled for December 12, 2007. Prior to the date of the hearing petitioner's counsel advised that the parties reached settlement which has been informally approved by the Board and will be formally approved at the next Board meeting and requested an adjournment.

On April 2, 2008 the undersigned received the fully executed settlement which is attached hereto.

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

Having reviewed the contents of the attached Stipulation of Settlement, and Board of Education Resolution, I **FIND**:

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

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

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

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

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

April 2, 2008
DATE

JOANN LASALA CANDIDO, ALJ

Date Received at Agency: 4-4-08

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APR 4 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

ljb

SCHWARTZ SIMON EDELSTEIN
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Tel. (973) 301-0001; Fax (973) 993-3152
Attorneys for the East Orange Board of Education.

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

KYLE SALES, Petitioner, vs. EAST ORANGE BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY OAL DOCKET NO. EDU3429-07 AGENCY DOCKET NO. 19-1/07 ADMINISTRATIVE ACTION **STIPULATION OF SETTLEMENT AND RELEASE**

This Stipulation of Settlement and Release is made by and between the East Orange Board of Education (hereinafter the "Board") with administrative offices located at 715 Park Avenue, East Orange, New Jersey, 07017 and Kyle Sales, whose address is 142 Sheppard Avenue, Apt. 3, East Orange, New Jersey 07018 (hereinafter the "Petitioner"). In consideration of the mutual promises and undertakings contained in this Stipulation of Settlement and Release and for good and valuable consideration, the receipt of which is hereby acknowledged, the undersigned parties state:

WHEREAS, on April 29, 2006, Petitioner was employed by the Board as a teaching staff member; and

WHEREAS, Petitioner was charged with a criminal action for certain acts alleged to have occurred on or about April 29, 2006, while Petitioner was in the employ of the Board; and

WHEREAS, on July 12, 2006, the criminal complaint against Petitioner was dismissed; and

WHEREAS, the Petitioner filed a Petition of Appeal with the Commissioner of Education on or about January 18, 2007, pursuant to N.J.S.A. 18A:16-6.1, seeking reimbursement from the Board for Petitioner's attorneys' fees and costs associated with the legal defense of the criminal action with which Petitioner had been charged; and

WHEREAS, on or about March 15, 2007, the Board filed its answer to the Petition of Appeal with Affirmative Defenses; and

WHEREAS, the parties have determined that it is in their respective best interests to enter into this Stipulation of Settlement and Release to avoid the need for further litigation;

NOW, THEREFORE, in consideration of the mutual promises and covenants, the parties agree as follows:

1. The Board will pay to the Petitioner the sum of Seven Hundred Eighteen Dollars and Twenty Three Cents ($718.23) in full and complete satisfaction of the amount Petitioner is claiming to be due and owing to him from the Board for Petitioner's attorneys' fees and costs.
2. This settlement amount will be paid directly to the trust account of Petitioner's legal counsel, Timothy Smith, Esq., of Timothy R. Smith & Associates, LLC, 76 South Orange Avenue, Suite 211, South Orange, New Jersey, 07079, following the approval of this Stipulation of Settlement and Release by the Commissioner of Education.
3. Petitioner, in consideration of this Agreement, hereby releases the Board, individually and collectively, and its agents, servants and employees from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings, and

judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought, or could be brought, arising under or relating in any way to the subject matter set forth in the Petition of Appeal now and forever, except to enforce the terms of this Stipulation of Settlement and Release.

4. Petitioner acknowledges that he has reviewed this Stipulation of Settlement and Release with his own independent legal counsel and that he enters into it without duress, and of his own free will and volition. He further acknowledges that he fully understands the terms of this Stipulation of Settlement and Release and the duties and obligations enumerated herein.
5. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of this matter hereby withdraws, with prejudice, the above-docketed Petition of Appeal.
6. Nothing contained in this Stipulation of Settlement and Release should be construed as an admission of wrongdoing by either party and neither party shall be considered a prevailing party for any reason.
7. This Stipulation of Settlement and Release is conditioned upon approval of the Board.
8. The Board President is authorized to execute this Stipulation of Settlement and Release on behalf of the Board.
9. This Stipulation of Settlement and Release contains the entire agreement between the parties, and no other representations, whether verbal or in writing shall be binding upon them.
10. All terms of this Stipulation of Settlement and Release are deemed material. This instrument may not be altered, amended, modified or revoked except by a new

instrument executed in writing by the parties.

11. This Stipulation of Settlement and Release is an agreement which is to be construed in accordance with the laws of the State of New Jersey.

IN WITNESS WHEREOF, the parties, or their duly authorized representatives, do set forth their hands and seal as of the date(s) set forth below.

FOR THE RESPONDENT EAST ORANGE BOARD OF EDUCATION:

By: Bibi Stewart Garvin
Bibi Stewart-Garvin, Board President

By: Victor R. Demming
, Witness

Date: _____

PETITIONER:

Kyle Sales

Date: 1/11/08

Sworn and subscribed before me this
11th day of January, 2007

Notary Public

ZINOVIA HATZIPETROS
A Notary Public of New Jersey
My Commission Expires APRIL 13, 2009

EXTRACT FROM THE MINUTES OF A MEETING
OF THE BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, NEW JERSEY
AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the City of East Orange in the County of Essex, New Jersey convened a Regular Meeting on Tuesday, February 5, 2008 at 6:15 p.m.

The following members of the Board were present:

Ms. Belinda Jackson, Mr. J. Garfield Jackson, Jr., Mr. Everett Jennings, Mr. Vernon Pullins, Jr., Mr. Arthur L. Wright, and Mrs. Bibi Stewart Garvin

The following resolution was offered by Mr. Vernon Pullins, Jr., duly seconded by Ms. Belinda Jackson and adopted by the Board of Education:

Resolution – Employee Indemnification

RESOLVED: that the Board hereby approves the Settlement Agreement/Release in the employee indemnification matter, Kyle Sales v. East Orange Board of Education, OAL Dkt. No. EDU3429-07, which is currently before the Commissioner of Education, in the amount of $718.23.

BE IT FURTHER RESOLVED: that the Board President is hereby authorized to execute the Settlement Agreement/Release in the above matter on behalf of the Board and a copy thereof shall be in included in the permanent minutes of this meeting.

ROLL CALL: AYES: 5
ABSTENTIONS: 1
EXCUSED: 1

STATE OF NEW JERSEY}
} ss
COUNTY OF ESSEX}

I, Victor R. Demming, Secretary of the Board of Education, of the East Orange Board of Education, in the County of Essex, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of said district, fully called and held on Tuesday, February 5, 2008, has been compared by me with the original minutes as officially recorded in my office in the minute book of said East Orange Board of Education, original minutes so far as the same related to the subject matter referred to in said extract, in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 28th day of February 2008.

Victor R. Demming
Victor R. Demming, Board Secretary

220-08

#220-08

OAL DKT. NO. EDU 6492-07
AGENCY DKT. NO. 206-7/07

DONALD SWINCHOSKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RUMSON-FAIR HAVEN REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Lucille Davy

COMMISSIONER OF EDUCATION

Date of Decision: 5/15/08

Date of Mailing: 5/15/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6492-07

AGENCY DKT. NO. 206-7/07

DONALD SWINCHOSKI,

Petitioner,

v.

RUMSON-FAIR HAVEN HIGH SCHOOL BOARD OF EDUCATION,

Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Martin M. Barger, Esq., for respondent Barbara A. Paolini (Reussille, Mausner, Carotenuto, Barger, Kenny & Steel, attorneys)

Record Closed: April 1, 2008 Decided: April 1, 2008

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

STATEMENT OF THE CASE

Petitioner Donald Swinchoski, a tenured teacher in the school system operated by respondent Rumson-Fair Haven High School Board of Education (BOE) claimed that the BOE

wrongfully withheld his employment and adjustment increments. The BOE denied any wrongdoing. See N.J.S.A. 10:4-6 to -21, N.J.S.A. 18A:4-12 N.J.S.A. 18A:29-14, N.J.A.C. 6A:3-4.1. See also Rice v. Union County Reg'l High School Bd. of Ed., 155 N.J. Super. 64 (App. Div. 1977), cert. den., 76 N.J. 238 (1978). As shown by the attached settlement agreement, the parties have settled their differences.

PROCEDURAL HISTORY

On July 27, 2007, the petition was filed with the Department of Education's Bureau of Controversies and Disputes and, on August 1, 2007, the BOE's answers were so filed. N.J.S.A. 18A:6-9. The Department transmitted the contested case to the Office of Administrative Law (OAL), where it was filed on August 15, 2007. N.J.S.A. 52:14B-2(b). The Settlement Agreement with the BOE's attorney's signature and certification was submitted on March 19, 2008 and, on April 1, 2008, the attorneys and I conferred to confirm that the Settlement Agreement's paragraph four refers to memoranda that are personnel records (related to performance) and the record was closed on that date.

FINDINGS OF FACT

1. The parties understood the settlement agreement and the parties voluntarily entered in to it.

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

The case involves substantial issues of fact. The settlement agreement avoids the time and expense of full hearing and further litigation. The settlement agreement's terms are reasonable.

CONCLUSIONS OF LAW

The settlement agreement meets the requirements of N.J.A.C. 1:1-19.1 and should be approved.

ORDER

I **ORDER** that the parties comply with the settlement agreement and that these proceedings be concluded.

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

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

April 1, 2008
DATE

JOHN R. TASSINI, ALJ

Date Received at Agency:

APR - 2008
DATE

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

mph

ZAZZALI, FAGELLA, NOWAK
KLEINBAUM & FRIEDMAN, P.C.
150 West State Street
Trenton, New Jersey 08608
p.(609) 392-8172
f. (609) 392-8933
Attorneys for Petitioner

RECEIVED
2008 MAR 10 P 2:05
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

DONALD SWINCHOSKI, Petitioner, v. RUMSON-FAIR HAVEN REGIONAL HIGH SCHOOL, MONMOUTH COUNTY, Respondent.	OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO.: EDU 06492-2007S **SETTLEMENT AGREEMENT**

The parties to this matter, Donald Swinchoski (hereinafter "Swinchoski") and the Board of Education of the Rumson-Fair Haven Regional School District (hereinafter "Board"), having reached an agreement to amicably resolve the within matter, hereby request that the Administrative Law Judge and the Commissioner of Education approve the following terms and conditions as their settlement agreement.

1. The parties agree that their agreement to this agreement and its validity is contingent upon the approval of the Commissioner of Education of all of the terms of this agreement, and that if any of the terms of this agreement are rejected by the Commissioner of Education, this agreement shall be deemed null and void, and that in such event, neither parties' position in relation to the petition of appeal shall be prejudiced and the matter shall be returned to the Office of Administrative Law for a hearing in relation to the petition of appeal, provided that nothing in this paragraph or in this agreement shall, in such event, preclude the parties from agreeing to a new

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

revised, or modified settlement agreement, provided that such agreement is subject to the approval of the Commissioner of Education.

2. The parties agree that based upon and subject to the Commissioner of Education's approval of all of the terms of this agreement, Swinchoski shall withdraw the petition of appeal.

3. The parties agree that in consideration of the mutual execution of this settlement agreement, the Board will restore Swinchoski's employment and adjustment increments for the 2007-2008 school year, starting at the beginning of the 2008-2009 school year, but shall have no obligation to repay Swinchoski for any monies withheld for the 2007-2008 school year.

4. The parties further agree that the Board will remove the following memorandums from Swinchoski's Personnel File:

November 28, 2006, January 8, 2007, and May 11, 2007 memorandums from Liz Panella;

November 27, 2007 memorandum from Superintendent Peter J. Righi.

In addition, Swinchoski may provide a written reply/rebuttal to any documents in his Personnel File, but the Board may not provide any written sur-reply/rebuttal to Swinchoski's written reply/rebuttal.

4. In exchange for the consideration set forth herein, Swinchoski hereby releases and waives any claims that he may have arising from the withholding of his salary employment and adjustment increments for the 2007-2008 school year, except for any claims arising from a breach of this settlement agreement or any provision thereof.

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PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

5. Swinchoski voluntarily and willingly enters into this settlement agreement without any duress or coercion, and that his successors shall be bound by the provisions of this settlement agreement.

6. By settling this matter, Swinchoski acknowledges that he is waiving his right to a hearing before the Office of Administrative Law and Commissioner of Education, in which he could seek adjudication on the merits of the petition of appeal. Swinchoski further acknowledges that he understands and agrees to the terms of this agreement and that he is satisfied with the legal representation that he received in this matter.

7. The parties agree that in the event that the Commissioner of Education does not accept any provision of this settlement agreement, this settlement agreement shall be deemed null and void, and the matter shall be returned to the Office of Administrative Law for a hearing without prejudice to either parties' position and without waiver of any of either parties' legal rights.

8. The Board hereby authorizes the president of the Board to sign this settlement on its behalf and approves the terms of this settlement as acknowledged by the attached resolution.

Ann Rossbach, President, Rumson-Fair Haven
Regional High School District Board of Education

STATE OF NEW JERSEY :
:SS
COUNTY OF MONMOUTH :

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

I certify that on March 5, 2008, Ann Rossbach, President, Rumson-Fair Haven Regional High School District Board of Education, personally came before me and acknowledged under oath, to my satisfaction, that she is the person named in and personally signed this document, and signed, sealed and delivered this document as her act and deed.

Kimberly E. Beaver

KIMBERLY E. BEAVER
NOTARY PUBLIC OF NEW JERSEY
COMMISSION EXPIRES MAY 14, 2008

Donald Swinchoski, Petitioner

STATE OF NEW JERSEY :
:SS
COUNTY OF MONMOUTH :

I certify that on March 5, 2008, Donald Swinchoski, petitioner in the within matter, personally came before me and acknowledged under oath, to my satisfaction, that he is the person named in and personally signed this document, and signed, sealed and delivered this document as his act and deed.

Kimberly E. Beaver

KIMBERLY E. BEAVER
NOTARY PUBLIC OF NEW JERSEY
COMMISSION EXPIRES MAY 14, 2008

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

I hereby certify that the DistrictBoard of Education has consented to the terms of settlement.

Martin M. Barger
Attorney for Respondent

221-08

221-08

OAL DKT. NO. EDU 1614-07
AGENCY DKT. NO. 3-1/07

IN THE MATTER OF THE TENURE	:	
HEARING OF DARREN McCRIMMON,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF HILLSIDE, UNION COUNTY.	:	

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

Upon such review, the Commissioner concurs with the ALJ that the proposed settlement is consistent with established standards governing settlement of tenure matters. *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846.

Accordingly, the settlement is hereby approved and the tenure matter dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E. Davy
COMMISSIONER OF EDUCATION

Date of Decision: 5/15/08
Date of Mailing: 5/15/08

* The referenced amendment was filed in response to a request from the Bureau of Controversies and Disputes for clarification of paragraphs 3 and 4c of the parties' stipulation.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 01614-07
AGENCY DKT. NO. 3-1/07

IN THE MATTER OF THE TENURE HEARING OF DARREN MCCRIMMON, HILLSIDE BOARD OF EDUCATION

Thomas O. Johnston, Esq., for petitioner (Porzio, Bromberg & Newman, attorneys)

Gregory T. Syrek, Esq., for respondent (Bucceri and Pincus, attorneys)

Record Closed: April 7, 2008 Decided: April 9, 2008

BEFORE **JOANN LASALA CANDIDO,** ALJ:

This matter involves tenure charges of insubordination and conduct unbecoming certified by the School District of Hillside (District) against Darren McCrimmon (McCrimmon) under the Tenure Employees' Hearing Law, N.J.S.A. 18A:6-10 to -18.1.

McCrimmon is a tenured custodian employed by the District. The District accused McCrimmon of repeatedly and willfully failing to perform the duties specified in the custodian job description, despite written warnings and directives from supervisors and for trespassing on school property while out on workers compensation and allowing non-district individuals access into the gymnasium without authority. He was also accused and charged with alleged sexual harassment of a fellow custodian.

On December 21, 2006, the District filed its written charges with the Commissioner of Education (Commissioner). Subsequently, the matter was referred by the

Commissioner to the Office of Administrative Law (OAL) on January 19, 2007 for a hearing as a contested case.

After numerous discussions pertaining to the OAL matter, the parties have agreed and have prepared a Stipulation of Dismissal indicating the terms thereof, which is attached and fully incorporated herein, as well as the Board minutes approving the dismissal.

In accordance with the decision of the State Board of Education in In re Cardonick, State Board decision of April 6, 1983 [1990 School Law Decisions (S.L.D.) 842, 846] and as codified by N.J.A.C. 6A:3-5.6, the record of any proposed settlement must include:

> . . . the nature of the charges, the length of the teacher's employment, circumstances justifying the settlement, consent or authorization by the Board of Education and the teacher to the proposed agreement, the administrative law judge's finding that the teacher entered into the agreement with a full understanding of his or her rights and [a finding] that the agreement is consistent with the public interests.

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

1. McCrimmon has been employed as a custodian in the Hillside school system since May 1998.
2. The nature of the charges has been documented by the submission of a Statement of Charges and Certificate of Determination.
3. It is anticipated that the hearing in this matter would be protracted and costly.
4. If a hearing becomes necessary, the District has identified school personnel who are potential witnesses.
5. Litigation of the charges would lead to the disruption of the District's educational program due to the great amount of time lost by administrators and other personnel who would be required to testify to the incidence which led to the filing of the tenure charges against an employee who has forfeited his custodial position and who is barred from obtaining public employment in the future.

6. Under the proposed settlement, McCrimmon has submitted his resignation effective upon the date of approval of the Commissioner. McCrimmon has been paid the equivalent of four months wages, less any monies paid him following service of tenure charges.

7. Under the best of circumstances, the hearing needs to be conducted and then the administrative law judge would have forty-five days to prepare an initial decision and the Commissioner would have an additional forty-five days for review and issuance of a final decision.

8. If the tenure matter proceeds to hearing, both parties would incur costs of paying their attorneys for a likely lengthy hearing.

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

Based upon the foregoing, I **CONCLUDE** that the terms of settlement are in the public interest.

It is **ORDERED** that the parties comply with the terms of settlement and that these proceedings are hereby concluded.

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

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

April 9, 2008
DATE

JoAnn LaSala Candido
JoANN LASALA CANDIDO, ALJ

4-14-08

Date Received at Agency:

APR 14 2008
DATE

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

ljb

PORZIO, BROMBERG & NEWMAN, P.C.
100 Southgate Parkway
Morristown, NJ 07962-1997
(973) 538-4006
Attorneys for Hillside Board of Education

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STATE OF N.J.
LAW
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In The Matter Of Tenure Hearing Against DARREN MCCRIMMON	BEFORE THE NEW JERSEY COMMISSIONER OF EDUCATION OAL DOCKET NO.: EDU 01614-2007N AGENCY REF. NO.: 3-1/07

STIPULATION OF DISMISSAL

This Stipulation of Dismissal ("Stipulation") is made and entered into, pursuant to, and in accordance with, N.J.A.C. 6A:3-5.6, by and between counsel for the HILLSIDE BOARD OF EDUCATION (hereinafter "the Board") and DARREN McCRIMMON (hereinafter "Mr. McCrimmon"), for full settlement of all claims that could have been alleged in the above tenure proceedings.

WITNESSETH:

WHEREAS, the Board operates the Hillside Public School District; and

WHEREAS, Mr. McCrimmon had been employed by the Board since May 1998 as a custodian; and

WHEREAS, on October 24, 2006, Mr. McCrimmon was suspended with pay; and

WHEREAS, McCrimmon's increment was withheld for the 2005-2006 school year; and

WHEREAS, on December 4, 2006, Tenure Charges (the "Charges") were filed with the Board, against Mr. McCrimmon, as a result of Mr. McCrimmon's alleged actions. (A true and correct copy of the Charges is attached hereto as Exhibit A and incorporated herein by reference.); and

WHEREAS, at its December 21, 2006 Board meeting, the Charges were certified to the Commissioner of Education (the "Commissioner") and Mr. McCrimmon was suspended without pay; and

WHEREAS, on January 19, 2007, pursuant to N.J.S.A. 18A:6-16, the Commissioner referred the Charges (Agency Docket No.: 3-1/07) to the Office of Administrative Law ("OAL"); and

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

1. Mr. McCrimmon shall tender his resignation, effective the date it is approved by the Board and the Commissioner of Education.

2. The Board agrees to withdraw the Charges that are currently pending before the Honorable Honorable Joann LaSala Candido, A.L.J., OAL Docket No.: EDU 01614-2007N, as Mr. McCrimmon's resignation renders the tenure charges moot.

3. The Board agrees to pay Mr. McCrimmon the amount equivalent to his wages for four (4) months, less any monies paid him following service on him of tenure charges. This payment will have the appropriate tax withheld in the normal course.

4. The parties agree that the resolution of this matter upon the terms set forth herein is both in their interests and in the public interest for the following reasons:

a. to avoid disruption of the school district and, possibly, other districts currently employing individuals who would be called upon to testify in these proceedings; and

b. to avoid a lengthy, expensive hearing on the charges and any possible appeals; and

c. to avoid the expenditure of additional public funds to pursue charges against an employee who has forfeited his present employment position with the Board and who is barred from obtaining public employment in the future.

PETITIONER

Angela Garretson
Board President
Hillside Board of Education

Dated:

Kenneth Weinheimer
Board Secretary/Business Administrator

Dated:

RESPONDENT

By: Darren McCrimmon 12-05-07
Darren McCrimmon

Dated:

Agenda Caucus/Regular Meeting -- February 28, 2008
LABOR RELATIONS – Sileem/Daniels (continued)

Other

31. Motion to approve the Stipulation of Dismissal pertaining to OAL Docket No.: EDU 01614-2007N, Agency Reference No.: 3-1/07 for the dismissal of D.M. (Attachment LR#1-02/08)

Motion: Sileem **Second: Smith**

Daniels	Y	Sileem	Y
Humphrey	Y	Smith	Y
Korzeneski	Y	Yafet	Y
Menza	Y	Garretson	Y
O'Shea	Absent		

Motion 31 carried. 8 Yes 0 No

I hereby certify that this is a true copy of the minutes of the Regular Meeting of the Hillside Board of Education held on February 28, 2008.

Kenneth R. Weinheimer
Business Administrator/Board Secretary

Shading indicates additions since Committee Meeting
Underlining indicates additions since initially sent to board.

AMENDMENT TO STIPULATION OF DISMISSAL

Pursuant to the conference call with the Director of the Bureau of Controversies and Disputes, the undersigned counsel for the parties hereby amend and supplement the Stipulation of Dismissal In the Matter of the Tenure Hearing of Darren McCrimmon, Hillside Board of Education, (O.A.L. Docket No. EDU 01614-07, Agency Docket No. 3-1/07) as follows:

1) As to paragraph 3, the parties acknowledge that Mr. McCrimmon has received all the sums agreed upon in this paragraph. He was initially suspended without pay for four (4) months. He was then returned to the payroll for four (4) months, as required by this paragraph, at which time his salary ceased.

2) At to paragraph 4c., the parties acknowledge that this matter does not involve a criminal conviction or forfeiture within the meaning of *N.J.S.A.* 2C:51-2. Mr. McCrimmon forfeited his employment in the District by virtue of his resignation. He is not barred from obtaining public employment in the future.

PORZIO, BROMBERG & NEWMAN, P.C.

By: _____
Thomas O. Johnston

Dated: 4/30/08

BUCCERI & PINCUS, ESQS.

By: _____
Gregory T. Syrek

Dated: 5/2/08

#222-08

222-08

OAL DKT. NO EDU 1484-08
AGENCY DKT. NO. 342-11/07

IN THE MATTER OF THE TENURE	:	
HEARING OF KENNETH LANDAU,	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF	:	DECISION
CORRECTIONS, EAST JERSEY STATE	:	
PRISON.	:	

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

Upon review, the Commissioner concurs with the Administrative Law Judge that the proposed settlement is consistent with established standards governing settlement of tenure matters. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846.

Accordingly, the settlement is hereby approved and the tenure matter dismissed, subject to compliance with the terms of the settlement. A copy of this decision shall be forwarded to the State Board of Examiners.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/15/08

Date of Mailing: 5/16/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 01484-08
AGENCY DKT. NO. 324-11/07

IN THE MATTER OF THE TENURE HEARING OF KENNETH LANDAU, DEPARTMENT OF CORRECTIONS, EAST JERSEY STATE PRISON.

Ellen M. Hale, Deputy Attorney General, for petitioner
(Anne Milgram, Attorney General of New Jersey, attorney)

Rosemarie Cipparulo, Esq., for respondent
(Weissman & Mintz, attorneys)

Record Closed: March 4, 2008 Decided: April 4, 2008

BEFORE **IMRE KARASZEGI,** ALJ:

The parties have agreed to an amicable resolution of the matter and submitted the attached Stipulation of Settlement.

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

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

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

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

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

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

April 4, 2008

DATE

IMRE KARASZEGI, ALJ

Date Received at Agency: 4-9-08

Mailed to Parties:

DIRECTOR AND
ADMINISTRATIVE LAW JUDGE

APR 9 2008

DATE

OFFICE OF ADMINISTRATIVE LAW

cml

OFFICE OF ADMINISTRATIVE LAW
33 WASHINGTON STREET
NEWARK, NJ 07102
APR 0 3 2008

ANNE MILGRAM
Attorney General of New Jersey
Attorney for Petitioner,
Department of Corrections
R.J. Hughes Justice Complex
PO BOX 112
Trenton, New Jersey 08625

By: Ellen M. Hale
Deputy Attorney General
(609)984-2906

In the Matter of the Tenure Hearing of Kenneth Landau, Department of Corrections, East Jersey State Prison	:	OAL Dkt. No.: EDUTH 1484-2008N
	:	Agency Ref. No.:342-11/07
	:	STIPULATION OF SETTLEMENT

The New Jersey Department of Corrections ("NJDOC" or "Department"), East Jersey State Prison, which is located at Lock Bag R, Rahway, New Jersey 07065, represented by ANNE MILGRAM, Attorney General of New Jersey, Ellen M. Hale, Deputy Attorney General, appearing; and Kenneth Landau, a tenured employee of the NJDOC represented by Rosemarie Cipparulo, Esq., appearing; by way of this Stipulation of Settlement say:

WHEREAS, the NJDOC initiated the filing of tenure charges against Mr. Landau, having filed the charges with the Commissioner of Education on or about October 31, 2007;

WHEREAS, Mr. Landau was charged with Conduct Unbecoming a Public Employee;

WHEREAS, the tenure charges alleged that on September 21, 2007, Kenneth Landau, a Teacher I within the New Jersey Department

of Corrections, was charged in Elizabeth, New Jersey, with unlawful possession of an antique handgun in violation of N.J.S.A. 2C:39-5B;

WHEREAS, the NJDOC sought the dismissal of Mr. Landau on the above set of charges;

WHEREAS, Mr. Landau disputed the charges;

WHEREAS, the matter was initially referred in January 2007 to the Office of Administrative Law for a plenary hearing; and

WHEREAS, no hearing has yet been scheduled;

WHEREAS, on December 12, 2007, Mr. Landau entered into a Pre-Trial Intervention Program (PTI), pursuant to N.J.S.A. 2C:43-12 (see also New Jersey Court Rule 3:27-2) for the above-referenced criminal charges for unlawful possession of a handgun. The PTI term is for twelve months beginning on December 12, 2007, and if successfully completed will terminate on December 11, 2008; and

WHEREAS, the petitioner has concluded that, it may be difficult, time consuming and expensive to prove the tenure charges against Mr. Landau. Based upon the evidence presented, petitioner will have difficulty proving Mr. Landau knowingly possessed the handgun in his luggage when he attempted to board a flight at the Newark International Airport to attend his father's funeral in Florida;

WHEREAS, the parties wish to enter into an amicable resolution of the tenure charges filed against Mr. Landau;

WHEREAS, Mr. Landau entered into the agreement with a full understanding of his rights;

WHEREAS, it is in the best interest of the parties and the public to enter into this Stipulation of Settlement. By entering into this settlement agreement, petitioner avoids the excessive costs of litigation. Additionally, petitioner agrees that upon successful completion of PTI, Mr. Landau, who has been employed for twenty-two years, eight months with the petitioner, with no prior record of any disciplinary charges, may resume his duties and functions of his position as Teacher I; and

NOW, THEREFORE, in consideration of the mutual promises contained herein, the parties agree as follows:

1. Mr. Landau admits the charge of Conduct Unbecoming a Public Employee and Other Just Cause, specifically, as it relates to his unintentional unlawful possession of a handgun at the Newark International Airport.

2. As the penalty, Mr. Landau shall be suspended without pay until he successfully completes the PTI term and provides proof of dismissal of the indictment. This suspension will begin Monday, February 18, 2008, and will end upon Mr. Landau providing a court order from the New Jersey Superior Court, Union County, demonstrating successful completion of the PTI term and dismissal of the indictment with prejudice.

3. This Agreement shall be part of Mr. Landau's official personnel file and Mr. Landau's admission of the noted charge and the penalty imposed by way of settlement may be presented and considered in any subsequent disciplinary action against him.

4. If Mr. Landau attempts to obtain employment during the suspension period, he must submit his request for secondary employment to the Ethics Liaison for approval. Mr. Landau cannot take part in any secondary employment until it has been approved by the Ethics Liaison.

5. If Mr. Landau fails to successfully complete the PTI program and obtain dismissal of the indictment with prejudice, he will immediately resign, retire or be terminated from his position as Teacher I. If Mr. Landau fails to successfully complete the PTI program and obtain a dismissal of the indictment with prejudice, the petitioner will report the misconduct alleged in the tenure charges to the State Board of Examiners pursuant to N.J.A.C. 6-11-3.5;

6. This Agreement constitutes a final and complete resolution of the tenure charges in this matter and fully disposes of all issues in controversy between the parties hereto. Mr. Landau agrees not to appeal the terms of

this Agreement in any administrative, arbitral or judicial forum.

7. Settlement of this matter is justified and in the public interest because it imposes the desired discipline without the need for a contested tenure hearing. The reduction in penalty from removal to a suspension without pay for the proscribed period is equitable in exchange for eliminating the expense, time and uncertainty connected with a contested tenure hearing.

8. This Agreement shall not constitute a precedent in any other matter involving Mr. Landau or any other employee.

9. This Agreement shall only become effective when the Commissioner of Education approves it. Any disapproval by the Commissioner shall not interfere with the rights of either party to pursue this matter further.

This Agreement is made in good faith. The parties have read the Agreement and freely and voluntarily agree to its provisions.

For the Employee:

Kenneth Landau

Dated: 3/7/2008

Kenneth Landau

Dated: 3/11/08

Rosemarie Cippafulo, Esq.
Weissman & Mintz, LLC

Attorney for Landau

For the Department of Corrections:

Dated: 3/14/08

Kenneth Green, Director

ANNE MILGRAM
ATTORNEY GENERAL OF NEW JERSEY

Dated: 3/31/08

By: Ellen M. Hale
Deputy Attorney General

223-08

223-08

OAL DKT. NO. EDU 1903-08
AGENCY DKT. NO. 381-12/07

IN THE MATTER OF THE TENURE	:	
HEARING OF GUSTAVO MARTINEZ,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
UNION CITY, HUDSON COUNTY.	:	

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

Upon such review, the Commissioner concurs with the ALJ that the proposed settlement is consistent with established standards governing settlement of tenure matters. *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846.

Accordingly, the settlement is hereby approved and the tenure matter dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/16/08
Date of Mailing: 5/16/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1903-08

AGENCY DKT. NO. 381-12/07

IN THE MATTER OF THE TENURE OF GUSTAVO MARTINEZ, SCHOOL DISTRICT OF THE CITY OF UNION CITY, HUDSON COUNTY.

Susan Lavelle, Esq., for Petitioner School District of Union City

Tomas Espinosa, Esq., for Respondent Gustavo Martinez

Record Closed: March 28, 2008 Decided: April 7, 2008

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

This matter was transmitted to the Office of Administrative Law ("OAL") from the Department of Education on February 8, 2008, for hearing as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

A hearing was scheduled at the OAL, 33 Washington Street, Newark, New Jersey. Prior to the hearing, settlement discussions were held and a settlement was reached.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement and Release indicating the terms thereof. The Superintendent is the signatory on behalf of the and the Board has passed a resolution approving the settlement, both are attached hereto and fully incorporated herein as part of this decision.

In cases where, as here, tenure charges have been certified to the Commissioner, such charges may only be withdrawn or settled with the Commissioner's approval and, pursuant to regulation, the proposed settlement or withdrawal must address specific standards as established by the State Board of Education in the matter entitled In re Cardonick, State Board decision, April 6, 1983 (1996 School Law Decisions, 842, 846). N.J.A.C. 6A:3-5.6.

Those standards require that the proposal be accompanied by documentation as to the nature of the charges. In this case, Respondent who is employed and tenured as a school custodian, is charged with excessive absences and conduct unbecoming a public school employee which was predicated on charges of submitting time sheets for overtime he could not have worked, leaving work early without permission, and absence without permission. In addition, he has been found to be highly intoxicated on duty and he has been admitted to inpatient rehabilitation programs several times. Moreover, the charges are set forth in full in the Statement of Charges and Evidence which were transmitted to this Court by the Commissioner; these, too, are incorporated herein and made a part hereof as if set forth in full.

I **FIND**, therefore, the first requirement of the regulation has been satisfied.

Second, the regulation requires the circumstances justifying settlement or withdrawal be explained. In this case, the Board's attorney has set forth the circumstances of the case which, the Board feels, justify settlement. I hereby incorporate page two, paragraph two of the letter of March 27, 2008, as if set forth in full.

The consent of the parties, the indication that the charged party entered into the agreement with a full understanding of his rights are indicated by and in the written statement.[i]

Accordingly, I **FIND** the settlement agreement meets the standard as established by the State Board of Education and codified at N.J.A.C. 6A:3-5.6.

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

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

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

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

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

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

[i] There is no issue of referral to the State Board for purposes of action against a certificate since this position Respondent holds does not require a certificate.

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

April 7, 2008
DATE

Maria M La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Date Received at Agency: 4-10-08

Mailed to Parties:

APR 10 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

withdrawn or rescinded in the event this Agreement is not approved by the Commissioner;

4. The Board shall reinstate Martinez' medical benefits effective upon the final approval of this Agreement by the Commissioner or April 21, 2008, whichever occurs first, and through July 31, 2008. Thereafter, Martinez' will receive retirement medical benefits.

5. Martinez may not re-apply for employment by the Board;

6. Martinez is not entitled to any compensation for unused sick, vacation, personal, or comp time, or any other payments or compensation;

7. Martinez will receive no sick, personal, or vacation days which may accrue beginning upon final approval of this Agreement by the Commissioner or April 21, 2008, whichever occurs first, and through July 31, 2008, this includes but is not limited to any sick, personal or vacation days which would accrue beginning July 1, 2008;

8. In the event Martinez acquires other employment before July 31, 2008, which employment provides him with health benefits, he shall immediately notify the Board, and the Board's obligation with respect to the payment of health, dental, and vision benefits shall cease;

9. The Board shall withdraw the tenure charges filed against Martinez without prejudice;

10. The Board will provide Martinez with a leave of absence with pay beginning upon final approval of this Agreement by the Commissioner or April 21, 2008, whichever occurs first, and through July 31, 2008;

11. Martinez will not be entitled to any reimbursement for salary, pension contributions or medical benefits lost while he was suspended without pay as the result of the tenure charges.

No Representations As To Tax Consequences

1. The Board makes no representation as to the tax consequences of this Agreement.

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2. Martinez acknowledges and agrees that he will be responsible for the payment of all applicable State, Federal, and Local taxes with respect to health, dental, and vision payments under this Agreement, and that he assumes full responsibility and liability with respect to same. Martinez further agrees that if the IRS, or other taxing authority, deems any tax, interest, penalties, or other amounts to be due from the Board with respect to the above-referenced payments, Martinez will fully indemnify and hold the Board harmless for any sums the Board may be required to pay.

Complete Release

1. Martinez releases and gives up any and all claims and rights that he has or may have against the Board, or any of its officials, officers, representatives or employees, including, but not limited to, any claim of liability, damages or attorneys' fees. This release includes all claims, including those of which Martinez is not aware and those not mentioned in this Agreement. This Agreement and this release applies to all claims resulting from anything that has happened up to and including the date of this Agreement.

2. In addition to releasing the Board from any and all claims and rights set forth in the Paragraph above, Martinez also specifically releases the Board from the following:

    1. Any and all claims which were brought or could have been brought or arising pursuant to:

        a. The New Jersey Law Against Discrimination, N.J.S.A. 10: 5-1, et. seq. ("LAD"), which, among other things, prohibits discrimination in employment on the basis of an individual's race, creed, color, religion, sex, national origin, ancestry, age, marital status, affection or sexual orientation, familial status, handicap, atypical hereditary cellular or blood trait or liability for service in the Armed Forces of the United States;

        b. The Conscientious Employee Protection Act, N.J.S.A. 34:19-1, which among other things, prohibits retaliatory action against an employee under certain specified conditions;

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and prohibits discrimination in employment and employment benefits on account of a person's age; and

k. Any Federal or State statute, rule or regulation or common law.

2. Any and all claims included within the EEOC Notice of Charge of Discrimination, bearing Charge No. 524-2008-00524, dated March 4, 2008.

Who Is Bound

Martinez is bound by this Agreement. Anyone who succeeds to Martinez' rights and responsibilities, such as heirs or the executors of Martinez' estate, are also bound. The Board and all who succeed to its rights and responsibilities are also bound. The Association is also bound.

No Disparaging Statements

Martinez agrees that he has not nor will he in the future make any statement(s) that have or can be expected to have the effect of disparaging the Board and/or its employees or agents. The Board, as an entity will not make or adopt any statement(s) that have or can be expected to have the effect of disparaging Martinez, nor will it authorize any of its employees or agents to do so.

Fair Representation

Martinez represents and warrants that private counsel, Tomas Espinosa, Esq. has represented him fully, fairly, and without bias in connection with the Action and this Agreement.

Consultation With An Attorney

Martinez acknowledges that he consulted with Mr. Espinosa regarding his rights under this Agreement.

Complete Agreement

This Agreement contains the entire agreement between the Board, Martinez, and the Association with respect to the subject matter, and supersedes all prior agreements or understandings dealing with the same subject matter. There is no agreement on the part of the Board, Martinez

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or the Association to do anything other than as is expressly stated in this written Agreement.

Choice of Law

The Agreement shall in all respects be interpreted, enforced and governed by the laws of the State of New Jersey.

Modification

No modification or amendment of this Agreement will be enforceable unless it is in writing and signed by all parties hereto.

Attestation of Martinez

Martinez represents and warrants that he has carefully read each and every provision of this Agreement, and that he fully understands all the terms and conditions contained in each provision of this Agreement. Martinez represents and warrants that he enters into this Agreement voluntarily, of his own free will, without any pressure or coercion from any person or entity whatsoever.

Negotiated Agreement: No Construction Against Any Party

This Agreement was not drafted by any of the parties, but rather is the result of negotiations between the parties with the benefit of union representation and/or legal advice from an attorney. Each party to this Agreement read this Agreement and has freely and voluntarily executed it. No ambiguity that may arise in this Agreement shall be resolved by construing the Agreement against either of the parties as drafters of same.

Confidentiality and Non-Disclosure

Unless consent is granted by the parties to this Agreement, or unless disclosure is otherwise required by order of the Court or law such as the Open Public Records Act, neither Martinez, the Board, the Association, nor their representatives shall disclose this Agreement or discuss the terms hereof with any third party, except that Martinez may disclose the terms of this Agreement with his immediate family provided they agree to maintain its confidentiality. However, the information in this Agreement may be communicated to the parties' attorneys, tax advisors, and financial advisors. If a party or their representative receives an inquiry from any third party about the Action or this Agreement, he shall respond by saying only that "the matter has been settled". The parties agree and understand the confidentiality requirements of this paragraph

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are a material inducement to their consent to this Agreement, and that a violation of the confidentiality requirement shall be deemed a material breach of this Agreement. In the event a party or their representative is required by Court Order, the Department of Education, or the Open Public Records Act, or any similar law, to disclose the terms and provisions of this Agreement, he shall give all other parties to this Agreement written notification prior to disclosure. The Parties agree that the Confidentiality and Non-Disclosure of this Agreement cannot and does not bind the Commissioner or any other individual not mentioned in this Agreement to such confidentiality provision as the Commissioner's decision is a matter of public record.

Past Practice

Nothing herein shall be considered as establishing past practice or may be used in any way in any future proceeding between the Board and the Association or any successor union.

Severability

Should any provision of this Agreement be declared or determined by any court of competent jurisdiction to be illegal, invalid or unenforceable, the legality, validity, and enforceability of the remaining parts, terms, or provisions shall not be affected thereby and said illegal, unenforceable or invalid part, term, or provision shall be deemed not to be part of this Agreement.

Formal Approval

The Board shall not be bound by this Agreement until it has been formally approved by Resolution of the Board, and duly executed by all parties.

Execution in Counterparts

This Agreement may be signed in separate counterparts, each of which shall be deemed a duplicate original but all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed.

WITNESS:

Tomas Espinosa, Esq.

Dated: 3/20/08

GUSTAVO MARTINEZ

WITNESS:

Susanne Lavelle, Esq.

Dated: 3/26/08

UNION CITY BOARD OF EDUCATION

Gerald Caputo, Asst. Superintendent

WITNESS:

Dated: 3/26/08

UNION CITY EDUCATION ASSOC.

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RESOLUTION PRESENTED AT A PUBLIC
MEETING OF THE UNION CITY BOARD OF
EDUCATION HELD ON MARCH 26, 2008

RESOLUTION AUTHORIZING AND APPROVING THE SETTLEMENT OF TENURE CHARGES AGAINST GUSTAVO MARTINEZ IN ACCORDANCE WITH THE TERMS OF THE SETTLEMENT AGREEMENT DATED MARCH 20, 2008

WHEREAS, Gustavo Martinez ("Martinez") is a tenured custodian employed by the Union City Board of Education ("Board"); and

WHEREAS, on November 7, 2007, Tenure Charges ("Charges") were filed against and served upon Martinez for excessive absenteeism and unbecoming conduct; and

WHEREAS, on November 27, 2007, the Board certified the Charges to the Commissioner of Education; and

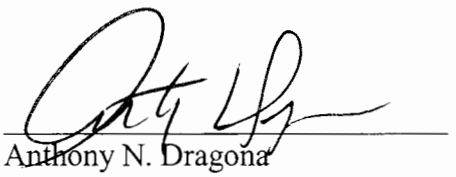
WHEREAS, the Board has determined that it is in the best interests of the Board to settle the tenure charges in accordance with the terms of the Settlement Agreement dated March 20, 2008 ("Agreement"), a copy of which is on file in the Department of Human Resources and which is incorporated herein by reference; and

NOW, THEREFORE, BE IT RESOLVED by that:

1. The aforesaid recitals are incorporated herein as though fully set forth at length.
2. The Agreement is hereby authorized and approved, with such changes as the Superintendent and Assistant Superintendent of Personnel, in consultation with Board Counsel, deem necessary, desirable or convenient to effectuate the transaction contemplated thereby.
3. Martinez' resignation effective July 31, 2008, is hereby accepted and approved.
4. The Board President and Board Secretary, and any other official or employee of the Board be and hereby is authorized to execute any and all documents and to take any and all actions necessary to the complete and realize the intent and purpose of this Resolution.
5. This Resolution shall become effective upon final approval of the Agreement by the Commissioner of Education.

ADOPTED: March 26, 2008

I hereby certify that the Union City Board of Education duly Adopted the foregoing on March 26, 2008



Anthony N. Dragona
Interim Board Secretary

SEAL

224-08

OAL DKT. NO. EDU 9081-07
AGENCY DKT. NO. 199-7/07

PAUL MINENNA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF DOVER, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 5/16/08

Date of Mailing: 5/16/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 09081-07

AGENCY DKT. NO. 199-7/07

PAUL MINENNA,

Petitioner,

v.

DOVER BOARD OF EDUCATION,

Respondent.

David Nash, Esq., for petitioner (New Jersey Principals and Supervisors Association)

Cherie L. Adams, Esq., for respondent (Sills, Cummis, Epstein & Gross, attorneys)

Record Closed: April 22, 2008 Decided: April 22, 2008

BEFORE **IMRE KARASZEGI,** ALJ:

The parties have agreed to an amicable resolution of the matter and submitted the attached Settlement and Release Agreement. Also attached is an extract from the March 27, 2008 minutes of the meeting of the Dover Board of Education, ratifying same.

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

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

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

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

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

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

April 22, 2008

DATE

IMRE KARASZEGI, ALJ

Date Received at Agency: 4-23-08

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APR 23 2008

DATE

OFFICE OF ADMINISTRATIVE LAW

\mvh

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SETTLEMENT AND RELEASE AGREEMENT

This is a Settlement and Release Agreement (hereinafter "Agreement") between Paul Minenna ("Minenna"), residing at 4 Florence Drive, Wharton, New Jersey, 07885, and the Board of Education of the Town of Dover ("*Board*" or "District"), located at 100 Grace Street, Dover, N.J. 07801.

WITNESSETH:

WHEREAS, Minenna *was* employed as a Supervisor for the Board of Education of the Town of Dover, Morris County;

WHEREAS, On or about April 26, 2007, Minenna received notice from the District that his employment contract would not be renewed for the 2007-08 school year;

WHEREAS, Minenna filed a petition in the Office of Administrative Law under *OAL Docket Number EDUOR 09081-2007N; Agency Reference Number 199-7/07* challenging said non-renewal and contending that Minenna had received tenure prior to his notice of nonrenewal and the district's action was therefore a violation of N.J.S.A. 18A:28-5;

WHEREAS, the District asserts that Minenna was not tenured and that his non-renewal was consistent with applicable laws and regulations;

WHEREAS, prior to a determination on the merits of such petition the District through its counsel and Minenna through his counsel engaged in settlement negotiations for the purposes of avoiding protracted litigation between them; and

WHEREAS, the parties, without admitting liability or fault, and after an opportunity to consider and to confer with competent counsel of their choice, have reached a voluntary agreement with respect to any and all disputed issues in connection with Paul Minenna's employment relationship with the District and the separation thereof, and with a full understanding of the terms of this Agreement, desire to memorialize their settlement herein; and

WHEREAS, the parties, desire to resolve all claims, between them, except as is specifically provided herein,

NOW, THEREFORE, in consideration of the mutual covenants contained herein and as set forth in further detail herein, the parties agree as follows:

1. **Payment.** Minenna shall receive a lump sum payment in the amount of sixteen thousand three hundred twenty seven dollars ($16,327), less applicable taxes and withholdings, as a settlement of claims that Minenna has or may have had against the District.

2. **Minenna's Release.** Except for claims relating to the enforcement of this Agreement, Minenna hereby releases and forever discharges the District and all of their former and current employees, Board members, superintendents, officers, directors, overseers, trustees, students, consultants, vendors, attorneys, agents, successors and assigns ("Releasees") from any and all manner of action and actions, cause and causes of action, suits, claims, grievances, debts, sums of money, wages, compensation, bills, claims for attorneys' fees, interest, expenses and costs, controversies, agreements, promises, variances, trespasses, damages, judgments, executions, claims and demands of any nature whatsoever known or unknown, suspected or unsuspected, vested or contingent, which Minenna ever had or now has against the Releasees arising out of Minenna's former and existing employment relationship with them or for any other reasons which were asserted or could have been asserted by Minenna under any local, state or federal statute, constitution, ordinance, contract or the common law, including, but not limited to, all claims under: the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 6, et seq. ("ADEA"); Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. §§ 2000e, et seq., ("Title VII"); the Reconstruction Era Civil Rights Act, as amended, 42 U.S.C. §§ 1981, § 1983, et seq. ("Civil Rights Act"); the Civil Rights Act of 1991, as amended, 42 U.S.C. § 1981a, et seq. ("CRA of 1991"); the Americans with Disabilities Act, 42 U.S.C. §§ 12101, et seq. ("ADA"); the Family and Medical Leave Act, 29 U.S.C. §§ 2601, et seq. ("FMLA"); the Fair Labor Standards Act, 29 U.S.C. § 201, et seq. ("FLSA"); the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, et seq. ("ERISA"); the Equal Pay Act, 29 U.S.C. § 201, et seq., (EPA"); the Rehabilitation Act, 29 U.S.C. §§ 701, et seq. ("RA"); the Pregnancy Discrimination Act, 42 U.S.C. §§ 2000, et seq. ("PDA"); the Whistleblower Protection Statutes, 10 U.S.C. § 2409, 12 U.S.C. § 1831j, 31 U.S.C. § 5328, 41 U.S.C. § 265, (collectively as "WPS"); the Sarbanes-Oxley Act, 18 U.S.C. 1514A, the False Claims Act, 31 U.S.C. §§ 3729, et seq.; the New Jersey Civil Rights Act, N.J.S.A. 10:6-1, et seq.; the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et seq. ("LAD"), the New Jersey Family Leave Act, N.J.S.A. 34:11B-1, et seq. ("FLA"); the New Jersey Conscientious Employee Protection Act, N.J.S.A. 34:19-1, et seq. ("CEPA"); the New Jersey Worker Freedom from Intimidation Act, N.J.S.A. 34:19-9, et seq.; the New Jersey Wage and Hour Law, N.J.S.A. 34:11-56a, et seq. ("WHL"); the New Jersey Discrimination in Wages Law, N.J.S.A. 34:11-56.1, et seq. ("DWL"); the New Jersey Workers' Compensation Law, N.J.S.A. 34:15-39.1, et seq. ("NJWC"); and the New Jersey Wage Payment Law, N.J.S.A. 34:11-4.1, et seq. ("WPL).

3. **District's Release.** Except for claims relating to the enforcement of this Agreement or claims against Minenna by third parties alleging intentional conduct outside the scope of his job duties with the District, the District hereby releases and forever discharges Minenna from any and all manner of actions, claims, suits, grievances, debts, sums of money, claims for attorneys fees, sums of money, wages, compensation, bills, claims for attorneys' fees, interest, expenses and costs, controversies, agreements, promises, variances, trespasses, damages, judgments, executions, claims and demands of any nature whatsoever known or unknown, suspected or unsuspected, vested or contingent, which it ever had or has against Minenna arising out of Minenna's former or existing employment relationship with the District or for any other reasons which were asserted or could have been asserted under any local, state or federal statute, constitution, ordinance, contract or the common law.

5. **Dismissal of Pending Petition/Covenant Not to Sue.** The parties shall provide the presiding Administrative Law Judge with a joint stipulation that a settlement has been reached regarding the petition filed as *OAL Dkt. No. EDUOR 09081-2007N, Agency Ref. No. 199-7/07*. The parties further covenant not to sue each other for actions arising out of their former and/or existing relationship.

6. **Non-Admission of Liability.** The execution of this Agreement and the settlement made hereunder shall not be construed as an admission of liability by any party to this Agreement, such liability being expressly denied. It is agreed that there is no prevailing party in this litigation.

7. **Confidentiality.** To the extent permitted by law, the parties shall hold confidential the terms of this Agreement, the amount paid in consideration thereof, any claims or purported admissions made during the settlement negotiations, and any information required here under the terms of settlement (the "Confidential Information") and shall not disseminate the Confidential Information to anyone other than the parties, their accountants, and their counsel, other than to state in response to an inquiry that the differences between them have been resolved to their mutual satisfaction.

8. **Entire Agreement/Severability/Not Construed Against Drafter.** This Agreement constitutes the entire understanding between the parties as it relates to the subject matter of this Agreement and supersedes all other representations, statements, and understandings or agreements pertaining to such subject matter. The provisions of this Agreement are severable, and if any provision of it is found to be unlawful or unenforceable, it

Agreement in its entirety, understands all of the terms and freely, voluntarily and knowingly, without duress or coercion, assents to all the terms and conditions contained herein.

By signing below, all Parties indicate that they have carefully read and understand the terms of this Agreement, enter into this Agreement knowingly, voluntarily and of their own free will, understand its terms and significance and intend to abide by its provisions without exception.

PAUL MINENNA

STATE OF NEW JERSEY :
: S.S.:
COUNTY OF Morris :

On March 17, 2008, before me personally came Paul Minenna, known to me to be the individual described in, and who executed the foregoing Settlement Agreement and General Release, and duly acknowledged to me that he executed the same.

Sworn to before me on this
17 day of March 2008.

GERARD R. SMITH
Attorney At Law
State of New Jersey

DOVER SCHOOL DISTRICT

By: [SIGNATURE]

Frederick E. Vanderhoof [PRINTED NAME]

Board Secretary [TITLE]

Date: March 27, 2008

DOVER BOARD OF EDUCATION
GRACE STREET
DOVER, NEW JERSEY 07801

FREDERICK E. VANDERHOOF **SECRETARY TO THE BOARD**

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

The Board of Education of the Town of Dover in the County of Morris, New Jersey was convened in Special Committee of the Whole Session, March 27, 2008 at 8:00 PM in the Media Center at Dover High School, Dover, New Jersey.

The following Board members were present:

Mrs. Susan Shauer, Mrs. Lynn Laurie, Mr. Donald Brill, Mr. Scott Miller, Mrs. Abby Handzel, Mr. Albert Galloza, Mrs. Julia Popovitch and Mr. William Shuler.

Absent:

Mr. Frank Simini and Mrs. Margo Maher

Mr. Shuler recommended authorizing the Board President and Board Secretary to execute the Settlement and Release Agreement set forth in the matter relating to Docket No. EDUOR 09091-2007N.

ROLL CALL VOTE:

Yes:	8
Noes:	0
Abstention:	0

STATE OF NEW JERSEY)
) ss
COUNTY OF MORRIS)

I, Frederick E. Vanderhoof, Secretary of Board of Education, of the Town of Dover, in the County of Morris, State of New Jersey, hereby certify that the foregoing extract from the minutes of the Board of Education of said district has been compared by me with the original minutes as officially recorded in my office in the minute book of the Dover Board of Education and is a true and complete copy thereof, and of the whole of said original minutes so far as the same relate to the subject matters referred to in said extract in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 28th day of March 2008.

Frederick E. Vanderhoof

SECRETARY TO THE BOARD OF EDUCATION

THE FACE OF THIS DOCUMENT HAS A COLORED BACKGROUND - NOT A WHITE BACKGROUND

DOVER BOARD OF EDUCATION
DOVER, NJ

DATE
4/11/08

55-33/212
CHECK NO.
992184

$10,103.25

PAY TO THE ORDER OF

Paul Minenna
4 Florence Drive
Wharton, NJ 07885

Ten thousand One hundred Three 25/100

FLEET BANK
DOVER, NJ

Kelly N. Tookey

THE BACK OF THIS DOCUMENT HAS AN ARTIFICIAL WATERMARK - HOLD AT ANGLE TO VIEW. HEAT SENSITIVE LOGO ON BACK DISAPPEARS WHEN HEATED.

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Ameripay

TEAR HERE

CO. CODE	COMPANY NAME
v8	DOVER BOARD OF EDUCATION

EMPLOYEE NO.	DEPT. NO.	EMPLOYEE NAME	SOC. SEC. NO.	PERIOD ENDING	CHECK NO.
		Paul Minenna			992184

EARNINGS	HOURS/UNITS	RATE	CURRENT AMOUNT	YTD AMOUNT	DEDUCTIONS	CURRENT AMOUNT	YTD AMOUNT
STR3			16,327.00		fica	1,012.27	
					medi	236.74	
					fwt	3,996.46	
					SWT	908.89	
					heal	.00	
					sui	62.45	
					work	6.94	

CURRENT EARNINGS	CURRENT DEDUCTIONS	NET PAY	YTD EARNINGS	YTD DEDUCTIONS	YTD NET PAY
16,327.00	6,223.75	10,103.25			

RECEIVED
2008 APR 22 A 8:28

SETTLEMENT AND RELEASE AGREEMENT

This is a Settlement and Release Agreement (hereinafter "Agreement") between Paul Minenna ("Minenna"), residing at 4 Florence Drive, Wharton, New Jersey, 07885, and the Board of Education of the Town of Dover ("*Board*" or "District"), located at 100 Grace Street, Dover, N.J. 07801.

WITNESSETH:

WHEREAS, Minenna *was* employed as a Supervisor for the Board of Education of the Town of Dover, Morris County;

WHEREAS, On or about April 26, 2007, Minenna received notice from the District that his employment contract would not be renewed for the 2007-08 school year;

WHEREAS, Minenna filed a petition in the Office of Administrative Law under *OAL Docket Number EDUOR 09081-2007N; Agency Reference Number 199-7/07* challenging said non-renewal and contending that Minenna had received tenure prior to his notice of nonrenewal and the district's action was therefore a violation of N.J.S.A. 18A:28-5;

WHEREAS, the District asserts that Minenna was not tenured and that his non-renewal was consistent with applicable laws and regulations;

WHEREAS, prior to a determination on the merits of such petition the District through its counsel and Minenna through his counsel engaged in settlement negotiations for the purposes of avoiding protracted litigation between them; and

WHEREAS, the parties, without admitting liability or fault, and after an opportunity to consider and to confer with competent counsel of their choice, have reached a voluntary agreement with respect to any and all disputed issues in connection with Paul Minenna's employment relationship with the District and the separation thereof, and with a full understanding of the terms of this Agreement, desire to memorialize their settlement herein; and

WHEREAS, the parties, desire to resolve all claims, between them, except as is specifically provided herein,

NOW, THEREFORE, in consideration of the mutual covenants contained herein and as set forth in further detail herein, the parties agree as follows:

1. **Payment.** Minenna shall receive a lump sum payment in the amount of sixteen thousand three hundred twenty seven dollars ($16,327), less applicable taxes and withholdings, as a settlement of claims that Minenna has or may have had against the District.

2. **Minenna's Release.** Except for claims relating to the enforcement of this Agreement, Minenna hereby releases and forever discharges the District and all of their former and current employees, Board members, superintendents, officers, directors, overseers, trustees, students, consultants, vendors, attorneys, agents, successors and assigns ("Releasees") from any and all manner of action and actions, cause and causes of action, suits, claims, grievances, debts, sums of money, wages, compensation, bills, claims for attorneys' fees, interest, expenses and costs, controversies, agreements, promises, variances, trespasses, damages, judgments, executions, claims and demands of any nature whatsoever known or unknown, suspected or unsuspected, vested or contingent, which Minenna ever had or now has against the Releasees arising out of Minenna's former and existing employment relationship with them or for any other reasons which were asserted or could have been asserted by Minenna under any local, state or federal statute, constitution, ordinance, contract or the common law, including, but not limited to, all claims under: the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 6, et seq. ("ADEA"); Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. §§ 2000e, et seq., ("Title VII"); the Reconstruction Era Civil Rights Act, as amended, 42 U.S.C. §§ 1981, § 1983, et seq. ("Civil Rights Act"); the Civil Rights Act of 1991, as amended, 42 U.S.C. § 1981a, et seq. ("CRA of 1991"); the Americans with Disabilities Act, 42 U.S.C. §§ 12101, et seq. ("ADA"); the Family and Medical Leave Act, 29 U.S.C. §§ 2601, et seq. ("FMLA"); the Fair Labor Standards Act, 29 U.S.C. § 201, et seq. ("FLSA"); the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, et seq. ("ERISA"); the Equal Pay Act, 29 U.S.C. § 201, et seq., (EPA"); the Rehabilitation Act, 29 U.S.C. §§ 701, et seq. ("RA"); the Pregnancy Discrimination Act, 42 U.S.C. §§ 2000, et seq. ("PDA"); the Whistleblower Protection Statutes, 10 U.S.C. § 2409, 12 U.S.C. § 1831j, 31 U.S.C. § 5328, 41 U.S.C. § 265, (collectively as "WPS"); the Sarbanes-Oxley Act, 18 U.S.C. 1514A, the False Claims Act, 31 U.S.C. §§ 3729, et seq.; the New Jersey Civil Rights Act, N.J.S.A. 10:6-1, et seq.; the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et seq. ("LAD"), the New Jersey Family Leave Act, N.J.S.A. 34:11B-1, et seq. ("FLA"); the New Jersey Conscientious Employee Protection Act, N.J.S.A. 34:19-1, et seq. ("CEPA"); the New Jersey Worker Freedom from Intimidation Act, N.J.S.A. 34:19-9, et seq.; the New Jersey Wage and Hour Law, N.J.S.A. 34:11-56a, et seq. ("WHL"); the New Jersey Discrimination in Wages Law, N.J.S.A. 34:11-56.1, et seq. ("DWL"); the New Jersey Workers' Compensation Law, N.J.S.A. 34:15-39.1, et seq. ("NJWC"); and the New Jersey Wage Payment Law, N.J.S.A. 34:11-4.1, et seq. ("WPL).

3. **District's Release.** Except for claims relating to the enforcement of this Agreement or claims against Minenna by third parties alleging intentional conduct outside the scope of his job duties with the District, the District hereby releases and forever discharges Minenna from any and all manner of actions, claims, suits, grievances, debts, sums of money, claims for attorneys fees, sums of money, wages, compensation, bills, claims for attorneys' fees, interest, expenses and costs, controversies, agreements, promises, variances, trespasses, damages, judgments, executions, claims and demands of any nature whatsoever known or unknown, suspected or unsuspected, vested or contingent, which it ever had or has against Minenna arising out of Minenna's former or existing employment relationship with the District or for any other reasons which were asserted or could have been asserted under any local, state or federal statute, constitution, ordinance, contract or the common law.

5. **Dismissal of Pending Petition/Covenant Not to Sue.** The parties shall provide the presiding Administrative Law Judge with a joint stipulation that a settlement has been reached regarding the petition filed as *OAL Dkt. No. EDUOR 09081-2007N, Agency Ref. No. 199-7/07.* The parties further covenant not to sue each other for actions arising out of their former and/or existing relationship.

6. **Non-Admission of Liability.** The execution of this Agreement and the settlement made hereunder shall not be construed as an admission of liability by any party to this Agreement, such liability being expressly denied. It is agreed that there is no prevailing party in this litigation.

7. **Confidentiality.** To the extent permitted by law, the parties shall hold confidential the terms of this Agreement, the amount paid in consideration thereof, any claims or purported admissions made during the settlement negotiations, and any information required here under the terms of settlement (the "Confidential Information") and shall not disseminate the Confidential Information to anyone other than the parties, their accountants, and their counsel, other than to state in response to an inquiry that the differences between them have been resolved to their mutual satisfaction.

8. **Entire Agreement/Severability/Not Construed Against Drafter.** This Agreement constitutes the entire understanding between the parties as it relates to the subject matter of this Agreement and supersedes all other representations, statements, and understandings or agreements pertaining to such subject matter. The provisions of this Agreement are severable, and if any provision of it is found to be unlawful or unenforceable, it

Agreement in its entirety, understands all of the terms and freely, voluntarily and knowingly, without duress or coercion, assents to all the terms and conditions contained herein.

By signing below, all Parties indicate that they have carefully read and understand the terms of this Agreement, enter into this Agreement knowingly, voluntarily and of their own free will, understand its terms and significance and intend to abide by its provisions without exception.

PAUL MINENNA

Paul Minenna

STATE OF NEW JERSEY :
: S.S.:
COUNTY OF Morris :

On March 17, 2008, before me personally came Paul Minenna, known to me to be the individual described in, and who executed the foregoing Settlement Agreement and General Release, and duly acknowledged to me that he executed the same.

Sworn to before me on this
17 day of March 2008.

GERARD R. SMITH
Attorney At Law
State of New Jersey

DOVER SCHOOL DISTRICT

By: Frederick E. Vanderhoof [SIGNATURE]

Frederick E. Vanderhoof [PRINTED NAME]

Board Secretary [TITLE]

Date: March 27, 2008

DOVER BOARD OF EDUCATION
GRACE STREET
DOVER, NEW JERSEY 07801

FREDERICK E. VANDERHOOF **SECRETARY TO THE BOARD**

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

The Board of Education of the Town of Dover in the County of Morris, New Jersey was convened in Special Committee of the Whole Session, March 27, 2008 at 8:00 PM in the Media Center at Dover High School, Dover, New Jersey.

The following Board members were present:

Mrs. Susan Shauer, Mrs. Lynn Laurie, Mr. Donald Brill, Mr. Scott Miller, Mrs. Abby Handzel, Mr. Albert Galloza, Mrs. Julia Popovitch and Mr. William Shuler.

Absent:

Mr. Frank Simini and Mrs. Margo Maher

Mr. Shuler recommended authorizing the Board President and Board Secretary to execute the Settlement and Release Agreement set forth in the matter relating to Docket No. EDUOR 09091-2007N.

ROLL CALL VOTE: Yes: 8
Noes: 0
Abstention: 0

STATE OF NEW JERSEY)
) ss
COUNTY OF MORRIS)

I, Frederick E. Vanderhoof, Secretary of Board of Education, of the Town of Dover, in the County of Morris, State of New Jersey, hereby certify that the foregoing extract from the minutes of the Board of Education of said district has been compared by me with the original minutes as officially recorded in my office in the minute book of the Dover Board of Education and is a true and complete copy thereof, and of the whole of said original minutes so far as the same relate to the subject matters referred to in said extract in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 28th day of March 2008.

Frederick E. Vanderhoof

SECRETARY TO THE BOARD OF EDUCATION

THE FACE OF THIS DOCUMENT HAS A COLORED BACKGROUND - NOT A WHITE BACKGROUND

DOVER BOARD OF EDUCATION
DOVER, NJ

DATE 4/11/08

55-33/212

CHECK NO. 992184

$10,103.25

PAY TO THE ORDER OF

Paul Minenna
4 Florence Drive
Wharton, NJ 07885

Ten-thousand One-hundred Three 25/100

FLEET BANK
DOVER, NJ

Kelly M. Sooley

THE BACK OF THIS DOCUMENT HAS AN ARTIFICIAL WATERMARK - HOLD AT ANGLE TO VIEW. HEAT SENSITIVE LOGO ON BACK DISAPPEARS WHEN HEATED.

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TEAR HERE

Ameripay

CO. CODE	COMPANY NAME
dv8	DOVER BOARD OF EDUCATION

EMPLOYEE NO.	DEPT. NO.	EMPLOYEE NAME	SOC. SEC. NO.	PERIOD ENDING	CHECK NO.
		Paul Minenna			992184

EARNINGS	HOURS/UNITS	RATE	CURRENT AMOUNT	YTD AMOUNT	DEDUCTIONS	CURRENT AMOUNT	YTD AMOUNT
STR3			16,327.00		fica	1,012.27	
					medi	236.74	
					fwt	3,996.46	
					SWT	908.89	
					heal	.00	
					sui	62.45	
					work	6.94	

CURRENT EARNINGS	CURRENT DEDUCTIONS	NET PAY	YTD EARNINGS	YTD DEDUCTIONS	YTD NET PAY
16,327.00	6,223.75	10,103.25			

227-08

227-08

VINCENT CRAPELLI, WILLIAM M. MOORE AND JOSEPHINE LEE,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF TRUSTEES OF THE RED BANK CHARTER SCHOOL, MONMOUTH COUNTY,[1]	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioners sought to invalidate a settlement that resolved lawsuits filed against the Red Bank Charter School (RBCS) by two creditors to recover monies owed in connection with the construction and renovation of RBCS's school facility, projects undertaken by the Red Bank Charter School Foundation (Foundation). Petitioners contended that the settlement effectively ratified a series of unauthorized actions on the part of former board trustees who acted on behalf of the separate Foundation, and that settlement will result in expenditure of funds in violation of school law. Petitioners filed a motion for emergent relief which was denied by the ALJ, who found no likelihood of success on the merits.

The ALJ found that: the salient facts and applicable law were outlined in his prior order denying emergent relief; the petition lacks merit, as boards of education enjoy wide discretion in the conduct of school affairs and the settlement at issue here falls well within that exercise; the RBCS Board of Trustees entered into the settlement on the advice of counsel that they had only poor defenses against the creditors' claims; the Board's decision to settle was not arbitrary or capricious. The ALJ ordered that the petition be dismissed.

The Assistant Commissioner, to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-34, concurred with the ALJ and adopted the Initial Decision of the OAL with supplementation. The Assistant Commissioner found that: the respondent Board acted reasonably in voting to approve the settlement under the totality of the circumstances presented; the Foundation was never truly independent of the RBCS – having been created for the sole purpose of providing RBCS with a school building and financial assistance – and RBSC was subsequently responsible for the liabilities of the Foundation. The petition was dismissed.

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

[1] The New Jersey Department of Education, Office of Charter Schools was originally a named respondent but has been dismissed by agreement of the parties.

May 15, 2008 Issued
May 16, 2008 Mailed

OAL DKT. NO. EDU 8821-07
AGENCY DKT. NO. 336-11/07

VINCENT CRAPELLI, WILLIAM M. MOORE AND JOSEPHINE LEE,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF TRUSTEES OF THE RED BANK CHARTER SCHOOL, MONMOUTH COUNTY,[1]	:	DECISION
RESPONDENT.	:	

Petitioners wish to undo a settlement reached between the respondent Board of Trustees of the Red Bank Charter School (RBCS or the Board), and Patock Construction Corp. (Patock), and Short-Term Money LLC (Short-Term), to resolve two lawsuits filed by the aforesaid companies to recover monies owed in connection with the construction and renovation of premises used as RBCS's school facility.[2] Both parties requested summary disposition of the matter.[3]

The material facts of this case do not appear to be disputed. The Assistant Commissioner, to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-34, has relied, in particular, upon facts presented 1) in an affidavit by Bruce Whitaker, current president of the RBCS Board of Trustees (Whitaker Affidavit), and 2) in various exhibits annexed to the

[1] The New Jersey Department of Education, Office of Charter Schools was originally a named respondent but has been dismissed by agreement of the parties.

[2] An emergent application that had been filed with the petition was denied by way of a November 20, 2007 order of the Office of Administrative Law (OAL), which order was adopted by the Commissioner of Education (the Commissioner) on December 18, 2007.

[3] No exceptions were filed by the parties.

Issued - May 15, 2008
Mailed - May 16, 2008

petition, including the May 6, 2005 report of a compliance investigation conducted by the New Jersey State Department of Education (Exhibit I to the petition).

From these facts it is apparent that in 2000, a foundation was created (the Foundation) for the purpose of financing, purchasing and renovating a facility to be used as the Red Bank Charter School. In 2003, the Foundation received a loan from the New Jersey Economic Development Authority (NJEDA) and purchased property at 58 Oakland Street in Red Bank (58 Oakland). In September 2003, the Foundation entered into a contract in the amount of $1,853,000 with Patock to perform renovations at 58 Oakland. In so doing, the Foundation did not observe the laws designating procedures to be followed when public entities contract for services. No resolutions approving the property purchase, the NJEDA loan, or the contract with Patock were passed by the respondent board of trustees of RBCS.

In January 2004, the president of the Board of Trustees signed documents on behalf of the RBCS in connection with the transfer to RBCS of the title to 58 Oakland and the liability for the NJEDA loan. The Foundation monitored the renovation project and, during the Spring of 2004, paid Patock over $1,200,000. However, the Foundation purportedly requested more work – in the amount of $453,495. The RBCS Board of Trustees did not formally approve this change order.

In May or June of 2004, the RBCS students were moved into the renovated 58 Oakland. At about the same time, the Foundation borrowed $600,000 from Short-Term and paid same to Patock. A few months later, in August 2004, the Foundation sought to borrow an additional $200,000 from Short-Term. In exchange, Short-Term asked for a second mortgage on 58 Oakland and an agreement that RBCS would assume the debt if the Foundation defaulted. The president of the RBCS Board of Trustees signed such an agreement, although the Board never formally approved same.

The Foundation was apparently attempting to secure another loan from Commerce Bank in October 2004. Representatives from Patock and Short-Term, whom the Foundation then collectively owed over $1,300,000, appeared before the respondent Board to urge them to vote to approve the use of 58 Oakland as collateral for such a loan. In December 2004, after hiring special counsel, the Board formally approved the terms of the Commerce Bank loan.

In January 2005, the Office of Compliance Investigation of the New Jersey State Department of Education (OCI) was asked to review RBCS's records. Its findings in March of 2005 included a determination that 1) the Foundation and RBCS were not separate entities,[4] 2) the Foundation incurred debt disproportionate to the value of the property it purchased and renovated, 3) the Foundation expected RBCS to take responsibility for debt that the trustees did not approve, and 4) the Foundation ignored public bidding laws. The OCI also noted that the former president of the board of trustees took actions independent of the rest of the Board.

A large penalty was imposed upon RBCS for the foregoing improprieties, and later reduced in a settlement with the RBCS. In addition, the OCI directed that RBCS implement procedures to limit debt, ensure that no debt or expenditures be incurred without board approval, and ensure that the Board be advised of all actions taken by the Foundation. The membership of the RBCS Board of Trustees subsequently changed and, by August 2005, all of the Foundation's board members had resigned.

In or about August 2005, Patock filed an action for the balance on its contract (and change order). RBCS's initial motion to be dismissed as a non-party to the contract

[4] For instance, the Foundation's articles of incorporation and bylaws indicate that the sole 'member' of the Foundation was the RBCS; the RBCS trustees voted for the Foundation trustees; the RBCS trustees were responsible for approving and monitoring the Foundation's operating and capital budgets and approving the Foundation's strategic, business and/or long-term plans; and any amendments to the Foundation's bylaws and articles of incorporation had to be approved by the RBCS trustees.

between Patock and the Foundation was denied. Further, the judge who oversaw the pretrial mediation advised RBCS that its defenses to the litigation were weak. Short-Term filed a similar action against RBCS in April 2006.

After extensive consultation with counsel, the respondent Board voted to settle the two lawsuits by accepting responsibility for the outstanding debt owed to Patock and Short-Term. The Whitaker Affidavit recites that the trustees knew that RBCS's case was weak, and were concerned about the possibility that judgment creditors could possibly compel the sale of 58 Oakland. Whitaker also explained that the trustees were aware of resentment from several of the school's benefactors, who were unhappy with RBCS's handling of the Patock and Short-Term claims. Loss of benefactor support was a serious concern.

Settling the lawsuits clearly saved further costs of litigation and, just as importantly, the plaintiffs agreed to relieve RBCS from paying a prodigious amount of interest on its debts if it managed to pay the principal within a year. Further, approval of the settlement enabled RBCS to initiate discussions with Commerce Bank to refinance the first mortgage on 58 Oakland to absorb the settlement debt and allow for manageable long term payment of same.

The Administrative Law Judge (ALJ) found that petitioners had failed to meet their high burden to show that respondents had abused their discretion in approving the above referenced settlement. First, he pointed out that boards of education – including boards of trustees for charter schools - enjoy wide discretion in the conduct of school affairs. The Assistant Commissioner notes that *N.J.S.A.* 18A:11-2 specifically bestows upon such boards the authority to sue and be sued, and the ancillary power to settle litigation.

Further, when an administrative agency 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. *Thomas v. Morris Bd. of*

Educ., 89 *N.J. Super.* 327 (App. Div. 1965); *Kopera v. West Orange Bd. Of Educ.*, 60 *N.J. Super.* 288 (App. Div. 1960). No such showing may be harvested from the facts of this case. The respondent Board settled claims against which they had only poor defenses, according to their lawyers and a mediating judge. In so doing, they avoided further litigation costs, were forgiven a significant amount of interest payments, kept judgment creditors away and won back former benefactors. Such action was neither arbitrary nor unreasonable.

The petitioners urge, by way of contrast, that RBCS need not take responsibility for the illegal or *ultra vires* acts of the Foundation and the former president of RBCS' Board of Trustees. The ALJ aptly addressed this argument on pages 3-4 of his November 20, 2007 order denying emergent relief:

> The Trustees do not deny that prior arrangements with the Foundation were problematic. The Department's Office of Charter Schools has already made this finding, imposed penalties, and directed corrective action . . . .
>
> . . . .
>
> Petitioners characterize the Trustees' action as ratification [of prior *ultra vires* acts] and then rely on principles that forbid governmental units from embracing illegal or *ultra vires* conduct, to conclude that the Board may not settle the Patock/Short-Term Money claims. **Yet, the matter does not rest alone on prior errors and misdeeds, but on the totality of circumstances before the trustees now. . . .**
>
> (Emphasis added)

As the OCI found, the Foundation was never truly independent of the RBCS and was, in fact, created for the sole purpose of providing RBCS with a school building and financial assistance. In such situations the corporate veil will be pierced and the 'parent' corporation will be held responsible for the liabilities of the 'subsidiary.' *See, e.g. OTR Associates v. IBC Services, Inc.*, 353 *N.J. Super.* 48 (App. Div. 2002) (the basic finding that must be made to enable the court to pierce the corporate veil is "that the parent so dominated the subsidiary that it

had no separate existence but was merely a conduit for the parent," *citing State, Dep't. of Envtl. Prot. v. Ventron Corp.*, 94 *N.J.* 473, 501 (1983)).

Further, RBCS was the beneficiary of the work that was requested of Patock, and the money that was borrowed from Short-Term. Neither law nor equity will countenance a recovery that would result in unjust enrichment. *Empire Box Corp. v. Delaware, L. & W. R. Co.*, 171 *F. 2d* 389, 390 (2d. Cir. 1948). *See, also, Donnelly v. Capodici*, 227 *N.J. Super.* 310, 313, (Ch. Div. 1987).

It is within the Commissioner's jurisdiction to find that the Board of the RBCS acted reasonably in voting to approve the settlement of the Patock and Short-Term lawsuits – under the totality of the circumstances set forth above – and the Assistant Commissioner sees no need to revisit the RBCS' former violations of school law, as those violations have been addressed by the Department of Education's OCI.[5] Accordingly, the Assistant Commissioner adopts the Initial Decision of the OAL and dismisses the petition.

IT IS SO ORDERED.[6]

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 5/15/08

Date of Mailing: 5/16/08

[5] The Commissioner of Education has no jurisdiction to adjudicate alleged criminal offenses; nor may the Commissioner supplant judgments or interfere with proceedings in the Superior Court of New Jersey.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8821-07
AGENCY DKT.NO. 336-11/07

VINCENT CRAPELLI, WILLIAM M. MOORE AND JOSEPHINE LEE,
Petitioners,
v.
BOARD OF TRUSTEES, RED BANK CHARTER SCHOOL[1]
Respondent,

Vincent Crapelli, William Moore and Josephine Lee, petitioners, pro se

Malachi J. Kenney, Esq., for respondent (Kenney, Gross, Kovats & Parton, attorneys)

Record Closed: January 18, 2008 Decided: February 15, 2008

BEFORE **SOLOMON A. METZGER**, ALJ:

This matter arises out of a petition filed with the Commissioner of Education pursuant to N.J.S.A. 18A:6-9. The file was transmitted to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 to -23. The matter has been

---

[1] The Department of Education, Office of Charter Schools was initially named as a respondent, but has been dismissed by agreement of the parties.

submitted on cross-motions for summary decision, N.J.A.C. 1:1-12.5; Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995).

The salient facts and applicable law were outlined in a prior order dated November 20, 2007 denying emergent relief; the Commissioner reviewed and approved the order. That discussion is incorporated herein by reference. In brief summary petitioners wish to undo a settlement reached between Red Bank Charter School, Paddock Construction Corp., and Short-term Money LLC to resolve a lawsuit filed in the Superior Court, Monmouth County. In denying petitioners emergent relief application I found no likelihood of success on the merits and now find that the petition lacks merit. Boards of Education enjoy wide discretion in the conduct of school affairs and the settlement falls well within that exercise, Thomas v. Morris Bd. of Educ., 89 N.J. Super. 327 (App. Div. 1965); Kopera v. West Orange Bd. Of Educ., 60 N.J. Super. 288 (App. Div. 1960).

The Trustees' have also added a few arguments. They maintain that the Commissioner lacks jurisdiction to hear this matter. N.J.S.A. 18A:6-9 only authorizes the Commissioner to hear cases "arising under the school laws," and the lawsuit between the parties to the Superior Court action was contractual. Moreover, to the extent that petitioners seek to have the Commissioner intercede because they suspect criminal wrongdoing their complaints are more properly brought to the Attorney General. The Trustees' argue also that if petitioners wanted to invalidate this settlement they should have intervened in the Superior Court where Paddock and Short-Term Money might have had an opportunity to respond.

These are interesting propositions, but the Trustees' pursue them without vigor; no cases are cited. It is sufficient therefore to deny petitioners' claims for the reasons previously expressed; on the advice of counsel the Trustees' settled claims for which they had only poor defenses. Petitioners differ with that advice, but it was not arbitrary for the Trustees to take it.

Based on the foregoing, it is **ORDERED** that the petition of appeal be **DISMISSED**.

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

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

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

2/15/08
DATE

SOLOMON A. METZGER, ALJ

Date Received at Agency:

FEB 2 0 2008

DATE

2/15/08

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

/cad

229-08

ALL CAN EXCEL (A.C.E.) ACADEMY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SPECIAL EDUCATION PROGRAMS,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning private school for students with disabilities appealed the Department's December 15, 2006 revocation – based on the lack of a facility meeting applicable health and safety standards – of its approval to operate effective December 31, 2006, contending that the Department failed to follow proper procedures, made unreasonable demands, and denied it due process.

The ALJ recommended reversal of the Department's action, finding that the Department did not give petitioner appropriate notice of deficiencies or reasonable opportunity to address them before revoking petitioner's approval.

The Commissioner rejected the ALJ's decision, finding that the Department's action to revoke petitioner's approval was fully warranted under the circumstances and effectuated in accord with applicable law. The Commissioner noted that petitioner was on notice at least as early as October 4, 2006 that – as a direct result of its unilateral expansion beyond approved capacity – its facility was insufficient for enrollment levels and not in compliance with applicable health and safety rules; moreover, as of December 15, 2006, petitioner still could not represent, in response to the Department's December 6, 2006 request, that its students would – by the end of the year or any date certain immediately thereafter – be assured of a safe, educationally appropriate school site. Opining that the Department would have failed in its own obligations had it not acted as it did, the Commissioner upheld the Department's revocation and dismissed petitioner's appeal.

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

May 16, 2008

OAL DKT. NO. EDU 1240-07
AGENCY DKT. NO. 1-1/07

ALL CAN EXCEL (A.C.E.) ACADEMY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SPECIAL EDUCATION PROGRAMS,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have exceptions filed by the Department of Education (Department) pursuant to *N.J.A.C.* 1:1-18.4 and *N.J.A.C.* 1:1-18.8. Petitioner did not reply to the Department's exceptions.

On exception, the Department first asserts that – contrary to the conclusion of the Administrative Law Judge (ALJ) – it was not required to follow the monitoring/investigation procedures set forth in *N.J.A.C.* 6A:14-9.1 *et seq.* (Subchapter 9) before exercising its authority to revoke petitioner's approval pursuant to *N.J.A.C.* 6A:14-7.10(b)3. According to the Department, Subchapter 9 flows from the federal Individuals with Disabilities Education Act (IDEA) and its purpose is to monitor local compliance with the IDEA so as to ensure that eligible students are provided with a free, appropriate public education in the least restrictive environment, whereas *N.J.A.C.* 6A:14-7.10(b)3 flows from the Department's statutory authority to effectuate the school laws of the State and specifically empowers the Department to act

immediately against any private school for students with disabilities where it has been documented that the health, safety or welfare of students is at risk. Thus, the Department contends, compliance with the procedural requirements of Subchapter 9 cannot be viewed as a precondition to action taken under the authority of the complementary but distinct provisions of *N.J.A.C.* 6A:14-7.10(b)3. (Department's Exceptions at 1-5)

The Department further contends that the ALJ erred in concluding that petitioner was not given an opportunity to correct deficiencies and was lulled into a false sense of security before having its approval revoked. To the contrary, the Department asserts, each of the allegedly "surprise" deficiencies cited by the Department in its December 6, 2006 memorandum was either already known to petitioner through prior discussions with Department staff – during which petitioner was clearly apprised of the need to ensure that its facility situation was addressed – or a violation of established regulations with which petitioner had an ongoing, independent obligation to comply. A finding that revocation could not be imposed under these circumstances, according to the Department, would effectively insulate noncompliant private schools from prompt Departmental intervention and remove any incentive for diligence in conforming their practices to rule. (Department's Exceptions at 5-8)

The Department next proffers that the ALJ's conclusions were based – substantially as a result of looking beyond the facts as they existed at the time of the Department's action – on the erroneous assumption that extension of petitioner's lease was a viable option, so as to permit its continued operation at 71 Sanford Street until a new facility was ready. According to the Department, the ALJ's own fact-finding established that, on the date of the Department's determination: 1) 71 Sanford Street

lacked proper approvals as required by *N.J.A.C.* 6A:14-7.4(b), including a Certificate of Occupancy and fire approvals for the second floor notwithstanding that such space had been used for student instruction since at least October 2006; 2) the facility was significantly overcrowded as a result of petitioner – without the Department's prior knowledge or approval – having unilaterally expanded its enrollment beyond the building's lawful capacity, to the point where students were seen to be cramped and endangered during a Department site visit, with no other location authorized as an additional school site; and 3) petitioner's lease was due to expire in approximately 15 days (on December 31, 2006), with petitioner still unable to guarantee that an adequate site would be available for students upon their return from winter break on January 2. Under the totality of these circumstances, the Department avers, it was compelled to act decisively so that the school's student population would not be abruptly displaced and sending districts would have adequate time to make alternative arrangements for their students' education consistent with required procedural safeguards. (Department's Exceptions at 9-14)

Finally, the Department contends this matter is now moot, since the relief sought by petitioner – reversal of the Department's determination to revoke its approval to operate a private school for students with disabilities at 71 Sanford Street – cannot be granted. To the extent that petitioner no longer occupies the site on which the approval in question was based, the Department asserts, reversal would be meaningless because any private school for students with disabilities that seeks to expand by opening an additional location must apply for approval as a new private school. Indeed, the Department observes, on March 15, 2007, it expressly notified petitioner of its

eligibility to apply for approval to operate a private school for students with disabilities at 760 Clinton Avenue, since the necessary site approvals had at that point been acquired; however, no application had been submitted as of the date of the hearing in this matter. (Department's Exceptions at 14-16)

Upon review, the Commissioner is unpersuaded by petitioner's arguments and cannot concur with the ALJ that the December 15, 2006 revocation of petitioner's status as an approved private school for students with disabilities was unfair or unwarranted. On the contrary, the Commissioner finds the Department's action to have been fully justified under the circumstances, as well as undertaken in a manner consistent with applicable law.

Petitioner has attempted to portray itself during this proceeding as an unsuspecting victim of heavy-handed State officials who acted in flagrant disregard of its rights – denying it any semblance of due process, depriving it of any reasonable opportunity to cure "alleged" deficiencies before being foreclosed from continued operation, and perhaps even targeting it for undisclosed reasons. However, the disobliging facts – as found by the ALJ and not materially disputed by petitioner – are as follows: Upon the Department's October 4, 2006 inquiry – precipitated by information that a serious violation was occurring at petitioner's school – petitioner was confirmed to have enrolled students far in excess of the maximum number allowed, and to have addressed the resulting overcrowding in its approved facility by transporting students in private vehicles to a second, unapproved facility. On subsequent site visits conducted on October 5 and November 1-2, 2006 – although students were no longer being transported to the second facility – Department officials found them crammed into undersized

second-floor rooms unapproved for student instruction, observed a number of plainly visible safety hazards, and discovered that petitioner had failed to maintain local fire and building approvals as clearly required by regulation. Moreover, petitioner had indicated that the lease on its sole approved facility – which by that point had itself been rendered inadequate by petitioner's unapproved, unilateral expansion in enrollment – was expiring on December 31, 2006, and petitioner was able neither to identify an acceptable alternative site nor to offer anything more than hopeful speculation – belied by the physical evidence as it then existed, as well as the pace at which work had previously progressed – that the building into which it was planning to move would be ready for student occupation in January 2007.[1] (Initial Decision at 4-16) Thus, regardless of whether petitioner and its landlord might have agreed between themselves to month-by-month extension of petitioner's lease beyond December 31, 2006, petitioner's then-current facility was clearly inadequate for the number of students enrolled – and had been since at least October 4, 2006 – and petitioner could offer no imminent date certain for availability of an approvable alternate location.[2]

The Commissioner similarly rejects petitioner's argument that the Department denied it due process and gave it no reasonable opportunity to correct deficiencies. Initially, the Commissioner fully concurs with the Department that Subchapter 9 and *N.J.A.C.* 6A:14-7.10(b)3 represent two complementary but distinct processes, and that the latter clearly (and appropriately) authorizes the Department to act

[1] The site was not actually deemed compliant until February 21, 2007. (Initial Decision at 16)

[2] The Commissioner expressly rejects the ALJ's suggestion (Initial Decision at 18) that petitioner could have been allowed simply to "cut" 24 of its 120 students to bring itself back into compliance with capacity requirements until its new facility was ready; such "solution" is tantamount to shifting the consequences for violating regulation from the offending private school to the sending districts and their students.

without observing the procedural requirements of the former in situations where student health and safety are at risk. Moreover, petitioner was on notice as early as October 4, 2006 – upon the Department's confirmation that petitioner had enrolled students beyond its approved capacity and was impermissibly transporting "overflow" students to a separate, unapproved site – that it needed a contingency plan in the event it was unable to carry out its planned move to a larger facility by the end of the year;[3] petitioner surely could not have expected that the Department would allow it to continue using its current, now-inadequate facility indefinitely while it proceeded in due course with its long-term plan for a wholesale move to new quarters – the timing of which would be determined not by student needs or compliance with regulation, but by petitioner's desire to avoid having to re-apply for approval as a new school pursuant to *N.J.A.C.* 6A:14-7.3(a), as it would if it opened a second location, rather than simply seek an amendment to its existing approval pursuant to *N.J.A.C.* 6A:14-7.3(a)2, as it could if it merely relocated.[4] Finally, while petitioner might well have been able to address many – or even most – of the "minor" violations identified during the Department's November 2, 2006 site inspection of 71 Sanford Street had it been provided with the ensuing evaluation report (Exhibit J-8), it is beyond comprehension that petitioner would believe it needed a specific directive from the Department before it was required to rectify obvious hazards and inadequacies and ensure that the fire and safety approvals required by rule were, in fact, in its possession; more importantly, the referenced "easy fixes" would still not have resulted in petitioner's current facility being adequate for the

[3] Testimony of Elaine Lerner, T1 at 27-28, 101; testimony of Shakuur Sabuur,. T2 at 135-47. These and all subsequent similar citations refer to transcripts of OAL hearings held on July 16, 2007 (T1), July 18, 2007 (T2) and July 19, 2007 (T3), respectively, followed by applicable page number(s).

[4] Testimony of Shakuur Sabuur, T3 at 28-30; Exhibit J-4.

number of students enrolled, so that the fundamental obstacle to petitioner's continued operation – and the essential basis for the Department's withdrawal of approval for reasons of student health and safety – would have remained.[5] Under these circumstances, the Commissioner finds particularly disingenuous petitioner's insistence that the Department forced closure upon it by making unreasonable and unrealistic demands. To whatever extent petitioner was "backed into a corner" by the purportedly narrow time frame within which it was required to present the Department with an approvable site, that dilemma was entirely of its own making: the direct result of its unilateral expansion of enrollment beyond approved capacity, together with its failure to clearly understand – and consequently to make diligent efforts to comply with – the standards required before using all or part of a facility as instructional space.[6]

Similarly, the Commissioner rejects any notion that petitioner could have been lulled into a sense of false security by the Department's December 6, 2006 communication. The memorandum in question (Exhibit J-3) plainly states that extending the lease on 71 Sanford Street beyond December 31, 2006 was not an option in view of the inadequacy of that facility for the number of students enrolled, and that – unless petitioner could identify an alternative facility by December 15, 2006 – sending districts would be notified of the need to arrange other programming for their students, and petitioner would be placed on conditional approval. Thus, petitioner was unequivocally put on notice that, absent identification of an acceptable location by the stated deadline,

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[5] Testimony of John Ferraro, T1 at 127; T2 at 86-88. See also Note 2 above.

[6] Indeed, the record shows petitioner to have acted with alacrity in this regard only upon revocation of its approval, despite being clearly obligated by law to maintain proper certificates. Testimony of Shakuur Sabuur, T2 at 131, 179-81; T3 at 26-27, 39-45, 48-53, 100-18. Testimony of John Ferraro, T2 at 75-77, 88. See also Initial Decision at 4, where the ALJ finds it "noteworthy that Dr. Sabuur's testimony did not reflect a clear understanding as to required approvals." (Initial Decision at 4).

it could accept no new students and its approval to operate in any capacity would end on December 31, 2006 – at which time current students who had been allowed to remain in the interim would be removed and re-placed by their sending districts. Petitioner, then, should not have been surprised when – upon expiration of the deadline without its having identified an approvable facility in which to educate students effective January 1, 2007 – the Department deemed it incapable of operating as a private school for the disabled after December 31, 2006 and revoked its approval as of that date pursuant to *N.J.A.C.* 6A:14-7.19(b)3.[7] That the Department's December 6, 2006 communication did not convey any sense of urgency to petitioner – and, indeed, was actually viewed by it as something of a reprieve[8] – speaks volumes about petitioner's failure to comprehend its own rights and obligations, as well as those of the Department, under laws governing private schools for students with disabilities.

Finally, the Commissioner does not agree with the ALJ that the letter of Lisa Nathari – received by the Department on October 13, 2006 (Exhibit R-1) – effectively initiated, with respect to facility issues, a complaint investigation against petitioner pursuant to *N.J.A.C.* 6A:14-9.2 so as to invoke the procedural requirements of that regulation. (Initial Decision at 21-22). On the contrary, the Commissioner perceives the letter's sole relevance to this matter to be the fact that the phone call preceding it served as the impetus for the Department's unannounced October 4, 2006 site visit to petitioner's premises to ascertain whether students were, as alleged, being transported to an unapproved facility in violation of law – the confirmation of which set into motion the chain of events ultimately leading to the action herein in dispute. Notwithstanding

[7] Testimony of Elaine Lerner, T1 at 52, 114-16.

[8] Testimony of Shakuur Sabuur, T2 at 179-81 and T3 at 112-15.

the further issues identified by Ms. Nathari in her letter, the Commissioner finds, as did the ALJ (Initial Decision at 22-23), that the Department did not revoke its approval of petitioner for reasons other than those stated in its memoranda of December 6, 2006 and December 15, 2006 (Exhibits J-3 and J-5) – reasons which, in the Commissioner's view, clearly permitted it to act as it did.

In conclusion, then, the Commissioner determines that – contrary to the conclusion of the ALJ – the Department has met its burden of demonstrating by a preponderance of evidence that its action to revoke petitioner's approval to operate as a private school for students with disabilities was both justified and lawful, and as such must be sustained. In so holding, the Commissioner stresses that the issue in this matter is not whether petitioner was well-intentioned or whether petitioner can now – or could have at some point after the Department's action – operate a school in compliance with regulation;[9] rather, the question is whether the Department's action was warranted under the circumstances and effectuated in accordance with applicable law. It is of no import that, as events transpired, petitioner made diligent efforts toward compliance once its approval was actually revoked, or that one of the alternate sites it had been developing became approvable a little more than two months after the Department's action; the fact remains that, at least as early as October 4, 2006, petitioner – as a result of its own unapproved expansion in enrollment – knowingly lacked a facility complying with applicable health and safety rules, and as of December 15, 2006, still could not demonstrate that its students would, by the end of the year or any date certain

[9] The record shows that petitioner was eligible to reapply for approval to operate as of February 21, 2007 (Exhibit R-7), but had not done so as of the date of hearing in this matter, despite the Department's March 15, 2007 reminder of such eligibility (Exhibit R-2). The record does not indicate if petitioner applied for approval subsequent to hearing.

immediately thereafter, be assured of the safe, educationally appropriate environment to which they were entitled by law. Faced with this situation, the Department could not have acted other than it did, and, indeed, would have failed in its own obligations had it permitted petitioner to continue operating beyond December 31, 2006.

Accordingly, for the reasons expressed herein, the Initial Decision of the OAL – recommending reversal of the Department's revocation of petitioner's approval as a private school for students with disabilities – is rejected, and the petition of appeal is dismissed.

IT IS SO ORDERED.[10]

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 5/16/08

Date of Mailing: 5/16/08

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1240-07
AGENCY DKT. NO. 1-1/07

ALL CAN EXCEL (A.C.E.) ACADEMY,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF SPECIAL EDUCATION PROGRAMS,

Respondent.

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

Sookie Bae, Deputy Attorney General, for respondent

(Anne Milgram, Attorney General of New Jersey, attorney)

Record Closed: November 1, 2007 Decided: March 13, 2008

BEFORE **RICHARD McGILL**, ALJ:

All Can Excel (A.C.E.) Academy (petitioner) challenges a determination by the Office of Special Education Programs in the New Jersey Department of Education (respondent) to revoke the approval issued to petitioner to operate a private school for students with disabilities. The Office of Special Education Programs advised petitioner of the revocation by memorandum dated December 15, 2006, and petitioner filed a verified petition along with a request for emergent relief with the Commissioner of Education on January 3, 2007.

The matter was transmitted to the Office of Administrative Law on January 8, 2007, for determination as a contested case. A hearing in regard to the application for emergent relief in the form of a stay was conducted on January 11, 2007, at the Office of Administrative Law in Newark, New Jersey. The application for a stay was denied by an Order of a Deputy Commissioner of Education dated January 19, 2007. The plenary hearing was conducted on July 16, 18 and 19, 2007, and the record closed on November 1, 2007, upon receipt of reply briefs.

ISSUES

The main issue in the proceeding is whether respondent has proven by a preponderance of the evidence that revocation of petitioner's approval to operate a private school for students with disabilities is warranted under the circumstances of this case. The reasons for the revocation are set forth in a memorandum dated December 15, 2006, which references a memorandum dated December 6, 2006. The first key point was that petitioner's lease was due to expire on December 31, 2006, with the result that the students would not have a school on January 2, 2007. The second key point was that petitioner's existing facility was unsafe for the provision of educational services to the students. The stated concerns were as follows: (1) there was insufficient educational space for the number of students and staff in the building; (2) petitioner was using two classrooms on the second floor of the building in which the school was located without a certificate of occupancy; and (3) potential fire hazards had been identified in several areas of the school including the second floor. As a result, extension of the lease for the current location was not a viable option.

The third key point was that the memorandum dated December 6, 2006, gave petitioner until December 15, 2006, to propose a new location for the school and obtain all necessary approvals. Further, if petitioner did not have an approved location by the close of business on December 15, 2006, sending districts would be notified of the need

to arrange other programming for their students and petitioner would be placed on conditional approval. Finally, as set forth in the memorandum dated December 15, 2006, petitioner failed to obtain a new facility by December 15, 2006, and therefore was incapable of operating as an approved private school for students with disabilities in accordance with applicable regulations. Accordingly, petitioner's approval was revoked as of December 31, 2006.

Petitioner disputes the ultimate factual assertions by respondent. Petitioner maintains first that there was no real possibility that the students would not have a school as of January 2, 2007, because petitioner received an extension on its lease until January 31, 2007, and could have received additional extensions as necessary. Second, with respect to safety concerns, petitioner contends that it would have corrected them promptly if respondent had complied with applicable regulations which required a written report to petitioner identifying any deficiencies. Third, petitioner argues that the terms of the warning letter dated December 6, 2006, were unreasonable in that it was impossible to complete construction and have various agencies conduct inspections and issue approvals within nine days.

Finally, the manner in which respondent handled the situation was fundamentally unfair. First, respondent did not comply with applicable regulations which contain provisions requiring that petitioner be given an opportunity to cure deficiencies. Second, the memorandum dated December 6, 2006, foreclosed the only viable option which was to give petitioner the opportunity to bring its facility at 71 Sanford Street into compliance with its existing approvals, while directing petitioner to do the impossible by finding an approved location in nine days. Third, the memorandum dated December 6, 2006, was unfair in that it warned petitioner only of a conditional approval and lulled petitioner into a false sense of security. In contrast, a warning of a revocation would have created a sense of urgency to correct any deficiencies. Fourth, there is reason to believe that the revocation was imposed for reasons that went beyond those set forth in the memoranda dated December 6, 2006, and December 15, 2006, and that petitioner was not given notice or an opportunity to be heard in regard to those other reasons.

FACTS

Respondent presented the testimony of Elaine Lerner, who is employed by respondent as an Education Program Development Specialist with the Office of Special Education Programs, and John Ferraro, who is employed by respondent as the Essex County School Business Administrator. Dr. Shakuur A. Sabuur is employed by petitioner as its director and principal and testified as its only witness.

It is noteworthy that Dr. Sabuur's testimony did not reflect a clear understanding as to required approvals, but otherwise all witnesses gave credible testimony as to the underlying facts. The factual issues in this case are whether the broader assertions in the memoranda dated December 6, 2006, and December 15, 2006, are true.

Based upon the evidence presented at the hearing, I **FIND** as follows:

1. In March 1999, petitioner received its initial approval to operate a private school for the disabled serving pupils with behavioral disabilities.

2. In February 2001, petitioner received approval to move its school to the most recent location at 71 Sanford Street in East Orange, New Jersey.

3. On or before October 27, 2006, petitioner received approval to operate eight classes for pupils with disabilities. The physical location for the school was the first floor of the building at 71 Sanford Street in East Orange. The first floor had eight classrooms.

4. Since the maximum number of pupils with disabilities per class is twelve in accordance with N.J.A.C. 6A:14-4.7(e), the limit for the entire school was ninety-six students.

5. There were five rooms on the second floor, but they were not approved for educational use as of the beginning of the 2006-2007 school year.

6. The students were receiving special education services in an out-of-district placement.

7. Dr. Sabuur planned to expand the school and operate it at two different locations. One location would be for grades K to 6, and the other would be for grades 7 to 12.

8. A building was purchased at 760 Clinton Avenue in Newark and was intended to serve grades K to 6.

9. Another building was purchased at 186 South Clinton Street in East Orange and was intended to serve grades 7 to 12.

10. On August 20, 2006, a fire at 71 Sanford Street resulted in smoke and water damage.

11. Initially, the East Orange Fire Department would not allow petitioner's personnel into the building.

12. After petitioner's personnel were allowed into the building, they worked over Labor Day weekend and got the building ready for the opening of school during the first week of September 2006.

13. Petitioner did not notify respondent of the fire and its aftermath.

14. In September 2006, petitioner had approximately 120 pupils.

15. Since there was not sufficient room at 71 Sanford Street, some pupils and staff were transported to the building at 760 Clinton Avenue in Newark.

16. The building at 760 Clinton Avenue lacked various required approvals including approval from respondent for use as a school.

17. A fire inspection was conducted on September 19, 2006, at 71 Sanford Street. A report indicates that there was a violation for storage in a front hallway obstructing a means of egress.

18. Petitioner had furniture in a hallway.

19. On September 28, 2006, respondent received a telephone call from Lisa Nathari, who was previously an employee of petitioner's school. Ms. Nathari had been terminated by Dr. Sabuur in or about March 2006.

20. Ms. Nathari stated that students attending All Can Excel Academy had been transported to any unapproved location by individuals using their private vehicles.

21. As a result of the telephone call, an unannounced visit was made to the site at 760 Clinton Avenue in Newark by Ms. Lerner, Judith Vasquez from the Office of Special Education Programs and Mark Lanzi, who is the Essex County Child Study Supervisor.

22. The building at 760 Clinton Avenue was not an approved site for a school.

23. There were five staff members instructing twenty-two elementary students. No administrator was present at 760 Clinton Avenue.

24. The team for the site visit then went to 71 Sanford Street, where they asked to speak with the administrator.

25. They were told that Dr. Sabuur was not on site, but he arrived within the hour.

26. Dr. Sabuur said that there was a problem with the number of students and that it was his plan to move the elementary school pupils to another building.

27. Dr. Sabuur took the team to 186 South Clinton Street and gave them a tour of the building. There were some construction workers but no teachers or children.

28. Dr. Sabuur stated that his lease at 71 Sanford Street would expire on December 31, 2006, but that he was confident that the building at 186 South Clinton Street would be ready in time for the move.

29. Ms. Lerner was concerned that the building would not be ready in time, because it was basically a shell, and she advised Dr. Sabuur that he should have a contingency plan.

30. By letter dated October 6, 2006, Roberta Wohle, the Acting Director of Office of Special Education Programs, directed petitioner to immediately cease utilization of 760 Clinton Avenue, because it was not an approved location.

31. Meanwhile, Essex County Business Administrator John Ferraro and Essex County Child Study Supervisor Mark Lanzi visited the second floor of petitioner's facility at 71 Sanford Street on October 5, 2006.

32. Later that day, Essex County Superintendent of Schools Anthony P. Marino sent a letter prepared by Mr. Ferraro to petitioner stating that two

of the four rooms on the second floor are appropriate for educational use and that the two other rooms have potential but need renovation.

33. Dr. Sabuur took this letter to mean that petitioner had approval to use the two rooms on the second floor that were determined to be appropriate for educational use.

34. On October 13, 2006, respondent received a five-page letter from Ms. Nathari, detailing multiple concerns related to petitioner.

35. A monitoring team led by Ms. Lerner conducted an unannounced visit to petitioner's facility at 71 Sanford Street on November 1, 2006.

36. All students who were previously at 760 Clinton Avenue in Newark were back at the facility at 71 Sanford Street.

37. Dr. Sabuur was present at the time of the visit, but Ms. Lerner did not have any conversation with him about facility issues at that time.

38. Mr. Ferraro visited 71 Sanford Street on November 2, 2006, to inspect the entire facility.

39. Mr. Ferraro completed a checklist with eighty items. For each item, there is a description followed by boxes entitled "Yes," "No" and "N/A." "Yes" indicates compliance, "No" reflects lack of compliance, and "N/A" means "not applicable."

40. For some items, 100 percent compliance is required; for others, eighty percent is satisfactory.

41. Mr. Ferraro found noncompliance with respect to nine items for which 100 percent compliance was required.

42. With respect to the other items, the compliance rate was less than eighty percent.

43. Some of the areas of noncompliance related to fire safety.

44. Mr. Ferraro observed that the school was very crowded, particularly the classrooms on the second floor.

45. The checklist is normally given to the owner of the building to correct the deficiencies.

46. Mr. Ferraro forwarded the checklist to the monitoring team. He did not forward the checklist to the owner for the building or to petitioner.

47. Correction of the deficiencies involved "easy fixes," a characterization to which Mr. Ferraro agreed on cross-examination.

48. Dr. Sabuur had construction workers at 760 Clinton Avenue and 186 South Clinton Street.

49. Workmen could have corrected all of the deficiencies at 71 Sanford Street in a day or two.

50. Petitioner had a certificate of occupancy for the first floor of 71 Sanford Street, but it was not in petitioner's name.

51. On November 2, 2006, petitioner did not have a fire certificate because of furniture in the hallway.

52. During the monitoring visit, Dr. Sabuur stated that he intended to move the school to another location by the beginning of the new year.

53. Dr. Sabuur and Mr. Ferraro drove to 186 South Clinton Street in East Orange.

54. The building was still under construction. There was no sheetrock on the walls, there was an elevator shaft with no elevator, and the stairwells had no steps.

55. Mr. Ferraro did not think that the building would be ready by the beginning of January 2007.

56. By memorandum dated November 21, 2006, to Mr. Ferraro, the monitoring team noted that Dr. Sabuur planned to move the school due to the expiration of the lease on December 31, 2006, that the school would not have an approved alternate site by that time and that students would not have a school program at the beginning of January 2007. The memorandum requested assistance in gathering information related to petitioner's facilities from local officials.

57. The memorandum requested the following: (1) a report from the East Orange building inspector concerning the second floor at 71 Sanford Street; (2) a comprehensive report from the East Orange fire inspector listing items of noncompliance at the site; (3) a status report concerning the facility at 186 South Clinton Street; and (4) inspection reports from the Newark building inspector and fire inspector regarding 760 Clinton Avenue in Newark.

58. Ms. Lerner did not consider the site at 71 Sanford Street to be suitable for continued use for five reasons as follows: (1) petitioner was losing its lease with the result that there was not going to be a building that had received approval available for the students; (2) there were concerns

about a fire and with respect to the current fire inspection; (3) tools were found in the facility; (4) the second floor did not have a certificate of occupancy or a fire inspection certificate and had not been approved for use by respondent; and (5) Dr. Sabuur stated that he felt that the current location was not adequate to meet the students' needs.

59. In response to the memorandum dated November 21, 2006, Mr. Ferraro contacted local officials in East Orange and Newark.

60. As of November 27, 2006, the second floor at 71 Sanford Street had not been inspected for issuance of a certificate of occupancy for educational use.

61. A fire inspector from East Orange went back to 71 Sanford Street, but the situation was unchanged with respect to the furniture in the hallway.

62. The work on the building at 186 South Clinton Street was not nearly complete, and the facility would not be ready to serve as an educational site as of January 1, 2007.

63. The building at 760 Clinton Avenue in Newark had a certificate of occupancy for business use as a training center and administrative office.

64. Mr. Ferraro forwarded his response to Ms. Lerner.

65. The site at 71 Sanford Street would be suitable for continued educational use, if petitioner corrected the problems.

66. Dr. Sabuur felt that the site was no longer adequate, because he wanted to move to a larger facility.

67. Mr. Ferraro never discussed a lease extension with Dr. Sabuur.

68. Acting Director of the Office of the Special Education Programs Roberta Wohle sent a memorandum dated December 6, 2006, to Dr. Sabuur.

69. The memorandum stated that it had been brought to the Acting Director's attention that petitioner intended to move its school from its approved location at 71 Sanford Street in East Orange by December 31, 2006, to an unspecified location due to expiration of the lease. The memorandum expressed concern that the students would not have a school program on January 2, 2007.

70. The memorandum noted that extending the lease at the current location was not a viable option because several facility concerns had been identified by respondent and the East Orange fire inspector. These concerns included insufficient educational space for the number of students and staff in the building as well as the use of the second floor for which petitioner did not have a certificate of occupancy. Further, potential fire hazards were identified in several areas of the school including the second floor.

71. The memorandum further stated that petitioner must notify the Superintendent of Schools of the proposed relocation to schedule a facility review. The memorandum advised Dr. Sabuur that any proposed building must receive written approval by the county office in which the facility is located before any students may attend the new location.

72. Finally, the memorandum advised Dr. Sabuur that if the school did not have an approved location by the close of business on December 15, 2006, sending districts would be notified of the need to arrange other programming for their students and that petitioner would be placed on conditional approval.

73. In response to this memorandum, Dr. Sabuur sent a letter dated December 11, 2006, to Acting Director Wohle, identifying four sites for inspection including 760 Clinton Avenue in Newark, with a copy to the Essex County Acting Superintendent of Schools.

74. Two of the sites were dismissed by Ms. Lerner, because they were to be used by a charter school which was in its planning year. The buildings were not ready as of December 2006, and as of July 2007, the charter school still did not have all of the approvals for these buildings.

75. As of December 14, 2006, construction work was ongoing at 760 Clinton Avenue, and the building was not ready to open by the next day, December 15, which was the deadline.

76. Ms. Lerner treated the fourth site as withdrawn based on comments by Dr. Sabuur.

77. Mr. Ferraro visited 760 Clinton Avenue on December 14, 2006.

78. Mr. Ferraro had a discussion with Dr. Sabuur, who said that he was getting ready to open both 760 Clinton Avenue and 186 South Clinton Street in January 2007. As of December 14, 2006 both buildings were undergoing renovations.

79. On December 14, 2006, Mr. Ferraro sent a memorandum to Acting Director Wohle. Mr. Ferraro mentioned that petitioner did not have a certificate of occupancy for the second floor or a fire inspection certificate for 71 Sanford Street.

80. Mr. Ferraro listed a variety of other concerns mainly related to fire safety and overcrowding.

81. Late on December 15, 2006, Acting Director Wohle e-mailed a memorandum to Dr. Sabuur. The memorandum stated that as of 4:15 p.m. petitioner still did not have an approved location. As a result, County Offices of Education were being directed to contact each local school district in writing to advise them of the need to arrange alternate placements for their students.

82. The memorandum further stated that petitioner's current facility was determined to be unsafe for the provision of educational services to children. Further, petitioner had failed to obtain a new facility by December 15, 2006, as directed in the memorandum dated December 6, 2006. Since petitioner did not have an approved facility, petitioner's approval was revoked as of December 31, 2006.

83. Meanwhile, Dr. Sabuur did not give up on petitioner's facility at 71 Sanford Street.

84. By letter dated December 15, 2006, petitioner's landlord confirmed an agreement with Dr. Sabuur to extend petitioner's lease to January 31, 2007.

85. By memorandum dated December 18, 2006, the interim Essex County Superintendent of Schools advised school districts that petitioner's approval to operate a private school for students with disabilities was being revoked, because petitioner failed to obtain a new location for its school. As a result, all school districts with students placed with petitioner needed to immediately take all steps necessary to secure an alternative placement for each student.

86. On December 19, 2006, a meeting was held among Senator Ronald Rice, Dr. Sabuur and Interim Essex County Superintendent of Schools Thomas Dowd.

87. At the meeting, Mr. Dowd presented a table identifying areas of critical concern that led to respondent's decision to revoke petitioner's approval.

88. The table contains three columns entitled "Facility," "Program" and "Personnel."

89. The column entitled "Facility" contains sixteen items and generally corresponds to the concerns mentioned above in regard to this proceeding.

90. The columns entitled "Program" and "Personnel" contain fourteen and ten items, respectively. The items in these columns were not mentioned in this proceeding aside from the letter from Ms. Nathari. For example, an item described as "Non-compliance/non-sectarian program" is uniquely suggestive of the letter from Ms. Nathari, who claimed that she was terminated because she converted from Islam to Christianity.

91. Petitioner's facility at 71 Sanford Street was re-inspected on December 22, 2006, and a fire certificate reflecting satisfactory compliance was issued on that date.

92. A certificate of occupancy for educational use was issued for 71 Sanford Street including the second floor with petitioner as the tenant.

93. Despite Dr. Sabuur's best efforts to have the certificate of occupancy issued in December 2006, it was issued on January 2, 2007.

94. By memorandum dated January 3, 2007, Mr. Dowd requested confirmation from all school districts that their students previously enrolled in petitioner's school had been provided with alternative placements.

95. Petitioner did not have any students after the beginning of January 2007.

96. On January 18, 2007, petitioner received a certificate of occupancy for educational use for the building at 760 Clinton Avenue in Newark.

97. An inspection team from the Essex County Office of Education toured petitioner's facility at 760 Clinton Avenue in Newark on January 31, 2007.

98. The team completed a report entitled "Evaluation of School Buildings Checklist Report (Indicator 7.6)," which is the same form as was completed by Mr. Ferraro on November 2, 2006, in regard to 71 Sanford Street in East Orange.

99. By letter dated February 7, 2007, Mr. Dowd advised Dr. Sabuur that based upon the inspection the facility at 760 Clinton Avenue in Newark was noncompliant.

100. Mr. Dowd attached a copy of the Evaluation of School Buildings Checklist Report (Indicator 7.6) to his letter dated February 7, 2007.

101. A certificate of inspection for fire safety was issued to petitioner for its facility at 760 Clinton Avenue in Newark on February 9, 2007.

102. After a second inspection of petitioner's facility at 760 Clinton Avenue, Mr. Dowd advised Dr. Sabuur by letter dated February 21, 2007, that the site was now compliant.

103. By letter dated March 15, 2007, Acting Director of the Office of Special Education Programs Roberta Wohle advised that with overall approval for use of the facility at 760 Clinton Avenue in Newark as a school building, petitioner could apply for approval to operate a private school for students with disabilities.

104. A Life Hazard Use Certificate of Registration was issued on March 20, 2007, for petitioner's facility at 760 Clinton Avenue in Newark.

105. As of the hearing in this matter, petitioner had not applied for approval to operate a private school for students with disabilities.

LAW AND ANALYSIS

Respondent's memorandum dated December 15, 2006, revoking petitioner's approval to operate a private school for students with disabilities did not cite any legal authority for that action other than a reference to "applicable resolutions." The letter mentioned, however, that petitioner's facilities had been determined unsafe for the provision of educational services to students. The regulation which is applicable to this type of situation is N.J.A.C. 6A:14-7.10(b)3, which states that the Department of Education may immediately remove program approval when it is determined that the health, safety or welfare of the students is in danger.

In the case of a revocation, the burden of proof is on the agency. In re Suspension or Revoc. License of Kerlin, 151 N.J. Super. 179, 188 (App. Div. 1977). The standard of proof is a fair preponderance of the believable evidence. In re Polk License Revocation, 90 N.J. 550, 560 (1982).

The revocation letter dated December 15, 2006, and the December 6, 2006, memorandum referenced therein, mention several potential dangers in regard to the students' health, safety or welfare. One major concern is that the students would not have a school as of the beginning of January 2007. This concern presumably relates to the welfare of the students. Other concerns are insufficient space for the number of students and staff and the use of the second floor for which petitioner did not have a certificate of occupancy. Finally, there were concerns related to fire safety in the building.

As support for the concern that petitioner's students would not have a school after December 31, 2006, respondent relies on statements by Dr. Sabuur that petitioner's lease at 71 Sanford Street in East Orange was scheduled to expire on that date. Respondent seems to equate expiration of the lease with a circumstance where petitioner would actually vacate the premises by December 31, 2006. But there is no indication that the landlord was pressuring petitioner to leave the building by December 31, 2006, and there is nothing unusual about a renewal or an extension of a lease. The impetus to leave the building came from Dr. Sabuur, who wanted to expand the school to two different buildings. In fact, petitioner received an extension of the lease to January 31, 2007, and additional extensions were possible. Under the circumstances, it is simply not true that petitioner had to vacate the building by December 31, 2006.

According to the memorandum dated December 6, 2006, extension of the lease at 71 Sanford Street was not a viable option due to three concerns as follows: (1) insufficient educational space for the number of students and staff; (2) the use of the second floor which had safety concerns but no certificate of occupancy; and (3) fire safety concerns. The concerns related to the sufficiency of space and the use of the second floor are closely related. Petitioner's building at 71 Sanford Street had eight classrooms on the first floor and five rooms on the second floor. Two of the rooms on the second floor were used as classrooms. Petitioner has a total of 120 students in this space.

Petitioner's approval provides for eight classrooms, which by regulation could have twelve pupils each for a total of ninety-six students. It appears that by reducing the number of students to ninety-six, petitioner could eliminate the need for use of the second floor and resolve the problem with insufficient space. Respondent did not explain why petitioner could not resolve these problems by simply bringing itself into compliance with its existing approvals.

Another concern related to fire safety. The two sources for this concern are the fire inspection on September 19, 2006, which cited petitioner for storage in a hallway, and Mr. Ferraro's monitoring evaluation on November 2, 2006.

Assuming that all fire safety matters must be satisfactorily resolved, there are still several difficulties which diminish the significance of respondent's concerns as a basis for revocation. First, as discussed further below, respondent is supposed to advise the educational agency of deficiencies and provide an opportunity to cure them in cases where the problems were detected as the result of monitoring or a complaint investigation. Here, Mr. Ferraro completed an evaluation checklist reflecting concerns as to fire safety, but respondent did not send a copy to petitioner. It is unreasonable to hold the deficiencies against petitioner, when it was not given a copy of the evaluation checklist. Further, all of the deficiencies required nothing more that "easy fixes," which workers could have completed in a day or two. Finally, petitioner obtained a fire certificate evidencing satisfactory compliance by December 22, 2006.

It follows that the concerns related to petitioner's facility were not insurmountable obstacles to continued use of the facility on an interim basis. In sum, petitioner could have remained at 71 Sanford Street as an interim measure by bringing itself into compliance with its existing approval and completing "easy fixes" in regard to the deficiencies related to fire safety.

In the memorandum dated December 6, 2006, the Acting Director of the Office of Special Education Programs directed petitioner to notify Mr. Dowd, the Essex County Interim Superintendent of Schools, of the proposed new location of the school to schedule a facility review. The Acting Director noted that the proposed building must have written approval before any students may attend the new location. Finally, if the school does not have an approved new location by December 15, 2006, petitioner will be placed on conditional approval.

The memorandum dated December 6, 2006, in effect required petitioner to complete construction and/or renovations at its proposed new facility, have inspections

completed and approvals issued, some of which were sequential in nature, within nine days. In response, petitioner focused on the facility at 760 Clinton Avenue in Newark. The building and electrical approvals were issued on January 17, 2007, and then the certificate of occupancy for educational use was issued on January 18, 2007. The inspection for approval of the building for use as a school took place on January 31, 2007. By letter dated February 7, 2007, Mr. Dowd advised petitioner that the facility was noncompliant, but he attached a copy of the evaluation checklist identifying the areas of noncompliance. The fire certificate of inspection was issued on February 9, 2007. The date of the second educational inspection is not specified, but Mr. Dowd sent petitioner a letter dated February 21, 2007, advising that the building was compliant and that the facility was approved for use as a school building.

This sequence of events is indicative of a realistic time frame for approval of petitioner's facility at 760 Clinton Avenue for use of a school building. It follows that the nine-day time limit that respondent gave petitioner to have its building approved for use as a school was not even close to being realistic. This sequence of events also shows the importance of the checklist to have deficiencies corrected promptly.

Petitioner maintains that the process related to the revocation was unfair in several respects. First, respondent did not comply with provisions contained in regulations related to monitoring and complaint investigations in that respondent did not advise petitioner of deficiencies and provide an opportunity to cure them. Second, the memorandum dated December 6, 2006, was unfair in that it foreclosed the only viable option, which was to bring the then-current facility at 71 Sanford Street into compliance with existing approvals, while directing petitioner to undertake the impossible task of having an approved new location by December 15, 2006. Third, the memorandum dated December 6, 2006, warned that failure to have an approved location by December 15, 2006, would result in a conditional approval, which is a relatively mild action, but the memorandum dated December 15, 2006, imposed a revocation, which is much more severe. Fourth, there are indications that the revocation was imposed for reasons that went beyond those mentioned in the memoranda dated December 6,

2006, and December 15, 2006, and that petitioner has not been given notice and an opportunity for a hearing in regard to these other reasons.

An administrative agency in determining how best to effectuate public policy must apply principles of fundamental fairness. State, Dep't of Envtl. Protection v. Stavola, 103 N.J. 425, 436 (1986). Principles of fundamental fairness extend beyond the requirements of the Constitution. Ibid. In making a determination, an agency must conscientiously concern itself with and accommodate the rights and interests of affected individuals and genuinely account for the individualized effect of the proposed action. Ibid. The determination whether an agency has observed principles of basic fairness requires an examination of the facts of each case. Ibid.

Respondent has an obligation to monitor programs and services in accordance with N.J.A.C. 6A:14-9.1(a). After the monitoring process is completed, a report must be sent to the public or private educational agency. N.J.A.C 6A:14-9.1(c). If a public or private educational agency receives a report that indicates noncompliance, it shall develop an improvement plan to be submitted to respondent for approval. N.J.A.C. 6A:14-9.1(d). Similarly, an educational agency against which a complaint is directed shall receive an opportunity to respond to the complaint. N.J.A.C. 6A:14-9.2(c)4. The substance of these regulations is that educational agencies will be given an opportunity to correct deficiencies.

Here, the letter from Ms. Nathari amounted to a complaint. Nonetheless, petitioner was not given a copy of her letter. In addition to denying petitioner the opportunity to deal with specific items, this omission prevented petitioner from being aware of the scope and gravity of the accusations in the letter. Further, petitioner was not given a copy of the evaluation checklist, as is customary, from the monitoring on November 2, 2006, reflecting fire and other safety deficiencies. This omission denied petitioner the opportunity to complete the "easy fixes" that were necessary to correct these deficiencies. In view of the severe action taken against petitioner, respondent

should have complied with the spirit of these regulations as a matter of fundamental fairness.

Petitioner's second concern is that the memorandum dated December 6, 2006, foreclosed its only viable option, which was to remain at its then-current location on an interim basis, while directing petitioner to do the impossible by coming up with a new approved location by December 15, 2006. As set forth above, petitioner had a viable option to remain at its then-current facility by bringing itself into compliance with its existing approvals. In contrast, it was impossible for petitioner to take all the steps necessary to have a new approved location by December 15, 2006. By foreclosing petitioner's only viable option and directing petitioner to do the impossible, respondent failed to satisfy its obligation to conscientiously concern itself with the interests of all parties and consider the effects of its actions.

Petitioner's third concern as set forth above is that the memorandum dated December 6, 2006, warned of a conditional approval. However, the memorandum dated December 15, 2006, imposed a revocation.

When an approved private school for students with disabilities is not in compliance with a requirement, respondent may place the school on conditional approval status. N.J.A.C. 6A:14-7.10(b)1. An approved private school which is issued a conditional approval status may not accept new students. N.J.A.C. 6A:14-7.10(b)li. Both parties were well aware that with 120 students, petitioner was not in a position to take more students. Under the circumstances, conditional approval status was a very mild action which would not likely instill a sense of urgency to deal with the situation. Instead, petitioner was lulled into a false sense of security. Again, respondent failed to satisfy its obligation to consider in a conscientious manner the impact of its actions on petitioner.

Petitioner's fourth concern is that respondent revoked petitioner's approval for reasons that went far beyond those set forth in the memoranda dated December 6, 2006, and December 15, 2006. More specifically, the concerns are that respondent

revoked petitioner's approval based on unproven accusations in Ms. Nathari's letter from October 2006 and from the monitoring on November 1 and 2, 2006. This concern is supported by a letter dated December 19, 2006, from Mr. Dowd stating that an attached table identifies critical concerns that led to the decision by respondent to revoke petitioner's approval.

The table lists forty areas of noncompliance including sixteen for the facility, fourteen for the program and ten for personnel. Approximately half of these items can be found in Ms. Nathari's letter. Even if all of the areas of noncompliance were identified or confirmed by the monitoring on November 1 and 2, 2006, the fact remains that the Interim Essex County Superintendent of Schools stated that forty areas of noncompliance led to the revocation, while only approximately seven of these items are mentioned as the reasons in the memoranda dated December 6, 2006, and December 15, 2006.

While petitioner's concerns are understandable under the circumstances, they do not warrant the conclusion that the Acting Director of Office of the Special Education Programs acted for reasons other that those set forth in the memoranda dated December 6, 2006, and December 15, 2006. Nonetheless, based on the other three concerns raised by petitioner, I **CONCLUDE** that the process in regard to the revocation of petitioner's approval did not satisfy the requirement of fundamental fairness.

Based upon all of the above, I **FURTHER CONCLUDE** that respondent has failed to prove by a preponderance of the evidence that the circumstances warrant a revocation of petitioner's approval to operate a school for students with disabilities. Accordingly, it is **ORDERED** that the revocation of petitioner's approval to operate a private school for students with disabilities is reversed.

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

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

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

Mar. 13, 2008
DATE

RICHARD MCGILL, ALJ

Date Received at Agency:

3-18-08

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

MAR 18 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

dh

APPENDIX

WITNESS LIST

For petitioner:

Shakuur A. Sabuur

For respondent:

Elaine Lerner
John Ferraro

EXHIBIT LIST

J-1	Letter dated October 6, 2006, from Roberta Wohle to Dr. Shakuur Sabuur	Evidence
J-2	Memorandum dated November 21, 2006, from All Can Excel Monitoring Team to John Ferraro	Evidence
J-3	Memorandum dated December 6, 2006, from Roberta Wohle to Shakuur Sabuur	Evidence
J-4	Letter dated December 11, 2006, from Shakuur A. Sabuur	Evidence
J-5	Memorandum dated December 15, 2006, from Roberta Wohle to Shakuur Sabuur	Evidence

J-6	Memorandum dated December 18, 2006, from Thomas J. Dowd to Chief School Administrators	Evidence
J-7	Memorandum dated January 3, 2007, from Thomas J. Dowd to Participating Superintendents	Evidence
J-8	Evaluation of School Buildings, Indicator 7.6, dated November 2, 2006	Evidence
J-9	Letter dated February 7, 2007, from Thomas J. Dowd to All Can Excel Academy with attached Evaluation of School Buildings, Indicator 7.6, dated January 31, 2007	Evidence
J-10	Letter dated January 19, 2007, from Ronald C. Hunt to Melanie M. Brookes	Evidence
P-1	Letter dated July 11, 2006, from Anthony P. Marino to Linda H. Mitchell	Evidence
P-2	Letter dated August 30, 2006, from Anthony P. Marino to Linda H. Mitchell	Evidence
P-3	Letter dated October 5, 2006, from Anthony P. Marino to Dr. Shakuur Sabuur	Evidence
P-4	Fire Inspection Certificate issued December 22, 2006	Evidence

P-5	Certificate of Inspection dated October 3, 2006, for heating, ventilation and air conditioning (HVAC) at 760 Clinton Avenue, Newark, NJ	Evidence
P-13	Certificate of Continued Occupancy dated January 2, 2007, for 65-75 Sanford Street, East Orange	Evidence
P-14	Certificate of Occupancy dated January 18, 2007, for 760 Clinton Avenue, Newark	Evidence
P-15	Fire Certificate of Inspection issued February 9, 2007, for 760 Clinton Avenue, Newark	Evidence
P-16	Letter dated February 21, 2007, from Thomas J. Dowd to All Can Excel Academy	Evidence
P-17	Life Hazard Use Certificate of Registration issued March 20, 2007, for 760 Clinton Avenue, Newark	Evidence
P-19	List entitled "ACE Academy Items Requested by Monitoring"	Evidence
P-20	Letter dated December 15, 2006, from Hamilton V. Bowser, Sr. to Shakuur Sabuur	Evidence

R-1	Letter received October 13, 2006, from Lisa Nathari to New Jersey Department of Education, Office of Special Education Programs	Evidence
R-2	Letter dated March 15, 2007, from Roberta Wohle to Dr. Shakuur Sabuur	Evidence
R-3	Memorandum dated December 14, 2006 from John Ferraro to Roberta Wohle	Evidence
R-4	Type-written notes of John Ferraro dated November 27, 2006	Evidence
R-5	Letter dated December 19, 2006, from Thomas J. Dowd to Senator Rice	Evidence
R-6	Letter dated March 3, 1999, from Cecelia Downey to Toni Denson	Evidence
R-7	Letter dated February 21, 2001, from Anthony P. Marino to Shakuur Sabuur	Evidence
R-8	Information dated November 3, 2006, concerning All Can Excel (A.C.E.) as approved in-state private school for the disabled	Evidence
R-9	Violation notice from inspection of 71 Sanford Street	Evidence

231-08

OAL DKT. NO. EDU 3568-06
AGENCY DKT. NO. 384-12/05

ELAINE GECHTMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 5/19/08

Date of Mailing: 5/20/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3568-06

AGENCY DKT. NO. 384-12/05

ELAINE GECHTMAN,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,

Respondent.

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

Karen A. Murray, Esq., for respondent

Record Closed: April 2, 2008 Decided: April 3, 2008

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

This matter concerns the appeal of petitioner asserting respondent failed to pay full salary without loss of sick time for injury sustained in the course of employment. Upon receipt of petitioner's hearing request, the Department of Education transmitted this matter to the Office of Administrative Law ("OAL") on March 29, 2006, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. On April 17, 2006, it was determined that this matter should be placed on the inactive list pending the Workers' Compensation claim.

On April 2, 2008, the parties submitted a Settlement Agreement as well as the Board resolution, which is attached and fully incorporated herein.

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

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

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

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

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

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

April 3, 2008
DATE

BARRY N. FRANK, ALJ

Date Received at Agency:

4-9-08

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

APR 9 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

The Murray Law Firm, LLC
3 Revmont Drive
Suite 318
Shrewsbury, New Jersey 07702
Attorneys for Respondent Elizabeth Board of Education

2008 APR -2 A 9:14
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

ELAINE GECHTMAN, Petitioner, v. ELIZABETH BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY/OFFICE OF ADMINISTRATIVE LAW OAL DKT. NO.: EDUOR 03568-2006N AGENCY DKT. NO.: 384-12/05 SETTLEMENT AGREEMENT

SETTLEMENT AGREEMENT

Petitioner **ELAINE GECHTMAN** (E.G.) hereby agrees, with the Respondent, the **ELIZABETH BOARD OF EDUCATION** (the "Board"), to settle the above-referenced matter as follows:

1. Respondent shall reinstate to Petitioner, E.G., a total of forty (40) paid sick days for sick days utilized on the following dates:

October 6, 7, 11, 12, 14, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, and 31, 2005
November 1, 2, 3, 4, 7, 8, 9, 14, 15, 16, 17, 18, 21, 22, 23, 28, 29 and 30, 2005
December 1, 2, 5, 6, 7 and 8, 2005.

2. The parties agree that this settlement shall not constitute any admissions relative to this case by either party.

3. Petitioner, E.G., agrees that this Settlement resolves any and all claims that she had, or may have had against Respondent relative to any issue raised in or related to this matter except for the pending Worker's Compensation action between the parties.

4. Petitioner, E.G., agrees to waive any rights she had or may have had to file any other grievance, complaint, petition or charge in any court of law or administrative agency, including, but not limited to the Commissioner of Education; Office of Administrative Law; the Public Employment Relations Commission, etc., relative to any issues or potential issues that arose or could have arisen during the time period that Petitioner incurred and was treated for the injuries that occurred in October 2005, with the exception of the pending Worker's Compensation action between the parties.

5. Petitioner, E.G., hereby waives any claims for compensatory damages, interest, attorney fees, costs of suit and/or any other forms of relief in relation to the injuries that occurred in October 2005, with the exception of the pending Worker's Compensation action.

6. Petitioner, E.G., agrees that she has entered into this Settlement Agreement voluntarily and without coercion.

7. Petitioner, E.G., agrees that this settlement fully resolves, with prejudice, all of the issues and/or claims raised in Docket No. EDUOR 03568-2006N; Agency Docket No. 384-12/05.

8. Petitioner, E.G., agrees that she has been fully and fairly represented by legal counsel throughout this proceeding.

9. All parties mutually agree and enter into the terms contained in this Settlement Agreement.

10. This Agreement shall not be precedential with respect to any similar claims raised against the Elizabeth Board of Education.

11. All parties agree and acknowledge that the Settlement Agreement herein embodies the parties' full understanding of the terms of the parties' Settlement.

12. This Settlement Agreement may only be modified in a writing signed by all the parties.

13. All parties hereby agree that the terms of this Settlement Agreement are binding upon all parties, their heirs and their assigns.

ELAINE GECHTMAN

Elaine Gechtman
Petitioner
Dated: 2-29-08

ELIZABETH BOARD OF EDUCATION

Harold E. Kennedy, Jr.
Board Secretary/Sch. Business Admin.
Dated:

BERGMAN & BARRETT

Michael T. Barrett, Esquire
Counsel for Petitioner

Dated: 3-3-08

THE MURRAY LAW FIRM, LLC

Karen A. Murray, Esquire
Counsel for Respondent, Elizabeth Board of Education
Dated: 3/19/08

RESOLUTION
(Elaine Gechtman)

WHEREAS, the Elizabeth Board of Education and Petitioner, Elaine Gechtman, have discussed resolution of a dispute before the Commissioner of Education and the Office of Administrative Law (OAL) Docket No. EDU 3568-06N; Agency Reference No. 384-12/05; and,

WHEREAS, in the interest of cost effectiveness and judicial economy, the parties have agreed to resolve the above-referenced case, with prejudice; and,

NOW, THEREFORE, BE IT RESOLVED, that the Board hereby agrees to accept the Confidential Settlement Agreement on file with the Board Secretary.

Elizabeth, New Jersey

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD MARCH 19, 2008

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary

232-08

B.G., on behalf of minor child, B.G., III,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Pro se petitioner initially sought emergent relief to have disciplinary charges against his son – B.G., III – dismissed, and to have a Child Study Team assessment and related development of an Individual Education Program to address B.G.'s needs; he subsequently amended his petition to request monetary compensation for, *inter alia*, the expenses of childcare and possible future attorney fees. An emergent relief hearing was held, at which the ALJ determined that certain of petitioner's initial issues had been mooted by the Board's actions prior to the hearing date, and others were not conducive to determination on an emergent basis; the ALJ denied the application for emergent relief. Subsequently, the Board moved to dismiss the petition for failure to state a claim upon which relief could be granted.

The ALJ found that the Commissioner has no statutory authority to grant reimbursements for costs and legal fees, and the remaining issues in the petition were determined to be moot. Accordingly, the ALJ recommended dismissal of the petition in its entirety, with prejudice.

Upon a full and independent review, the Commissioner adopted the Initial Decision as the final decision in this matter. The petition was dismissed.

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

May 20, 2008
May 21, 2008 Mailed

OAL DKT. NO. EDU 3036-08
AGENCY DKT. NO. 40-1/08

B.G., on behalf of minor child, B.G., III,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon a full and independent review, the Commissioner determines that summary decision is appropriately granted to the Board as she concurs with the Administrative Law Judge that there is no legal authority for petitioner to recover damages or legal fees in this forum, and the remaining issues comprising the instant petition of appeal have previously been rendered moot.

Accordingly, the recommended decision of the OAL is adopted for the reasons articulated therein and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 5/20/08

Date of Mailing: 5/21/08

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 03036-08
AGENCY DKT. NO. 40-1/08

B.G., ON BEHALF OF MINOR CHILD,
B.G., III,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,

Respondent.

B.G., pro se, for petitioner

Marc H. Zitomer, Esq., for respondent (Schwartz, Simon, Edelstein, Celso & Kessler, LLC, attorneys)

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

Record Closed: April 7, 2008 Decided: April 25, 2008

STATEMENT OF THE CASE

Petitioner B.G. o/b/o B.G. III., (BG) a minor child has petitioned the Commissioner of Education (Commissioner), pursuant to N.J.A.C. 6A:3-1.1 et. seq., for an order (1) dismissing disciplinary charges against BG because the procedural requirements for short and long term suspensions and expulsion were allegedly not

followed; (2) directing that BG be immediately re-admitted to school; (3) directing that BG be immediately referred to an East Orange Board of Education Child Study Team (CST) for proper assessment and development of an Individual Education Program if necessary; and (4) directing that BG's educational program not be changed prior to the completion of the CST evaluation and its recommendation. In his amended petition, petitioner asks for an additional remedy of monetary compensation of $1000 for expenses for childcare and related expenses, loss of wages and for attorney fees for possible future litigation incurred as a result of the alleged negligence of Director of Educational Support Services Alexis Colander.

PROCEDURAL HISTORY

On January 25, 2008, petitioner filed a petition with the Commissioner seeking emergent relief. On February 1, 2008, the Director of the Bureau of Controversies and Disputes of the New Jersey Department of Education notified petitioner that the matter would not proceed on an emergent basis until the requisite submission is made addressing the standards set forth in N.J.A.C. 6A:3-1.6. The Director thereafter transmitted the matter on February 14, 2008, to the Office of Administrative Law (OAL), pursuant to N.J.S.A. 52:14B-1 to –15 and N.J.S.A. 52:14F-1 to –13, for determination as a contested case. Petitioner filed an amended petition on February 15, 2008. I heard the application for emergent relief on February 19, 2008. I issued an Emergency Order on February 20, 2008, denying the application for emergent relief and concluding that certain issues were moot and the others were not conducive to determination on an emergent basis. On March 27, 2008, the Commissioner adopted my Emergency Order as the final decision in this interim matter.

On March 27, 2008, the Board filed Notice of Motion to Dismiss in Lieu of Answer to Petition of Appeal and moved for an Order dismissing the outstanding issues in the petition for failure to state a claim for which relief can be granted. As the OAL rules do not provide for a motion for dismiss, this application is being treated as a Motion for Summary Decision under N.J.A.C. 1:1-12.5. B.G. has filed no responding affidavit setting forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. N.J.A.C. 1:1-12.5 (b).

BG is seven years old and had been in the first grade at the George Washington Carver School when he was suspended. He currently attends the Whitney Houston Academy School in the District.

In the amended petition B.G. contended:

1. During BG's third suspension for exhibiting violent and disruptive behavior, the Board assigned BG to home instruction and placed him on long-term suspension/expulsion pending the completion of a CST evaluation.
2. The Board violated BG's due process rights by failing to meet the regulatory procedural requirements for a long-term suspension regarding notices and hearings.
3. Prior to BG's third suspension, petitioner requested a CST evaluation, which the Board did not process prior to BG's removal from school, and the evaluation has not started despite the passage of two months.
4. The Board's decision to provide BG with home instruction is denying his right to an education because it does not cover the State's core curriculum requirements, is not comparable to the education he was receiving prior to his suspension, and did not start until over one month after the last suspension.
5. The Board knew that the CST evaluation could take up to ninety days to complete. By making its completion a condition of BG's readmission, it knew he would be out for over thirty days. The Board made this decision without developing an Individualized Program Plan.

   (See amended petition)

At the emergent relief hearing of February 19, 2008, Counsel for the Board represented on the record that: (1) based on a psychiatric evaluation that concluded that BG was not a danger, the Board was offering to immediately return BG to a regular first grade classroom at a school of petitioner's choice where BG would receive the same educational program he had been receiving subject to the results of a CST evaluation (B.G. accepted this offer and requested placement of BG at the Whitney Houston School, and arrangements were made for BG to report to that school on

February 20, 2008, and he currently attends school there); (2) if, in petitioner's discretion, BG has fallen behind in the first grade program as a result of the period of home schooling, the Board would provide BG with a period of prospective home schooling in addition to the resumption of his attendance in a regular classroom; (3) the CST has been conducting an evaluation of BG on an expedited basis and has completed psychiatric, psychological and social history assessments. The final neurological assessment was scheduled for February 22, 2008, after which the CST would expedite the completion of its evaluation (Petitioner expressed his satisfaction with the current activity of the CST); and (4) there is no suspension action pending against BG.

In view of the Board's actions and representations and B.G.'s agreement with those actions on February 19, I determined that those issues were moot. (See Emergency Order of February 20, 2008).

The remaining relief demanded by B.G. in his January 22, 2008, petition and February 15, 2008, amended petition is: "Monetary compensation of $1000.00 for expenses incurred as a result of [Director of Educational Support Services and Parent Relations] Colander's negligence. Expenses include childcare and related expenses, and loss of wages. Expenses to cover childcare, loss of wages. I would like to reserve the right to request attorney fees for possible future litigation." (See amended petition).

The Board contends that B.G.'s request for monetary damages and attorney's fees should be denied as a matter of law because the Commissioner does not have the authority to award monetary damages or attorney's fees.

The Commissioner has consistently denied that she is clothed with the authority to grant prayers for relief for punitive damages and reimbursement for costs and legal fees. Winter v. Bd. of Educ. of Tp. of North Bergen, 75 S.L.D. 236, 240. Also see, Bd. of Educ. of the Borough of Tenafly, 1974 S.L.D. 420, aff'd, State Board of Education, March 5, 1975. Instead, the award of money damages in education cases occurs only in a limited number of cases authorized by the education statutes such as lost earnings (of a school district's staff member) or restoring an increment improperly withheld.

Spivak v. Westwood Regional High School District, 97 N.J.A.R.2d(EDU) 270. The payment of any other damages is not within the Commissioner's authority. Dunn v. Elizabeth Board of Education, 96 N.J.A.R.2d(EDU) 279, aff'd, State Board of Education (December 6, 1995).

B.G. seeks to be reimbursed for his lost wages and child care expenses ostensibly while his son was on a school suspension and also seeks compensation for Colander's alleged negligence. I **CONCLUDE** that the Commissioner has no statutory authority to grant such relief. I also **CONCLUDE** that B.G. is not entitled to counsel fees. The Commissioner has held that, "in the absence of express statutory authority to award counsel fees, the Commissioner may not direct that [a party] be compensated for legal fees...." W.C.K. o/b/o M.P.-Y.C. v. Board of Education of the Borough of Dumont, EDU 09381-02, Final Decision, (March 18, 2004), <http://lawlibrary.rutgers.edu/oal/search.html>. B.G. has provided no statutory authority to the contrary. In any event, B.G. has appeared pro se in this matter and has presented no evidence that he has incurred any attorney's fees.

As the Board is entitled to Summary Decision regarding B.G.'s demand for damages and the right to request future attorney's fees, and as the remaining issues in the petition have been previously determined to be moot, the dismissal of the amended petition in its entirety with prejudice is appropriate.

ORDER

It is hereby **ORDERED** that the Board's Motion be **GRANTED** and that the petition be **DISMISSED** in its entirety with prejudice.

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

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

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

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

April 25, 2008
DATE

Jesse H. Strauss
JESSE H. STRAUSS, ALJ

Date Received at Agency: 4/25/08

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APR 28 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

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240-08

OAL DKT. NO. EDU 8870-06
AGENCY DKT. NO. 375-10/06

JOEL McGUCKIN,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF WINSLOW, CAMDEN COUNTY,	:	
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 5/23/08
Date of Mailing: 5/23/08

* The Commissioner notes that the agreement on its face is contingent upon acceptance, as creditable for pension purposes, of the referenced salary payments by the Board of Trustees of the Teachers' Pension and Annuity Fund.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8870-06
AGENCY DKT. NO. 375-10/06

JOEL MC GUCKIN,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WINSLOW, CAMDEN COUNTY,
Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Frank P. Cavallo, Esq., for respondent (Parker McCay, attorneys)

Record Closed: April 28, 2008 Decided: April 28, 2008

BEFORE **JOSEPH F. MARTONE**, ALJ:

Petitioner, Joel McGuckin, claims that he has tenure as a supervisor in the Township of Winslow school district, and that his tenure rights were violated when a newly-created supervisory position was given to a non-tenured employee. This matter was transmitted to the Office of Administrative Law on November 22, 2007, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

A prehearing was held on January 8, 2007, at which time counsel requested that this case be placed on the inactive list for a period of 90 days since the petitioner was presently on a leave of absence with pay for medical reasons and the parties were attempting a global settlement of all pending issues. By an Order entered on January 16, 2007, the matter was placed on the inactive list for a period of three months. By subsequent Orders dated March 26, 2007, and June 6, 2007, the matter was continued on the inactive list for additional periods of 45 days each while the parties continued with settlement negotiations. On October 10, 2007, the matter was again continued on the inactive list for an additional six months because the Board has asserted that petitioner was not capable of returning to work and he was on medical leave pending the results of several medical examinations. Settlement negotiations were to continue once the examations had been completed.

On April 18, 2008, an executed Settlement Agreement was received, and on April 28, 2008, a certified copy of the resolution of the board of education approving the settlement was received.

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

1. The parties have voluntarily agreed to the settlement as evidenced by the petitioner's signature and the execution thereof by the president and secretary of the board of education and the submission of a certified and sealed copy of the resolution of the board of education approving the settlement as required by N.J.A.C. 6A:3-1.13(d).

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

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore

ORDER that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

April 28, 2008
DATE

JOSEPH F. MARTONE, ALJ

5-2-08
Date Received at Agency:

Mailed to Parties:

APR 29 2008

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

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File No. 12414-0238

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Attorneys for Respondent,
Township of Winslow Board of Education

JOEL McGUCKIN, Petitioner, vs. BOARD OF EDUCATION OF WINSLOW TOWNSHIP, CAMDEN COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY OAL DOCKET NO. EDU-8870-06 AGENCY REF. NO. 375-10/06 CIVIL ACTION **SETTLEMENT AGREEMENT**

THIS AGREEMENT is made on this ____ day of February, 2008, between the Board of Education of the Township Winslow, 30 Coopers Folly Road, Atco, New Jersey 08004 (hereinafter "Board of Education") and Joel McGuckin, 125 South Landing Road, Waterford Works, New Jersey 08089 (hereinafter "McGuckin").

WHEREAS, McGuckin holds the position of teaching staff member in the Winslow Township School District and has held that position in good standing throughout his employment in the School District; and

WHEREAS, McGuckin has entitlement to an administrative position in the Winslow Township School District effective July 1, 2006, by virtue of McGuckin's being the holder of an Administrative Certificate with a Principal/Supervisor endorsement and a Settlement Agreement between McGuckin and the Lower Camden County Regional School District Board of Education

(now dissolved), the Winslow Township Board of Education, and other school districts dated September 2004, which was approved by the Commissioner of Education; and which is the subject of this petition of appeal.

WHEREAS, McGuckin had accumulated sick leave days throughout his employment with the Board of Education; and

WHEREAS, the parties by entering into this Agreement wish to agree upon issues with regard to McGuckin's claim and intent to retire due to a medical condition which has arisen while this petition of appeal has been pending.

NOW, THEREFORE, for good and valuable consideration, the parties hereto agree as follows:

1. **Employment Status** – McGuckin shall be entitled to employment as a Supervisor in the Winslow Township School District retroactive to July 1, 2006 through June 30, 2008. McGuckin shall submit a letter of resignation from his employment for purposes of retirement for the last day of the 2007-08 school year, which shall be accepted by the Board of Education contemporaneously with and contingent upon approval and acceptance of this Agreement, but which shall be effective after and only after approval of this Settlement Agreement pursuant to paragraph 4 of this Agreement.

2. **Salary Payment** – In addition to the salary he is receiving, McGuckin shall receive back salary for the difference between his salary as a teacher and the average salary paid to four individuals holding administrative certificates who were appointed to positions effective July 1, 2006, that amount of additional pay, i.e., back salary, being $15,683.25. McGuckin shall also receive back salary and salary going forward for the 2007-08 school year for the difference between his salary as a teacher and the average salary paid to those same four administrators,

that amount of additional pay, i.e., back salary, being $21,343.50. Said payments shall be made on July 15, 2008.

3. **Sick Leave** – McGuckin shall be paid for his unused sick leave days in the amount of $1,537.82. This amount shall represent McGuckin's total entitlement to payment of sick leave.

4. **Understanding**

a. This Agreement is contingent upon its acceptance by the Board of Trustees of the Teachers' Pension and Annuity Fund, and its recognition that the additional salary McGuckin shall receive under this agreement is creditable for all pension purposes, and upon its approval by the Commissioner of Education.

b. This Settlement Agreement, once approved, shall be binding upon the respective parties, their successors, heirs and assigns, and after, and only after this Agreement is approved by the Commissioner of Education and accepted by the Board of Trustees of the Teachers' Pension and Annuity Fund for the purposes described in this paragraph shall McGuckin's resignation be effective.

c. Nothing contained in this Agreement shall constitute evidence of a past practice on the part of the Board of Education, nor shall same be binding upon the Board of Education with respect to any other employee of the Winslow Township School District. The Board of Education and McGuckin have entered into this Agreement based upon the particular facts and circumstances unique to McGuckin's employment situation.

d. McGuckin hereby waives, by virtue of the submission of his letter of resignation for purposes of retirement, any entitlement, past, present and/or future to a teaching and/or administrative position in the Winslow Township School District by virtue of his status as a tenured employee. This paragraph shall be subject to the other provisions of this Agreement and

shall not take effect until McGuckin's resignation is effective.

e. McGuckin and the Board of Education each mutually release the other for any and all claims they may have and/or had against the other arising from the employment relationship for anything that has occurred up to the date of this Agreement.

5. **Payment to Estate** – In the event that McGuckin should become deceased prior to payment of part or all of the salary and/or sick leave provided by this Agreement, then any remaining monies shall be paid to McGuckin's estate.

6. **Employment Records** – All negative correspondence shall be expunged from McGuckin's employment records. A copy of that information may be maintained in the Board of Education's "litigation" file concerning this matter.

IN WITNESS WHEREOF, the parties have set their hands and seals as of the date first mentioned above.

Attest:

~~Pasquale Yacovelli~~, Secretary
THOMAS A D'AMBOLA

WINSLOW TOWNSHIP
BOARD OF EDUCATION

Gordon Sunkett, President

Witness:

JOEL McGUCKIN

JULIAN MAE McCURRY
State of NJ Notary Public
My Commission Expires 3/19/2012

WINSLOW TOWNSHIP BOARD OF EDUCATION
30 Coopers Folly Road, Atco, New Jersey 08004-2620
Telephone: (856) 767-2850 Fax: (856) 768-2765

`aniel Swirsky, Ed.D.
Superintendent

Thomas A. D'Ambola
Business Admin. /Board Secretary

RESOLUTION OF THE TOWNSHIP OF WINSLOW BOARD OF EDUCATION APPROVING THE SETTLEMENT AGREEMENT BETWEEN THE BOARD OF EDUCATION AND JOEL MCGUCKIN

WHEREAS, a Petition of Appeal was filed on behalf of Joel McGuckin ("McGuckin") against the Township of Winslow Board of Education ("Board") with the Commissioner of Education claiming entitlement to an administrative position in the Township of Winslow School District; and,

WHEREAS, the Petition of Appeal was transmitted to the Office of Administrative Law for a hearing before the Honorable Joseph Martone, A.L.J.; and

WHEREAS, the Board and McGuckin, through their respective counsel engaged in extensive settlement discussions in this matter; and

WHEREAS, as a result of those settlement discussions the parties have expressed a desire to settle the matter; and

WHEREAS, the Board believes it to be the best interest of the Township of Winslow School District to settle all claims in accordance with the terms of this Agreement.

NOW, THEREFORE, BE IT RESOLVED ON THE 7TH OF APRIL, 2008, BY THE TOWNSHIP OF WINSLOW BOARD OF EDUCATION AS FOLLOWS:

1. The Settlement Agreement between Township of Winslow Board of Education and Joel McGuckin is hereby approved.

2. The Board of Education President is hereby authorized to execute the Settlement Agreement.

This is to certify that the above is a true copy of the motion adopted by the Board of Education of Winslow Township in regular session held on Monday, April 7, 2008.

Thomas A. D'Ambola, Business Administrator/Board Secretary

241-08

OAL DKT. NO. EDU 12438-07
AGENCY DKT. NO. 359-11/07

IN THE MATTER OF THE TENURE	:	
HEARING OF KHEMI (KIM) FREEMAN,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF	:	DECISION
THE CITY OF PATERSON, PASSAIC COUNTY.	:	

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

Upon such review, the Commissioner concurs with the ALJ that the proposed settlement is consistent with established standards governing settlement of tenure matters. *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846.

Accordingly, the settlement is hereby approved and the tenure matter dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 5/23/08
Date of Mailing: 5/23/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 12438-07

AGENCY DKT. NO. 359-11/07

IN THE MATTER OF THE TENURE HEARING OF KHEMI (KIM) FREEMAN, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY.

Joanne Butler, Esq., for petitioner State Operated School District of the City of Paterson, (Schenck, Price, Smith & King, attorneys)

Nancy I. Oxfeld, Esq., for respondent Khemi (Kim) Freeman (Oxfeld Cohen, LLC, attorneys)

Record Closed: April 25, 2008 Decided: April 30, 2008

BEFORE **MUMTAZ BARI-BROWN,** ALJ:

On December 12, 2007, the Department of education transmitted this matter to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A hearing was scheduled on April 22, 23 and 24, 2008. During the pendency of the hearing the parties settled the matter. The attached Stipulation of settlement was submitted on April 25, 2008, indicating the terms of agreement which are incorporated herein by reference.

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

Pursuant to N.J.A.C. 6A:3-5 .6(a), the Commissioner of Education must approve settlement and withdrawal of certified tenure charges. The standards established by the State Board of Education In re Cardonick,1990 S.L.D. 842, 846 must include the following: 1) the nature of the charges; 2) an explanation of the circumstances justifying the settlement or withdrawal; 3) consent of both the charged and the charging parties; 4) the charged party entered into the agreement with a full understanding of his or her rights; 5) demonstrate that the agreement is in the public interest; and 6) the teaching staff member has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible loss of certificate. N.J.A.C. 6A:3-5.6.

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

(1) Sufficient documentation in the complaint and certification to support the Tenure Charges of Conduct Unbecoming a Teaching Staff Member filed before the Commissioner of Education as appended to the Initial Decision. (attached)

(2) The parties have provided an explanation to justify the settlement:

> "Whereas, the parties have determined that resolution of this matter without a hearing is in the interests of the public and consistent with furthering the public good, since the Petitioner District will obtain its goal of no longer employing Respondent as a tenured teacher, without having to resort to a lengthy hearing to address thirty tenure charges, the anticipated minimum of fifteen witnesses to be produced by Petitioner (including at least three, but likely six, student witnesses), the anticipated time and expense of the hearing, as well as the unavailability of additional hearing dates for approximately six months;

(3) The settlement agreement and release of claims executed by the parties demonstrates the consent of the parties to finally settle the matter and release all claims between the parties.

(4) The credible evidence reflects that petitioner State Operated School District of Paterson and respondent Khemi (Kim) Freeman entered into the settlement agreement with advice of counsel and were advised all rights under the agreement as set forth in the Settlement of Agreement and Release of Claims shall be construed in accordance with and governed by the laws of the State of New Jersey.

(5) The parties have established by the credible evidence that the settlement agreement and release of claims is in the public interest.

(6) Respondent will submit to the District an irrevocable letter of resignation, effective August 30, 2007. Further, she has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate.

Based upon the foregoing, I **CONCLUDE** that the Settlement Agreement and Release of Claims executed by petitioner State Operated School District of Paterson and respondent Khemi (Kim) Freeman satisfies the requirements of In re Cardonick, State Board decision of April 6, 1983 (1990 School Law Decisions (S.L.D.) 842, 846): Therefore, the Settlement Agreement and Release of Claims executed the parties should be **APPROVED.**

It is so **ORDERED**.

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

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

April 30, 2008
DATE

MUMTAZ BARI-BROWN, ALJ

Date Received at Agency: 5-2-08

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAY 2 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

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SCHENCK, PRICE, SMITH & KING, LLP
10 Washington Street
P.O. Box 905
Morristown, New Jersey 07963-0905
(973) 539-1000
Attorneys for the State Operated School District of Paterson

In the Matter of Tenure Charges Against KHEMI (KIM) FREEMAN	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DKT. NO. 12438-2007N AGENCY REF. NO. 359 -11/07 **SETTLEMENT AGREEMENT AND RELEASE OF CLAIMS**

This matter having come before the Court upon the filing of Tenure Charges by Petitioner State Operated School District of Paterson (hereinafter referred to as "Petitioner" and/or "District") against Khemi (Kim) Freeman (hereinafter referred to as "Respondent" and/or "Freeman"), and

WHEREAS, the parties have determined that resolution of this matter without a hearing is in the interests of the public and consistent with furthering the public good, since the Petitioner District will obtain its goal of no longer employing Respondent as a tenured teacher, without having to resort to a lengthy hearing to address thirty tenure charges, the anticipated minimum of fifteen witnesses to be produced by Petitioner (including at least three, but likely six, student witnesses), the anticipated time and expense of the hearing, as well as the unavailability of additional hearing dates for approximately six months; and

WHEREAS, the parties agree to fully and finally settle and/or release all claims between them arising out of Freeman's employment and separation from employment with District;

The parties do hereby agree as follows:

1. The foregoing recitals are incorporated herein.

2. Freeman has executed and supplied an irrevocable letter of resignation, which is attached to this Agreement, which resignation will become effective on the date that this Agreement is approved by the Commissioner of Education.

3. Until approval of this Agreement by the Commissioner, Freeman will continue on paid suspension.

4. ~~During the term of said suspension, and in perpetuity following the approval of this Agreement by the Commissioner~~, Freeman will not be employed by, volunteer for, be a participant in, or attend any program, event, or activity ~~which is at all related to the Paterson Public Schools, which shall include, but not be limited to, any program, event or activity~~ which is sponsored by the Paterson Public Schools, which operates with or uses public school monies or funding, or which is located in or on any Paterson Public Schools property (whether owned or leased). bea This does not limit Freeman's right to participate in any public forum on Paterson Public Schools property. KF 4/23/08

5. In consideration of the foregoing, the Petitioner School District will not prosecute the thirty (30) tenure changes certified against Respondent Freeman.

6. In consideration of the foregoing, Freeman hereby releases and forever discharges District and its present and former affiliates, subsidiaries, officers, directors, agents, employees, and their successors and assigns, from any and all actions, causes of action, suits,

claims, charges or complaints which Freeman may have or may have had, or may claim to have or have had, in the past, currently, or in the future, against any of them, except as may be necessary to enforce this Agreement. Freeman acknowledges that this general release also includes but is not limited to claims arising under federal, State, and local laws prohibiting employment discrimination, claims arising under the State education laws, including the tenure laws, claims arising under State, federal or common law for breach of contract, or claims growing out of any legal restrictions on the District's rights with regard to employment of individuals. Freeman hereby expressly waives and releases any and all claims or rights arising under the State education laws, N.J.S.A. 18A:1-1, et seq., including but not limited to the "Tenure" laws set forth in N.J.S.A. 18A:28-1, et seq., and the "Tenure Employees Hearing Law," set forth in N.J.S.A. 18A:6-10, et seq., as well as any and all claims or rights arising under the Civil Rights Acts of 1964 and 1991, 42. U.S.C. 2000e, et seq., the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et seq., Title VII of the Federal Civil Rights Act of 1964, as amended 42 U.S.C. § 2000 (3), et seq., and the Conscientious Employee Protection Act, N.J.S.A. 34:19-1, et seq.

7. This Agreement does not constitute an admission by either party of any wrongful action or violation of any federal or state statute, or common law rights, including those relating to the provisions of any law or statute concerning employment actions, or of any other possible or claimed violation of law or rights.

8. The terms of this Agreement shall be kept confidential. Freeman agrees not to disclose the terms thereof to any person other than Freeman's immediate family, accountant,

attorney, income tax preparer or similar professional, or taxing authorities, unless otherwise ordered by a court of competent jurisdiction. District agrees not to disclose the fact, terms or amount thereof to any person other than its Board of Education members, administrators and necessary clerical staff, accountants, auditors, attorneys, tax preparers, or other persons on a need-to-know basis, or ~~unless otherwise~~ as required by law or ordered by a court of competent jurisdiction or order of the Government Records Council. KF

9. This Agreement shall be binding upon and inure to the benefit of Freeman, the District, and any of their respective heirs, legal or personal representatives, employees, officers, directors, successors or assigns. 4/27/08

10. This Agreement sets forth the entire Agreement between the parties and supersedes any and all prior agreements or understandings between the parties. Freeman represents and acknowledges that he does not rely, and has not relied upon, any representation or statement not set forth in this Agreement made by District or its counsel with regard to the subject matter, basis, or effect of this Agreement or otherwise.

11. In the event of a breach of this Agreement, either party may seek relief, including damages, restitution and injunctive relief, at law or in equity, in a court of competent jurisdiction.

12. This Agreement shall be construed in accordance with, and all disputes hereunder shall be governed by, the laws of the State of New Jersey.

13. Freeman acknowledges that he has carefully read and fully understands all of the terms of this Agreement, including the general release contained herein, that he has had a

406 18th Ave
Paterson NJ 07504
1117

April 23, 2008

Paterson Public Schools
33 Church St
Paterson, NJ 07505

To Whom It May Concern:

Consistant with the settlement agreement in ~~In the Matter of the Tenure Charges Against Khemi (Kim) Freeman~~, OAL Dkt. No. 12438-2007N, Agency Ref. No. 539-11/07, I hereby resign my employment with the Paterson Public Schools. Said resignation is effective as of the date of approval of the settlement agreement by the Commissioner of Education, and solely upon such approval.

Kim "Khemi" Freeman April 23, 2008

reasonable period of time to consider the terms hereof, and that he enters into this Agreement voluntarily and with the advice of counsel.

14. The parties agree that this Agreement will be incorporated into an Initial Decision by the Honorable Mumtaz Bari-Brown, the administrative law judge assigned to preside over the pending tenure dismissal action bearing OAL DKT. NO. 12438-2007N and AGENCY REF. NO. 359 -11/07.

15. The parties recognize that if this Agreement is not approved by the Commissioner of Education, the tenure dismissal proceeding will resume before Judge Bari-Brown until completion.

WITNESS

Kim "Khemi" Freeman
KHEMI (KIM) FREEMAN
Date: 4/23/08

THE STATE OPERATED SCHOOL DISTRICT OF PATERSON .

WITNESS

By: Carol Smeltzer
Date: 4/23/08
Preliminary authorization.

Witness

Michael E. Glascoe
By: Dr Michael Glascoe
State District Superintendent
Date: 4/24/08

{00961475;1 /JLB }

_____

Paterson Public Schools
PERSONNEL TRANSACTION REQUEST & PERSONNEL ACTION FORM

(Please Type)

Date: 4/24/2008

1. INITIATOR: Dr. Michael E. Glascoe Position: State District Superintendent Signature: Michael E. Glascoe

2. EXPLANATION: *Provide a brief written explanation of personnel transaction/request:*

Approve the attached Settlement Agreement and Release of Claims in the matter of the tenure charges against Mr. Kim Freeman (113-54-4621), OAL Dkt. No. 12438-2007N, Agency Ref. No. 359-11/07.

Account #: _____ $ No cost to district

3. PURPOSE(S)
_____ Fill Vacancy _____ Change Date(#6) _____ Create/Delete Position (Approval Required)
_____ Transfer(s) _____ Promote _____ Request/Return Leave
_____ Resignation Retirement Suspension Dismissal Death(Circle)
X Other Describe: Approve the attached Settlement Agreement and Release.

4. VACANCIES: In PC#: N/A Position: _____ Location: _____
Vacated by: _____ Empl. #: _____ Reason: _____
Eff. Date: _____ Comments: _____

5. APPOINTMENT(S): In PC#: N/A Position: _____ Location: _____
Name of Appointee: _____ New Hire: YES _____ NO _____
If NO, provide: PC# _____ Position from: _____ Location: _____ Empl. #: _____
Eff. Date: _____ Comments: _____
Salary Guide: _____ Salary: _____ Level: _____ Step: _____

6. DATA: Funding, Split Time, Change in Time, Etc.:
Name: N/A Empl. #: _____ PC#: _____ Location: _____
Nature and Details of Changes: \
Eff. Date: 4/24/2008

7. STAFF TRANSFERS (i.e., even exchanges among existing positions):

	Name	Empl. #	From Location	From PC#	From Position/Funding	To Location	To PC#	To Position/Funding	EFF. DATE
A.									
B.									
C.									
D.									

APPROVALS REQUIRED

	Signature	Date		Signature	Date
Principal/Admin.					
Local Inst. Supt.			Bus. Admin.		
Assist. Supt.			Deputy Supt.		
Personnel Director			Superintendent	Michael E. Glascoe	4/24/08

Original-To Board Office Green-Superintendent Yellow-Personnel Pink-Payroll Gold Initiator

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Mr. Pete J. Frankoski
John F. Kennedy High School

SCHENCK, PRICE, SMITH & KING, LLP
10 Washington Street
P.O. Box 905
Morristown, New Jersey 07963-0905
(973) 539-1000
Attorneys for the State Operated School District of Paterson

In the Matter of Tenure Charges Against KHEMI (KIM) FREEMAN	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DKT. NO. 12438-2007N AGENCY REF. NO. 359-11/07 SETTLEMENT AGREEMENT AND RELEASE OF CLAIMS

This matter having come before the Court upon the filing of Tenure Charges by Petitioner State Operated School District of Paterson (hereinafter referred to as "Petitioner" and/or "District") against Khemi (Kim) Freeman (hereinafter referred to as "Respondent" and/or "Freeman"), and

WHEREAS, the parties have determined that resolution of this matter without a hearing is in the interests of the public and consistent with furthering the public good, since the Petitioner District will obtain its goal of no longer employing Respondent as a tenured teacher, without having to resort to a lengthy hearing to address thirty tenure charges, the anticipated minimum of fifteen witnesses to be produced by Petitioner (including at least three, but likely six, student witnesses), the anticipated time and expense of the hearing, as well as the unavailability of additional hearing dates for approximately six months; and

WHEREAS, the parties agree to fully and finally settle and/or release all claims between them arising out of Freeman's employment and separation from employment with District;

The parties do hereby agree as follows:

1. The foregoing recitals are incorporated herein.

2. Freeman has executed and supplied an irrevocable letter of resignation, which is attached to this Agreement, which resignation will become effective on the date that this Agreement is approved by the Commissioner of Education.

3. Until approval of this Agreement by the Commissioner, Freeman will continue on paid suspension.

4. ~~During the term of said suspension, and in perpetuity following the approval of this Agreement by the Commissioner~~, Freeman will not be employed by, volunteer for, be a participant in, or attend any program, event, or activity ~~which is at all related to the Paterson Public Schools, which shall include, but not be limited to, any program, event or activity~~ which is sponsored by the Paterson Public Schools, which operates with or uses public school monies or funding, or which is located in or on any Paterson Public Schools property (whether owned or leased). This does not limit Freeman's right to participate in any public forum on Paterson Public Schools property. 4/29/08

5. In consideration of the foregoing, the Petitioner School District will not prosecute the thirty (30) tenure changes certified against Respondent Freeman.

6. In consideration of the foregoing, Freeman hereby releases and forever discharges District and its present and former affiliates, subsidiaries, officers, directors, agents, employees, and their successors and assigns, from any and all actions, causes of action, suits,

claims, charges or complaints which Freeman may have or may have had, or may claim to have or have had, in the past, currently, or in the future, against any of them, except as may be necessary to enforce this Agreement. Freeman acknowledges that this general release also includes but is not limited to claims arising under federal, State, and local laws prohibiting employment discrimination, claims arising under the State education laws, including the tenure laws, claims arising under State, federal or common law for breach of contract, or claims growing out of any legal restrictions on the District's rights with regard to employment of individuals. Freeman hereby expressly waives and releases any and all claims or rights arising under the State education laws, N.J.S.A. 18A:1-1, et seq., including but not limited to the "Tenure" laws set forth in N.J.S.A. 18A:28-1, et seq., and the "Tenure Employees Hearing Law," set forth in N.J.S.A. 18A:6-10, et seq., as well as any and all claims or rights arising under the Civil Rights Acts of 1964 and 1991, 42. U.S.C. 2000e, et seq., the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et seq., Title VII of the Federal Civil Rights Act of 1964, as amended 42 U.S.C. § 2000 (3), et seq., and the Conscientious Employee Protection Act, N.J.S.A. 34:19-1, et seq.

7. This Agreement does not constitute an admission by either party of any wrongful action or violation of any federal or state statute, or common law rights, including those relating to the provisions of any law or statute concerning employment actions, or of any other possible or claimed violation of law or rights.

8. The terms of this Agreement shall be kept confidential. Freeman agrees not to disclose the terms thereof to any person other than Freeman's immediate family, accountant,

attorney, income tax preparer or similar professional, or taxing authorities, unless otherwise ordered by a court of competent jurisdiction. District agrees not to disclose the fact, terms or amount thereof to any person other than its Board of Education members, administrators and necessary clerical staff, accountants, auditors, attorneys, tax preparers, or other persons on a need-to-know basis, or ~~unless otherwise~~ as required by law or ordered by a court of competent jurisdiction or order of the Government Records Council. KF

9. This Agreement shall be binding upon and inure to the benefit of Freeman, the District, and any of their respective heirs, legal or personal representatives, employees, officers, directors, successors or assigns. 4/22/08

10. This Agreement sets forth the entire Agreement between the parties and supersedes any and all prior agreements or understandings between the parties. Freeman represents and acknowledges that he does not rely, and has not relied upon, any representation or statement not set forth in this Agreement made by District or its counsel with regard to the subject matter, basis, or effect of this Agreement or otherwise.

11. In the event of a breach of this Agreement, either party may seek relief, including damages, restitution and injunctive relief, at law or in equity, in a court of competent jurisdiction.

12. This Agreement shall be construed in accordance with, and all disputes hereunder shall be governed by, the laws of the State of New Jersey.

13. Freeman acknowledges that he has carefully read and fully understands all of the terms of this Agreement, including the general release contained herein, that he has had a

406 18th Ave
Paterson NJ 07504-
1117

April 23, 2008

Paterson Public Schools
33 Church St
Paterson, NJ 07505

To Whom It May Concern:

Consistent with the settlement agreement in ~~In the Matter of the Tenure Charges Against Khemi (Kim) Freeman~~, OAL Dkt. No. 12435-2007N, Agency Ref. No. 539-11/07, I hereby resign my employment with the Paterson Public Schools. Said resignation is effective as of the date of approval of the settlement agreement by the Commissioner of Education, and solely upon such approval.

Kemi "Khemi" Freeman April 23, 2008

reasonable period of time to consider the terms hereof, and that he enters into this Agreement voluntarily and with the advice of counsel.

14. The parties agree that this Agreement will be incorporated into an Initial Decision by the Honorable Mumtaz Bari-Brown, the administrative law judge assigned to preside over the pending tenure dismissal action bearing OAL DKT. NO. 12438-2007N and AGENCY REF. NO. 359 -11/07.

15. The parties recognize that if this Agreement is not approved by the Commissioner of Education, the tenure dismissal proceeding will resume before Judge Bari-Brown until completion.

WITNESS

Kim "Khemi" Freeman
KHEMI (KIM) FREEMAN
Date: 4/23/08

THE STATE OPERATED SCHOOL DISTRICT OF PATERSON .

WITNESS

By: Carol Smeltzer
Date: 4/23/08
Preliminary authorization.

Witness

Michael E. Glascoe
By: Dr Michael Glascoe
State District Superintendent
Date: 4/24/08

_____

Paterson Public Schools
PERSONNEL TRANSACTION REQUEST & PERSONNEL ACTION FORM

(Please Type)

Date: 4/24/2008

1. INITIATOR: Dr. Michael E. Glascoe Position: State District Superintendent Signature: Michael E. Glascoe

2. EXPLANATION: *Provide a brief written explanation of personnel transaction/request:*

Approve the attached Settlement Agreement and Release of Claims in the matter of the tenure charges against Mr. Kim Freeman (113-54-4621), OAL Dkt. No. 12438-2007N, Agency Ref. No. 359-11/07.

Account #: _____ $ No cost to district

3. PURPOSE(S) ____ Fill Vacancy ____ Change Date(#6) ____ Create/Delete Position (Approval Required)
____ Transfer(s) ____ Promote ____ Request/Return Leave
____ Resignation Retirement Suspension Dismissal Death(Circle)
X Other Describe: Approve the attached Settlement Agreement and Release.

4. VACANCIES: In PC#: N/A Position: _____ Location: _____
Vacated by: _____ Empl. #: _____ Reason: _____
Eff. Date: _____ Comments: _____

5. APPOINTMENT(S): In PC#: N/A Position: _____ Location: _____
Name of Appointee: _____ New Hire: YES ____ NO ____
If NO, provide: PC# _____ Position from: _____ Location: _____ Empl. #: _____
Eff. Date: _____ Comments: _____
Salary Guide: _____ Salary: _____ Level: _____ Step: _____

6. DATA: Funding, Split Time, Change in Time, Etc.:
Name: N/A Empl. #: _____ PC#: _____ Location: _____
Nature and Details of Changes: \
Eff. Date: 4/24/2008

7. STAFF TRANSFERS (i.e., even exchanges among existing positions):

	Name	Empl #	From Location	From PC#	From Position/Funding	To Location:	To PC#	To Position/Funding	EFF. DATE
A.									
B.									
C.									
D.									

APPROVALS REQUIRED

	Signature	Date		Signature	Date
Principal/Admin.					
Local Inst. Supt.			Bus. Admin.		
Assist. Supt.			Deputy Supt.		
Personnel Director			Superintendent	Michael E. Glascoe	4/24/08

Original-To Board Office Green-Superintendent Yellow-Personnel Pink-Payroll Gold Initiator

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Mr. Pete J. Frankoski
John F. Kennedy High School

242-08

OAL DKT. NO. EDU 1763-08
(EDU 5908-07 on remand)
AGENCY DKT. NO. 133-5/07

IN THE MATTER OF THE TENURE HEARING OF WILLIAM THOMAS, PLAINFIELD SCHOOL DISTRICT, UNION COUNTY.	COMMISSIONER OF EDUCATION DECISION

The record of this matter,[1] the Initial Decision of the Office of Administrative Law (OAL) and the exceptions filed by respondent have been reviewed.

Pursuant to a November 26, 2007 remand order of the Commissioner of Education (Commissioner), a plenary hearing took place in the OAL on February 26, 2008 to adjudicate the facts underlying tenure charges that petitioner had filed against respondent on May 16, 2007. After the conclusion of the hearing, the Administrative Law Judge (ALJ) found, as a matter of fact, that the petitioner's witness – Union County police officer Dennis O'Connell – was more credible than respondent,[2] and that petitioner had proven the facts necessary to sustain the tenure charges.

More specifically, the ALJ found that on May 4, 2004, O'Connell observed respondent sitting alone at a picnic table in Greenbrook Park and approached him. Respondent left his seat and advanced toward O'Connell, stating that everything was fine, even before O'Connell asked any questions. Respondent's demeanor was agitated, his eyes were bloodshot and his speech was rambling and incoherent.

[1] As no transcript of the February 26, 2008 hearing has been provided, the Commissioner will rely upon the Administrative Law Judge's (ALJ) account of the witnesses' testimony.

[2] Respondent alleges in his exceptions that O'Connell "acknowledged that he had very little recollection of the event in question and that he would have had even less recollection had he not reviewed his notes before the hearing . . . ." The Commissioner may not rely on this representation, in the absence of a transcript or other support from the record and, further, finds nothing out of the ordinary about a witness who needs to consult contemporaneous notes in order to give testimony about an event fours years after the fact.

A bag of suspected controlled dangerous substances (CDS) and a tube (or pipe) was on the picnic table where respondent had been seated and several more bags of suspected CDS were on the ground at respondent's feet. O'Connell arrested respondent for CDS possession and respondent mentioned, in the course of the arrest, that he had a problem with cocaine. State laboratory testing and analysis of the tube and the contents of the bags revealed that they contained cocaine.[3]

In light of the foregoing factual findings, and legal precedent pertinent thereto, the ALJ concluded that petitioner had met its burden to show that respondent had perpetrated unbecoming conduct sufficient to warrant termination. The Commissioner concurs.

In his exceptions, respondent urges the Commissioner to dismiss the petition because in describing respondent's unbecoming behavior, the original tenure charges also recited that respondent was arrested, indicted and accepted into the court's pre-trial intervention program because of the offending conduct. The Commissioner joins the ALJ in rejecting this argument.

As the ALJ pointed out, respondent had ample notice of the exact nature of the behavior which petitioner believed disqualified him to serve as an educator of school children. Petitioner met its burden at the February 26, 2008 hearing to prove that respondent committed the conduct. The Commissioner cannot find that the public good is served by invalidating charges – the factual bases of which were adequately articulated and subsequently proven – solely because the charges were drafted in a way that appeared to put more emphasis on legal procedure than on the underlying factual circumstances and their ramifications.

---

[3] The ALJ found that respondent's testimony at the hearing – *i.e.*, that two other men had left the cocaine and tube on the picnic bench about twenty minutes before O'Connell observed respondent – lacked credibility. Nor did the ALJ find credible respondent's contention that he never told O'Connell that he had a problem with cocaine.

Respondent also suggests that petitioner, having failed to present any fact witnesses at the first OAL hearing in this matter, should not have had a second chance to prove its charges at the remand hearing. This argument is untimely. Respondent's opportunity to appeal the Commissioner's November 26, 2007 order for a remand hearing to the State Board of Education pursuant to *N.J.A.C.* 6A:4-1.3 has long since expired.

Accordingly, the Commissioner adopts the Initial Decision in its entirety. The tenure charges against respondent are upheld, and respondent is terminated from his position in petitioner's district. Back pay is awarded, both from the date of the dismissal of the criminal indictment until May 17, 2007 – when the tenure charges were filed – and from the one hundred twenty-first day after the filing of tenure charges until the date of this decision. Back pay shall be reduced by any sums that respondent has received from employment during the applicable periods, and respondent shall provide any and all documentation reasonably required to ascertain the amount of back pay which is due him.

This matter shall be transmitted to the State Board of Examiners for action as that body deems appropriate against respondent's certificate.

IT IS SO ORDERED.[4]

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 5/23/08

Date of Mailing: 5/23/08

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 01763-08
AGENCY DKT. NO. 133-5/07
(REMAND EDU 05908-07)

IN THE MATTER OF THE TENURE HEARING OF WILLIAM THOMAS, SCHOOL DISTRICT OF THE CITY OF PLAINFIELD, UNION COUNTY.

Willie L. Parker, Esq., for petitioner (Hunt, Hamlin & Ridley, attorneys)

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

Record Closed: March 14, 2008 Decided: April 9, 2008

BEFORE **J. HOWARD SOLOMON,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The School District of the City of Plainfield, Union County (District), brought charges of unbecoming conduct, incompetence and other just cause against respondent, William Thomas, a certificated and tenured employee holding the position of acting principal at the Washington Community School. The District contended that respondent's arrest on May 4, 2004 for allegedly possessing a controlled dangerous substance (CDS), to wit: cocaine, and drug paraphernalia while in a public park, and his subsequent indictment and his entry

into, and completion of, a pre-trial intervention program, warranted his removal from his tenured position. N.J.S.A. 18A:6-10.

On May 16, 2007, the District filed with the Department of Education (Department) a Certificate of Determination for filing of tenure charges, the District's sworn tenure charges, and a sworn Statement of Evidence in support of these charges, all in compliance with N.J.S.A. 18A:6-9, 6-11 and N.J.A.C. 6:24-5.2. The District's Certification of Service was filed on May 21, 2007. On June 1, 2007, respondent's answer was filed.

The Department then transmitted this matter to the Office of Administrative Law (OAL) where it was received on June 7, 2007, for hearing as a contested case pursuant to N.J.S.A. 18A:6-11 and N.J.S.A. 52:14B-2(b). The initial hearing took place on September 6, 2007. Other than stipulated facts which were placed on the record, no witnesses appeared for the District at that hearing. On September 17, 2007, the record closed upon the receipt of post hearing briefs.

The undersigned then rendered an Initial Decision which concluded that respondent's entry into PTI, which fact was stipulated into evidence, was not a favorable conclusion of the criminal charge pending against him, and accordingly the tenure charges were sustained in light of the high standards required of all educators. However, the Commissioner of the Department, in rejecting this conclusion, remanded the matter back to the OAL "for a hearing on the facts underlying the tenure charges of unbecoming conduct, incompetence and other just cause." The Commissioner's decision was dated November 26, 2007.

As a result of the remand, further hearing dates were peremptorily scheduled for February 26 and February 29, 2008. The matter was heard to completion on February 26, 2008. Thereafter, the parties were given until March 14, 2008 for posthearing briefs and written summations, on which date the record closed.

At the commencement of the hearing on February 26, respondent moved for dismissal of the tenure charges, claiming they were defective. He argued that the tenure

charges were predicated on the issuance of two summonses [complaints], his indictment, and entry into PTI which did not provide "a favorable outcome of the charges instituted against him, as no determination of guilt or innocence will be made." (Sworn Tenure Charges, paragraph seven). He also argued that paragraph eight of the tenure charges was similarly predicated on the basis on his arrest, indictment and entry into PTI. Accordingly, he stipulated to his arrest, indictment and entry into PTI, while denying possession. Paragraphs seven and eight of the tenure charges read as follows:

> 7. Thomas is scheduled to complete the PTI program on or about March 16, 2007. Thomas' successful completion of the PTI program does not constitute a favorable outcome of the criminal charges instituted against him, as no determination of guilt or innocence will be made.
>
> 8. Thomas' arrest, indictment and entry into the PTI program for possession of a controlled dangerous substance, namely cocaine, constitute unbecoming conduct, incompetence and other just cause for dismissal.

The undersigned reserved on his motion until the conclusion of the proceedings.

In addition, respondent moved for reimbursement of back pay from the date he completed PTI on March 16, 2007 until the filing of tenure charges on May 17, 2007 and then from the one hundred twenty-first day after the filing of tenure charges until a determination has been made by the Commissioner, subject to any set-off by way of compensation he received during these periods, citing N.J.S.A. 18A:6-14. The undersigned also reserved on this motion.

FACTUAL DISCUSSION

As was done at the initial hearing in September 2007, the parties entered into the following joint stipulation of facts (Exhibit J-1):

1. Respondent possesses a certification in the following area: Elementary, Mathematics K-12, Supervisors, Principals, and Chief School Administrator (Superintendent).

2. He has a Bachelors' Degree in Mathematics and Chemistry, a Masters' Degree in Administration and Supervision. In addition, respondent has all the credits necessary for his Ed. D, Educational Leadership. However, he has not yet defended his dissertation.

3. He began employment as a teacher in 1993 in the Newark Public Schools as a high school mathematics teacher. In 1996, he was promoted to the administrative position of Staff Developer in Mathematics in the Newark School District. He continued to work in Newark until September 1998 when he joined the Plainfield School District as a Vice-Principal at the High School. Two years later in 2000, the District honored his request and he became Vice-Principal at Cedar Brook Elementary School. In November 2003, he became the Acting Principal of the Washington Community School, an elementary school in Plainfield. For personal reasons, respondent. took a leave of absence, which was effective May 1, 2004.

4. On May 4, 2004, respondent was issued two summonses [complaints] by the Union County Police Department. The first was for possession of a controlled dangerous substance, namely cocaine, in Greenbrook Park, Plainfield, New Jersey. The second was for possession of drug paraphernalia at the same time and place, the paraphernalia being a clear plastic tube commonly used to inhale CDS.

5. On December 9, 2004, he was indicted by a Union County Grand Jury for possession of a controlled dangerous substance on May 4, 2004 in the City of Plainfield, a third degree offense.

6. On March 16, 2005, in lieu of a trial or guilty plea, respondent was accepted into a Pretrial Intervention, Supervisory Treatment Program

(PTI). The terms of his acceptance into PTI were that the program would be for a period of twenty-four months, respondent had to perform sixty hours of community service, undergo random drug testing, complete a substance abuse treatment program and pay certain fees associated with entry into PTI.

7. He completed PTI on March 16, 2007.

8. The Plainfield District of Education certified tenure charges against respondent to the Commissioner of Education on May 16, 2007.[1] Immediately upon learning of his completion of PTI, the Plainfield Superintendent of Schools began the tenure process for respondent.

After this stipulation was placed on the record, the District called Corporal Dennis P. O'Connell, a police officer with the Union County Police Department, to testify on its behalf. He briefly discussed his background which included the completion of two narcotics courses and a prior assignment to a narcotics task force. During his career as a police officer, he had been involved in hundreds of arrests for possession of a CDS.

On May 4, 2004, O'Connell, was on duty, dressed in his full uniform, and was driving a marked patrol vehicle through Greenbrook Park, a public park. He noticed respondent sitting alone at a picnic table, who acted suspiciously when he abruptly looked at O'Connell. There were few people in the park at the time. O'Connell exited from his patrol vehicle and began to approach respondent. Respondent jumped up from his seat and approached O'Connell telling him, without being questioned, that everything was okay. Respondent appeared agitated, his eyes were bloodshot, he was rambling and his speech was incoherent. O'Connell concluded that, based upon his experiences as a police officer, respondent was probably under the influence of a CDS since there was no odor of alcohol emanating from his breath.

[1] Tenure charges were sworn to on March 13, 2007 and filed with the Commissioner on May 17, 2007.

O'Connell then walked to the table where respondent had been seated and noticed a bag on top of the table, the contents of which appeared to be crack-cocaine. He also notice a tube on the table commonly used for smoking crack-cocaine. O'Connell then directed respondent to return to his seat at the table where he was placed under arrest. A backup police officer arrived. O'Connell then observed nine more bags on the ground by respondent's feet which he also suspected contained CDS. These bags were not previously noticeable, but were after respondent was seated. O'Connell stated that during the course of his arrest, respondent admitted that he had a problem with cocaine. The bags and their contents, as well as the tube, were sent to the State laboratory for analysis. The contents of the bags and residue found on the tube tested positive for cocaine. [See Exhibits P-3(a-b) and Exhibit P-4(a-b)].

O'Connell, who did not see respondent ingest cocaine, confirmed that he was not charged with being under the influence, only for possession. He noticed no one else in the area where respondent had been seated. It was O'Connell's usual practice to charge only possession where a CDS was involved, not under the influence, since the department had no testing procedures in place for persons under the influence. Accordingly, he did not give any field tests to respondent.

Respondent then testified in his own behalf. On or about May 1, 2004, a few days prior to his arrest, he had requested and was granted a family leave of absence since he and his wife were having marital difficulties. On May 4, 2004, he claimed that he took a taxi to a bank in Somerville since he was not able to drive a motor vehicle due to legal issues concerning his license. On the way back, he got off at Greenbrook Park which was within walking distance of his home. Prior to entering the park, he stopped at a delicatessen and ordered lunch. While there, he claimed to have met an individual named Rasheen whom he recognized as a parent of one of his students. After ordering lunch, both he and Rasheen and a companion of Rasheen walked into the park. He stated that both Rasheen and his friend sat on the opposite side and at the opposite end of the picnic table where respondent was later seen by O'Connell. After a while, Rasheen and his friend left. About fifteen to twenty minutes later, O'Connell approached him.

In explaining why he got up from his seat to walk towards the approaching police officer, respondent claimed that it was his custom to greet someone who was walking towards him. He stated that O'Connell walked past him to the picnic table where he "pried out" a bag and a pipe[2] embedded in between the boards of the table where Rasheen and his friend had been seated. Respondent also claimed that the nine bags on the ground were found where Rasheen and his friend had been seated. He denied ever telling O'Connell that he had a problem with drugs, and denied that the drugs belonged to him or that he was under the influence.

Respondent further stated that, upon the advice of his attorney, he entered the PTI program where he performed sixty hours of community service, underwent drug testing and paid certain fees. He completed PTI on March 16, 2007, after which the prosecutor dismissed the charges. At the time of the hearing, he stated that he was employed as a principal of a school, which position was about to be eliminated. At the time of his arrest, although on a family leave of absence, he was employed by the District at the Washington Community School.

When facts are contested, the trier of fact must assess and weigh the credibility of the witnesses for purposes of making factual findings. Credibility is the value that a finder of fact gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality, its internal consistency, and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (8th Cir. 1963). O'Connell's testimony was compelling and credible. He recalled the incident, for the most part, even without referring to his report. Although he could not recall the height or weight of respondent who was outside of the hearing room at the time he was asked, his testimony was, nevertheless, cogent and clear. Respondent, on the other hand, was less than credible. His reason for approaching the officer was not believable, particularly where he mentioned that everything was okay even before being questioned, unless he did not want the officer to reach the table.

[2]The drug paraphernalia was referred to as a "tube" or "pipe."

FINDINGS OF FACT

Based upon a consideration of the testimonial and documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following **FACTS**, in addition to the above stipulated facts:

1. On May 1, 2004, respondent was granted a family leave of absence from the District because of marital difficulties.

2. On May 4, 2004, respondent was seated at a picnic table in Greenbrook Park, a public park, when he was observed by O'Connell, a police officer, in the rank of corporal, with the Union County Police Department.

3. O'Connell, a trained and experienced police officer in matters involving CDS, was on patrol, wearing his uniform and driving a marked patrol vehicle.

4. After respondent abruptly looked at him, O'Connell exited from his vehicle and began to approach respondent.

5. Respondent got up from his seat and, in turn, approached O'Connell stating that everything was okay even before O'Connell questioned him.

6. Respondent appeared agitated, his eyes were bloodshot, he was rambling and his speech was incoherent. No odor of alcohol was detected.

7. O'Connell noticed a bag of suspected CDS and drug paraphernalia (a tube) on the table where respondent had been seated.

8. When he directed respondent to return to his seat at the table, O'Connell noticed several more bags of suspected CDS at respondent's feet.

9. Respondent was then placed under arrest for possession of CDS and drug paraphernalia.

10. During the course of his arrest, respondent told O'Connell that he had a problem with cocaine.

11. The bags and their contents and the pipe were submitted to the State laboratory for testing.

12. The laboratory analysis concluded that the substance in the bags and the residue on the pipe was positive for cocaine.

LEGAL ANALYSIS AND CONCLUSION

The issue to be decided is whether the District had just cause to remove respondent, a tenured educator.

As mentioned, respondent moved to dismiss the tenure charges claiming they were defective in that they were predicated, not upon possession, but upon his arrest, indictment and entry into the PTI program, the completion of which did not result in a favorable outcome of the criminal charges. In support of his argument, respondent cited West New York v. Bock, 38 N.J. 500 (1962), a civil service case, where the following was stated:

> p]roperly stated charges are a *sine qua non* of a valid disciplinary proceeding. It is elementary that an employee cannot legally be tried or found guilty on charges of which he has not been given plain notice by the appointing authority. The *de novo* hearing on the administrative appeal is limited to the charges made below. (citations omitted).

In Bock, a firefighter, who was a civil service employee (not an educator), received a preliminary notice of disciplinary action for a potential suspension for being

late three times in one month. At the hearing on those specific charges, Bock pleaded guilty. However, the Director of Public Safety, who governed the forum, considered Bock's entire background, which included incidents not named in the notice, and ordered his dismissal. In the appeal process, his removal was modified to a six month suspension. When the matter came before the New Jersey Supreme Court, the Court agreed with the length of suspension, but not the basis upon which it was decided. The original charges only gave notice of three specific lateness derelictions. However, Bock was actually tried and found guilty for habitual tardiness and consequent chronic neglect of duty based upon his entire attendance record over many years. The Supreme Court held that not only was Bock unaware of the penalty of removal, but also that he was being charged with chronic lateness. The original notice only mentioned the alleged three instances of lateness and a potential suspension, not chronic lateness or removal. Accordingly, the Supreme Court held that "[i]t is elementary that [a civil service] employee cannot legally be tried or found guilty on charges of which he has not been given plain notice by the appointing authority. The *de novo* hearing on the administrative appeal is limited to the charges made below." (Citations omitted). Bock, p. 522. (Emphasis added).

In the present matter, the tenure charges clearly articulated the reasons for respondent's arrest, the issuance of the summonses [complaints] and his indictment- that is, for possession of a CDS and drug paraphernalia. Paragraph eight of the tenure charges clearly explained that respondent's arrest and indictment were based upon his possession of a CDS and drug paraphernalia. Had there been additional criminal charges prosecuted at the hearing which had not been recited in the tenure charges, those additional charges would have been outside of the tenure charges and possibly precluded by Bock. However, here the tenure charges gave sufficient and "plain" notice to respondent. For the reasons set forth above, respondent cannot claim surprise as in Bock. Accordingly, his motion to dismiss is **DENIED**.

In tenure cases, the District bears the burden of proving the charges upon which it relies by a preponderance of the competent, relevant and credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). Tenure protects

educators[3] from arbitrary dismissal for "unfounded, flimsy or political reasons." Spiewak v. Rutherford Board of Education, 90 N.J. 63, 73 (1982). It is designed to aid in the establishment of "a competent and efficient school system" by affording to teachers a measure of security in the ranks they hold after years of service. Viemeister v. Prospect Park Board of Education, 5 N.J Super. 215, 218 (App. Div. 1949). Accordingly, N.J.S.A. 18A:6-10 provides that no tenured person shall be dismissed or reduced in compensation "except for inefficiency, incapacity, unbecoming conduct or other just cause."

One of the charges brought by the District was unbecoming conduct which has been broadly defined to included any conduct "which has a tendency to destroy public respect for [government] employees and confidence in the operation of [public] services." Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998). Behavior rising to the level of unbecoming conduct "need not be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. Hartmann v Police Department of Ridgewood, 258 N.J Super. 32, 40 (App. Div. 1992). In the context of a school tenure case, "the touchstone is fitness to discharge the duties and functions of one's office or position." In re Tenure Hearing of Grossman, 127 N.J Super. 13, 29 (App. Div. 1974), certif denied, 65 N.J. 292 (1974).

Educators are held to certain prescribed standards of conduct because of the public trust placed in their positions. In that regard, the Commissioner has stated that:

> they are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other

[3] Since respondent is an educator which term is defined as "a person . . . that educates, esp. a teacher, principal, or other person involved in planning or directing education" [The Random House College Dictionary 420 (Revised Edition 1984)], references to the cited high standard of conduct shall apply to all educators, including teachers, principals and vice principals.

> types of employment . . . Those who teach do so by choice, and in this respect the teaching profession is more than a simple job; it is a calling. In the Matter of the Tenure Hearing of Jacque L. Sammons, School Dist. of Black Horse Pike Reg., Camden County, 1972 S.L.D. 302.

See also School District of the Township of Parsippany-Troy Hills v. Hess, 97 N.J.A.R. 2d (EDU) 34, in which it was stated that:

> [i]n determining the appropriateness of . . . conduct, the Commissioner of Education has often stressed '. . . that those persons who enter the teaching profession exercise a significant influence upon those they teach and must exercise a high degree of exemplary behavior.'
>
> [Id. at 51 (citing, In re Tyler, 12 N.J.A.R. 297).]

In In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson, 1974 S.L.D. 97, the Commissioner also stated:

> Teachers [and educators] are public employees who hold positions demanding public trust, and in such positions they teach, inform and mold habits and attitudes, and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by their teachers, but what they see, hear, experience, and learn about their teacher. When a teacher . . . violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner.
>
> Id. at 98-99.

The fact that possession of CDS or paraphernalia occurred off school premises had no bearing on the determination that the possession, in and of itself, constituted unbecoming conduct. Willingboro Board of Education v. Lott, 93 N.J.A.R.2d (EDU) 516, aff'd State Board of Education, 94 N.J.A.R. 2d (EDU) 35; In the Matter of the Tenure Hearing of McIntyre, 96 N.J.A.R. 2d (EDU) 718, aff'd, Appellate Division Docket No. A-5942-94 (July 10, 1996). "Possession of a controlled dangerous substance constitutes conduct unbecoming a teaching staff member and subjects a teaching staff member to penalty . . . The fact that criminal charges against the respondent were dismissed does

not diminish his violation of the public trust. The appropriate penalty for the respondent is dismissal." McIntyre, supra.

Based upon the facts adduced, I **CONCLUDE** that respondent was in possession of a CDS, to wit: cocaine, and drug paraphernalia. Accordingly, the District has proven unbecoming conduct, incompetence[4] and other just cause.

With regard to his motion for back pay, respondent relies upon N.J.S.A. 18A:6-14, which states:

> Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay, but, if the determination of the charge by the Commissioner of Education is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made. Should the charge be dismissed, the person shall be reinstated immediately with full pay from the first day of such suspension. Should the charge be dismissed and the suspension be continued during an appeal therefrom, then the full pay or salary of such person shall continue until the determination of the appeal. However, the board of education shall deduct from said full pay or salary any sums received by such employee or officers by way of pay or salary from any substituted employment assumed during such period of suspension. Should the charge be sustained on the original hearing or an appeal therefrom, and should such person appeal from the same, then the suspension may be continued unless and until such determination is reversed, in which event he shall be reinstated immediately with full pay as of the time of such suspension.

During the time when respondent was under indictment, he was not entitled to back pay. N.J.S.A. 18A:6-8.3. "Any employee or officer of a board of education in this State who is suspended from his employment, office or position, other than by reason of

[4]Incompetence has long been regarded and used as an appropriate standard of conduct for judging the performance of public employees in various removal proceedings. In re Parkwood Co., 98 N.J. Super. 263 (App.Div. 1967).

indictment, pending any investigation, hearing or trial or any appeal therefrom, shall receive his full pay or salary during such period of suspension . . ." Id. (Emphasis added). Here, respondent was indicted on December 9, 2004, and completed PTI on March 16, 2007, after which he claimed the criminal charges were dismissed. Therefore, respondent argues that his back pay should commence on the date he completed PTI [actually it should be the date of dismissal of the criminal complaint or indictment. N.J.S.A. 2C:43-13d]. In his moving papers, respondent certified that he was paid by the District until December 15, 2004, which was his last pay check following his indictment. On May 17, 2007, tenure charges were filed against him. He, therefore, asserts that he is entitled to back pay from the date of the completion of PTI until May 17, 2007, when tenure charges were filed[5] and from the one-hundred-twenty-first day after the tenure charges were filed until a determination has been made by the Commissioner.

New Jersey law provides that "upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay." N.J.S.A. 18A:6-14. However, "if the determination of the charge by the Commissioner of Education is not made within 120 calendar days after certification of the charges. . . then the full salary . . . of such person shall be paid beginning on the one hundred twenty-first day until such determination is made." Id. (emphasis added). The only exclusions from the calculations of the 120 day requirement are "all delays which are granted at the request of" the respondent as well as any mitigating salary received by the respondent "from any substituted employment assumed during such period of suspension." Id. "This statute contains mandatory language which requires that a board commence payment of salary on the 121st day after certification. It does not authorize a board to withhold such money until some later date, such as the conclusion of a tenure proceeding." IMO Tenure Hearing of Brian Yatauro, EDU 0793-99, Initial Decision (6/12/99), modified, Comm'r (10/13/99)

[5]Respondent did not certify when the criminal complaint or indictment was dismissed nor did he produce a copy of the order of dismissal.

<http://lawlibrary.rutgers.edu/oal/search.html>. The purpose behind the 120-day requirement was commented upon the Appellate Division when it said:

> It seems clear that in enacting it the Legislature must have had in mind the economic hardship endured by teachers and other board of education employees suspended without pay pending the outcome of charges filed against them and certified for hearing to the Commissioner of Education. We are certain, moreover, of the Legislature's awareness that in many instances, because of the volume of matters awaiting hearing, a prompt disposition of charges is not feasible. Thus, the obvious intent and purpose of the amendment was to alleviate the financial plight of those affected by providing for the payment of their full salary (less sums received from other employment during suspension) from the 121st day following the certification of charges until the determination thereof by the Commissioner, or in the case of an appeal by a board from a decision adverse to it, until the determination of the appeal.

[In re Grossman, 127 N.J. Super. 13 (App. Div. 1974).]

It is clear that the Legislature required that the salary was to commence on the 121st day. Yatauro, supra.

The 120 day rule is mandatory even if it is determined the teacher was rightfully dismissed. The ALJ in Yatauro emphasized the fact that a board must abide by the payment requirements of N.J.S.A. 18A:6-14 regardless of whether the tenure charges were upheld or not:

> The law as it currently exists does not permit a board of education to refuse to pay to an employee the employee's full pay once the 120-day initial period has concluded. Where a board fails to do so, it cannot invoke equitable considerations to support a refusal to pay the moneys owed to the now ex-employee following his or her removal on substantiated tenure charges.
>
> [Ibid.]

The initial analysis of a statute's meaning begins with its plain language. Hardwicke v. American Boychoir School, 188 N.J. 69, 95 (2006) (citations omitted);

DiProspero v. Penn, 183 N.J. 477, 493 (2006). Where the language of a statute is clear and unambiguous, its interpreter should not turn to extrinsic interpretive aids in an attempt to ascribe to it further meaning. Id. at 492.

In the instant matter, tenure charges were filed on May 17, 2007, the 137th day of the year. Respondent is entitled to be paid from the 258th day, September 15, 2007 (the 121st day thereafter), until the Commissioner renders a decision.

As noted above, in addition to the first 120 days after tenure charges have been filed, a teacher may be suspended without pay "by reason of indictment." N.J.S.A. 18A:6-8.3. These two circumstances are the only times when a teacher employed by New Jersey public schools can be suspended without pay. "A tenured employee may be suspended without pay only if indicted or if tenure charges have been preferred and certified to the Commissioner of Education. In all other circumstances, a suspension must be with pay." Slater v. Board of Educ. of Ramapo-Indian Hills Regional Hills, 237 N.J. Super. 424, 426 (App. Div. 1989). In the instant matter, respondent was suspended without pay after the criminal complaint or indictment was dismissed upon his completion of PTI and before the filing of tenure charges. As he was neither indicted nor facing tenure charges, respondent is entitled to back pay for this time. See I/M/O Tenure Hearing of Robert G. Morton, EDU 0253-97, Initial Decision (06/11/99), adopted, Comm'r (07/30/99) <http://lawlibrary.rutgers.edu/oal/ search.html>.

In Morton, a teacher was indicted on numerous drug offenses, to which he pled and was sentenced to probation. Following his guilty plea, the Board of Education suspended Morton without pay for one month before filing tenure charges. Although Morton's dismissal was upheld by the Commissioner, Morton was granted back pay for the time he had been suspended without pay but no longer under indictment and before tenure charges were filed. "If the Board applies to the appropriate court and receives a forfeiture order, the effective date of forfeiture would be the date of conviction and Mr. Morton would not be entitled to any back pay. In the absence of such a forfeiture order, Mr. Morton's suspension should have been with pay until the Board certified tenure charges against him." Id. Since a forfeiture order was not presented in the instant

matter, respondent was improperly suspended without pay for the time he was no longer under indictment until the date tenure charges were filed.

In opposing respondent's motion, the District relied upon Kerwick v. Trenton, 184 N.J. Super. 235 (Law Div. 1982), arguing that completion of PTI did not equate to a final determination in respondent's favor, and therefore he should be denied back pay altogether. This argument is without merit as Kerwick is irrelevant to the issues presented here. In that case, the court held that a police officer whose indictment was dismissed after successfully completing PTI could not seek reimbursement for his legal defense. Id. at 239. The relevant statute in Kerwick specifically required that the charges be dismissed or finally determined in the officer's favor before costs for his defense would be reimbursed. Id. at 237. See also Cressinger v. Board of Education of City of Newark, 256 N.J. Super. 155 (App. Div. 1992). That is not the issue here. In the above cited cases, the party claiming reimbursement for counsel fees was required to have a favorable outcome on the criminal charges. The matter here involves back pay, not reimbursement for counsel fees, and is without legal precedent to require a favorable disposition. The language of N.J.S.A. 18A:6-8.3 places a mandatory requirement on the board, not a voluntary one. Yatauro, supra, EDU 0793-99 <http://lawlibrary.rutgers.edu/oal/search.html>.

Based upon the facts adduced, I **CONCLUDE** that the respondent is entitled to back pay, not only from the date of the dismissal of the criminal complaint or indictment until May 17 2007, when tenure charges were filed, but also from the one-hundred-twenty-first day following the filing of tenure charges until a determination has been made by the Commissioner. The amount of back pay is to be reduced by any and all sums respondent received by way of pay or salary from other employment during these periods.

ORDER

Based upon the foregoing, it is **ORDERED** that the appeal filed by respondent with regard to the tenure charges be and is hereby **DISMISSED WITH PREJUDICE**.

It is further **ORDERED** that respondent be provided with back pay from the date of the dismissal of the criminal complaint or indictment until May 17, 2007, when tenure charges were filed, and from the one hundred twenty-first day after the filing of tenure charges until a determination on those charges has been made by the Commissioner. The amount of back pay shall be reduced by any sums respondent received by way of pay or salary from other employment during these periods. In addition, respondent must establish the precise amount of pay to which he is entitled and shall promptly provide any documentation reasonably required by the District in its determination or confirmation of the amount due.

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

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

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

4-9-08
DATE

J. HOWARD SOLOMON, ALJ

Date Received at Agency: 4-9-08

Mailed to Parties:

APR 14 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

mvh/jb

APPENDIX

Witnesses

For Petitioner:

Dennis P. O'Connell

For Respondent:

William J. Thomas

Exhibits

Joint:

J-1 Stipulation of Facts

For Petitioner:

P-1	Investigation Report
P-2	Complaint for Possession of a CDS
P-3(a)&(b)	Laboratory Submittal Form for testing the residue in the pipe, Laboratory Report for the pipe, Certificate of Analysis and curriculum vitae of the chemist
P-4(a)&(b)	Laboratory Submittal Form for testing the contents of the plastic bags, Laboratory Report, Certificate of Analysis, and curriculum vitae of the chemist
P-5	Indictment for Possession of a CDS
P-6	Pretrial Intervention Supervisory Treatment Order of Postponement
P-7	Union County Police Arrest Report
P-8	Rutgers' Faculty/Staff Identification Card
P-9	Complaint for Drug Paraphernalia

For Respondent:

R-1	Dismissal of Charges
R-2	None
R-3	Minutes of Plainfield of Board of Education, dated May 18, 2004

244-08

#244-08EL

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

JON S. CORZINE
Governor

LUCILLE E. DAVY
Commissioner

May 27, 2008

Mohamed F. El-Hewie, *Pro Se*
[redacted]
West Paterson, NJ 07424

Dear Mr. El-Hewie:

I have reviewed the most recent request for emergent relief submitted by you in conjunction with the matter entitled *Mohamed F. El-Hewie v. Board of Education of the Bergen County Vocational School District, Bergen County*, Agency Dkt. No. 225-6/06, decided by me on April 10, 2008 and presently on appeal before the State Board of Education. Therein, you ask that I order immediate restoration of your employment and "rectification of the falsified record submitted by the [respondent Board of Education] to the Provisional Teacher Program," as well as appoint a special investigator to review "the corrupt actions of the Office of Controversies and Disputes that led to the Commissioner's decision to accept the malicious Initial Decision of the ALJ [Administrative Law Judge]."

In your submission, you contend that the Office of Controversies and Disputes "succeeded into sneaking a fraudulent Initial Decision by ALJ Margaret Monaco through the Commissioner's office with falsified review of Petitioner's written exceptions and permitted a corrupt ALJ to deprive Petitioner of his constitutional rights to the state-approved teacher training program." In support of this allegation, you recite a litany of instances where you believe the ALJ concealed "corruption and breach of professional standards" on the part of school district officials by accepting untrue testimony and/or falsified exhibits, and claim that the relief due you as a result of your petition is "[two years] overdue and has been caused by the unscrupulous actions of the Respondent and the Commissioner of Education."

Initially, as I did in my previous emergent decision, I note that any request for extraordinary relief must meet the established standard set forth in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982); see *N.J.A.C.* 6A:3-1.6. Specifically, the requesting party must be able to demonstrate that s/he will suffer irreparable harm in the absence of immediate relief, that his/her claim is based on settled law, that s/he is reasonably likely to prevail on

the merits, and that the balance of equities and interests lies in his/her favor. Having considered your present application in light of this standard, I once again cannot find that the relief you are seeking is warranted.

As you are aware, even assuming, *arguendo*, that your employment situation and certification status constitute irreparable harm, your application cannot succeed without meeting the remaining necessary criteria. In that regard, I note that – while you have made accusations of fraud, corruption, unscrupulousness and malice against both the Administrative Law Judge and staff of the Bureau of Controversies and Disputes – these accusations are based on nothing more than your continuing disagreement with the ALJ's credibility determinations and the fact that my April 10, 2008 decision found your exceptions unpersuasive and adopted the Initial Decision of the ALJ; thus, I cannot find that your application demonstrates a likelihood of success on the merits. Further, I cannot find that your personal interest in obtaining the employment and licensure to which you believe you are entitled outweighs the finding to the contrary of a fully litigated administrative decision – a decision which, to any extent you believe it incorrect or unfounded, is fully reviewable by the State Board and courts on appeal.

Finally, I have considered your request that I investigate the conduct of the Bureau of Controversies and Disputes, and having done so, conclude that bare accusations of wrongdoing – based solely on the exercise of professional judgment with which you do not agree – do not constitute a sufficient or appropriate reason to direct the undertaking of an investigation.

Accordingly, I hereby DENY the application for emergent relief and DECLINE to conduct the requested investigation, and I remind you once again that any perceived deficiencies in the Commissioner's decision and the Initial Decision upon which it is based may be fully and fairly addressed by you on appeal.*

Sincerely,

Lucille E. Davy
Commissioner

c: William C. Soukas, Esq.
Honorable Margaret Monaco, ALJ
County Superintendent
State Board Appeals Office
State Library

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

243-08

CAREY SAVAGE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a tenured, certificated supervisor in respondent's district – claimed that the decision of the respondent Board to appoint a non-tenured person as supervisor of early childhood education violated his tenure rights. Petitioner's position was eliminated in a reduction in force in July 2006 and he subsequently applied for a newly posted position as supervisor of early childhood education; the Board selected another candidate purportedly because petitioner did not possess the requisite experience in preschool education pursuant to *N.J.A.C.* 6A:10A-2.2(a)(19).

The ALJ found that: the only issue to be determined in this matter is whether or not petitioner has the required experience in preschool education; it is appropriate to review petitioner's experience as far back as may be relevant; petitioner's experience between 1976 and 1979 in a Philadelphia learning center for preschoolers unquestionably qualifies as preschool experience and is not precluded by regulation; and the wording of the regulation does not require hands-on experience. The ALJ concluded that petitioner's experience meets the regulatory requirements for experience in preschool education, and ordered that the Board provide the petitioner with back pay and emoluments due him from the date he was removed from their employ, September 20, 2006, until the date he returned to the district in another supervisory position, July 2, 2007; the ALJ also ordered that any income received during that period be considered in mitigation.

Upon a thorough and independent review of the record, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision as the final decision in this matter, with amplification regarding the appropriate standard of review and the ALJ's order for relief.

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

May 23, 2008

OAL DKT. NO. EDU 8747-06
AGENCY DKT. NO. 389-10/06

CAREY SAVAGE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL) and the parties' exceptions have been reviewed. No hearing transcript was provided to the Commissioner.

The parties stipulate that petitioner was a tenured, certificated supervisor in respondent's district. His job title was "supervisor of whole school reform and data analysis," and the description for that title is attached as Exhibit A to a Stipulation of Facts that was submitted by the parties prior to the January 4, 2008, hearing at the OAL (the Stipulation). On July 19, 2006, respondent abolished that and other positions in the course of a legitimate reduction in force. Petitioner was advised that his last day of employment would be September 20, 2006.

Later in July 2006, respondent's district posted the position of "supervisor of early childhood education." Petitioner applied, but a Ms. Bleistine – another employee who was qualified for the job, but not a tenured supervisor – was given the position. In response to petitioner's inquiry as to why he was not selected for the job, respondent's interim

superintendent – in a letter dated September 7, 2006, which is annexed to the Stipulation as Exhibit D – cited two criteria set forth in *N.J.A.C.* 6A:10A-2.2(a)(19), which identifies qualifications for supervisors of preschool education. More specifically, the interim superintendent directed petitioner's attention to the following two job requirements:

> Each district Board of Education shall ensure that Supervisors of Preschool programs hold a New Jersey Supervisor's Certificate and have a background and experience in Preschool Education.

The interim superintendent advised petitioner that "it was determined that [petitioner's experience working from 1976-1979 in a Philadelphia learning center for preschoolers] did not satisfy the criteria of 'a background and experience in Preschool Education'."

Petitioner filed his appeal with the Commissioner on October 26, 2006. In its answer, respondent conceded that petitioner holds a New Jersey administrative certificate with a supervisor endorsement, but once again alleged that he lacked "the requisite background and experience in preschool education." In Paragraph 12 of the pre-hearing Stipulation it was reiterated that the reason for petitioner's rejection was that he did not have the background and experience in preschool education called for in *N.J.A.C.* 6A:10A-2.2 (a) (19) for the position of supervisor of early childhood education.

In the case file forwarded to the Commissioner is an unsigned and undated "Stipulated Statement of Facts" (Stipulated Statement) which appears to summarize the testimony given at the OAL hearing. Paragraph 21 of the Stipulated Statement recites that "[t]he only issue to be decided in this matter is whether petitioner had experience in preschool education, as required by *N.J.A.C.* 6A:10A-2.2 (a) (19)." Paragraph 22 states:

> If petitioner had "experience in preschool education" as required by *N.J.A.C.* 6A:10A-2.2 (a) (19) and was in competition with a non-tenured applicant, such as Ms. Bleistine, for the position of

> supervisor of early childhood education, he would have been awarded the job because of his tenured status.

These two paragraphs can also be found on page 5 of the Initial Decision, at the end of the section entitled "Stipulated Facts."

The Administrative Law Judge (ALJ) concluded, after considering the hearing testimony and petitioner's job descriptions and educational certificates, as follows:

> [T]he experience described by petitioner meets the regulatory requirements of "experience in preschool education" found at *N.J.A.C.* 6A:10A-2.2 (a) (19).
>
> Initial Decision at 10-11.

In light of the facts concerning petitioner's administrative, supervisory and analytical experience relating to early childhood education, and for the reasons set forth in the Initial Decision, the Commissioner concurs that it was unreasonable for respondent to determine that petitioner's experience relating to preschool education was inadequate. *See, e.g., Kopera v. West Orange Board of Education,* 60 *N.J. Super.* 288, 294-96 (App. Div. 1960); *G.M. on behalf of minor child T.M. v. Board of Education of the Borough of Roselle Park, Union County,* 95 *N.J.A.R.* 2d (EDU) 107, 109 (It is well established that actions of local boards that lie within their discretionary powers may not be upset unless they are arbitrary, without rational basis or induced by improper motives.)

Nor will the Commissioner disturb the ALJ's determination to disregard respondent's argument that its decision to reject petitioner's application for the early childhood supervisor position was justified by petitioner's alleged failure to have participated in annual training specific to preschool program implementation. This argument is untimely, as it

appeared for the first time in respondent's post-hearing brief.[1] The Commissioner, therefore, adopts the Initial Decision of the OAL.

In considering the ALJ's order for relief, the Commissioner notes that it does not correspond with the relief that petitioner requested in his petition – *i.e.,* placement into the position of early childhood supervisor in respondent's district, with retroactive salary and benefits. This may be explained by facts disclosed on page 5 of the Initial Decision. More specifically, after petitioner's job in respondent's district – as supervisor of whole school reform and data analysis – ended, he worked in the Bridgeton School District for ten months as supervisor of mathematics and science. On July 2, 2007 he returned to respondent's district as "supervisor for Tier I No Child Left Behind Data Analysis and Art."

The Commissioner assumes that the ALJ's order – solely restoring "back pay and emoluments owed from the date he was removed from employment, September 20, 2006, until the date he returned to employment in Vineland, July 2, 2007," minus any income he received during that period – reflects that fact that petitioner once again holds a supervisory position in respondent's district and no longer wishes to replace the current supervisor of preschool education. This assumption is buttressed by petitioner's failure to except to the relief ordered by the ALJ.

Accordingly, respondent shall pay to petitioner all back salary and benefits owed from September 21, 2006 through July 1, 2007, less any income petitioner received from employment during that period.

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[1] Nor is it clear to the Commissioner from the wording of *N.J.A.C.* 6A:10A-2.2 (a) (19) that it requires a candidate for supervisor of preschool programs to have already participated in annual training in preschool program implementation prior to his or her installation into the supervisor position.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 5/23/08

Date of Mailing: 5/27/08

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8747-06
AGENCY DKT. 389-10/06

CAREY SAVAGE,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,
Respondent.

Robert M. Schwartz, Esq., appearing for the petitioner

Frank P. Cavallo, Jr., Esq., appearing for the respondent (Parker McCay, attorneys)

Record Closed: February 29, 2008 Decided: April 11, 2008

BEFORE **DENNIS P. BLAKE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Carey Savage contends that the decision of the respondent, Vineland Board of Education, appointing a non-tenured person as supervisor of early childhood education violated his tenure rights. After agreeing to a stipulated statement of facts

both parties agreed that the only issue to be decided is whether petitioner has "experience in preschool education," as required by N.J.A.C. 6A:10A-2.2(a)(19). If he does, then it is agreed that he was qualified for the post and that his tenure rights were violated by respondent's failure to appoint him.

PROCEDURAL HISTORY

On or about July 20, 2006, respondent notified petitioner that his position as supervisor of whole school reform and data analysis had been abolished. He was advised that his last day of employment would be September 20, 2006. He remained on a preferred eligibility list in accordance with N.J.A.C. 18A:28-12. On July 24, 2006, he applied for the position of supervisor of early childhood education. On September 7, 2006, respondent advised petitioner that he was not qualified for the position, and on August 30, 2006, it had appointed a non-tenured applicant to the position. On October 25, 2006, petitioner filed his appeal of respondent's appointment of the non-tenured applicant. On November 2, 2006, respondent filed its answer. On November 8, 2006, the Department of Education transmitted the appeal to the Office of Administrative Law as a contested case in accordance with N.J.S.A. 52:14B-1 through -15 and N.J.S.A. 52:14F-1 through -13. At a prehearing conference on June 25, 2007, it was revealed that petitioner had obtained another job and that a settlement proposal had been made. However, that proposal was turned down by respondent and the hearing was scheduled for August 28, 2007. That hearing date was adjourned due to the death of petitioner's attorney's father. On December 4, 2007, both parties agreed to prepare a joint stipulation of facts, which was filed and marked as Exhibit J-1. The hearing took place on January 24, 2008, and the record remained open until February 29, 2008, for the submission of briefs.

STIPULATED FACTS

1. Petitioner, Carey L. Savage (hereinafter referred to as "petitioner"), was initially employed by the respondent, Vineland Board of Education (hereinafter referred to as "respondent"), on or about March 24, 2003, in the position of "supervisor of whole school reform and data analysis."

2. The petitioner's position of supervisor of whole school reform and data analysis had a job description, which is attached hereto as Exhibit A. The actual title set forth in the job description is "supervisor of school reform and data analysis."

3. Among the qualifications for the position of supervisor of school reform and data analysis was the requirement that the holder of the position have a New Jersey administrative certificate in accordance with the requirements of N.J.S.A. 18A:27-1 et seq., with a supervisor endorsement in accordance with N.J.A.C. 6:11-9.3 and -9.6.

4. Petitioner met the qualifications for the position for which he was assigned/initially employed, the title of supervisor of whole school reform and data analysis.

5. On or about July 20, 2006, Maryann Greenfield, the executive director of personnel for the respondent, corresponded with petitioner informing him that at its meeting of July 19, 2006, the respondent abolished his position pursuant to the authority found in N.J.S.A. 18A:28-9. Ms. Greenfield advised petitioner that he would remain on a preferred eligibility list in accordance with N.J.S.A. 18A:28-12. Petitioner was further advised that his "last day of employment" would be September 20, 2006. Attached hereto as Exhibit B is Ms. Greenfield's July 20, 2006, correspondence.

6. On or about July 28, 2006, the respondent circulated an "internal posting" for the position of supervisor of early childhood education. Attached hereto as Exhibit C. On or about July 24, 2006, the petitioner applied for the position of supervisor of early childhood education.

7. On or about September 7, 2006, respondent, through its interim superintendent of schools, Dr. Keith Figgs, notified the petitioner that he did not "qualify" for the position of supervisor of early childhood education. Attached hereto as Exhibit D.

8. In his correspondence of September 7, 2006, Dr. Figgs referred to N.J.A.C. 6A:10A-2.2(a)(15),[1] which provided that each district board of education "shall ensure that supervisors of preschool programs hold a New Jersey Supervisor's Certificate and have a background and experience in preschool education."

9. The respondent had a job description adopted on or about October 1, 2003, for the position of supervisor of early childhood education. Attached hereto as Exhibit E.

10. Petitioner holds a K–12 supervisor's certificate issued by the State Board of Examiners of the State of New Jersey. (See Exhibit I, which pertains to the certificates held by the petitioner, as well as the degrees he has obtained.)

11. In addition, petitioner also served as a program specialist for the Community Concern #13 Multipurpose Learning Center in North Philadelphia from 1976 to 1979.

12. Nonetheless, the respondent maintains that petitioner does not have the "background and experience" in preschool education pursuant to N.J.A.C. 6A:10A-2.2(a)(15)[2] for the position of supervisor of early childhood education.

13. The respondent did not appoint the petitioner to the position of supervisor of early childhood education. Instead, the respondent appointed a non-tenured staff member to the position.

14. By virtue of the fact that petitioner served in the position of supervisor of whole school reform and data analysis from March 24, 2003, through September 20, 2006, he accrued tenure as a supervisor. N.J.S.A. 18A:28-5.

15. The respondent appointed Nancee Bleistine as supervisor of early childhood education. Ms. Bleistine was appointed as coordinator of early childhood education by the respondent in March of 2004. (See Exhibit F.)

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[1] Now N.J.A.C. 6A:10A-2.2(a)(19).
[2] See note 1.

16. Nancee Bleistine was the holder of a standard certificate in nursery school and elementary education (Exhibit G) and supervisor certificate (Exhibit H) issued by the State of New Jersey.

17. Nancee Bleistine has been employed from 1998 through the present at the Vineland City School District in the area of preschool/early childhood education.

18. Abolition of petitioner's prior job at Vineland as supervisor of whole school reform was proper and in keeping with all legal requirements.

19. If petitioner had not applied for the position of supervisor of early childhood education, Ms. Bleistine would have been qualified for that position.

20. The position of supervisor of early childhood education falls within the preschool programs covered by N.J.A.C. 6A:10A-2.2(a)(19).

21. The only issue to be decided in this matter is whether petitioner had "experience in preschool education," as required by N.J.A.C. 6A:10A-2.2(a)(19).

22. If petitioner had "experience in preschool education" as required by N.J.A.C. 6A:10A-2.2(a)(19) and was in competition with a non-tenured applicant, such as Ms. Bleistine, for the position of supervisor of early childhood education, he would have been awarded the job because of his tenured status.

SUMMARY OF TESTIMONY

Carey Savage has been employed as supervisor for Tier I No Child Left Behind, Data Analysis and Art at the Vineland School District since July 2, 2007. Prior to that, he worked in the Bridgeton School District as supervisor of mathematics and science education for ten months. He was also chairman of the math and science committees. Prior to that he worked as the supervisor of whole school reform and data analysis in Vineland. His last day of employment in Vineland was September 20, 2006. In that job

he had supervisory responsibility over Nancee Bleistine. Ms. Bleistine is the non-tenured applicant who was appointed to the position of supervisor of early childhood education, the appointment that is the basis for this appeal. She was a facilitator in the Whole School Reform program. She worked as a liaison for core curriculum coordination. She facilitated for grades one through four. Petitioner supervised her in these activities. Data analysis was required to make the data quantifiable for distribution to teachers throughout the school district. Ms. Bleistine was part of that process. Petitioner ran conferences to ensure that core curriculum content standards were being developed and followed throughout the school district. He supervised Ms. Bleistine to ensure that the requirements for grades one through four were met. He had occasion to go to her school and supervised her performance of her duties. He did this to ensure maximum benefit of the core curriculum content standards for grades one through four. He did reports on raw scores for grades one through four and analyzed various disciplines for these classes. He prepared reports on the scores and discussed them with teachers. He would convene conferences for all school teachers, including teachers of preschool through grade 12. He prepared a performance analysis report in accordance with the preschool report of N.J. ASK 3. The State wanted to know if preschool education was viable. He looked at preschool 3 and 4, that is, preschool for three- and four-year-olds. The object of this analysis was to ascertain if students fared better in elementary school after attending preschool. This analysis also involved the review of racial and language components. As a result of his work in this area, Vineland determined that students who attended a two-year preschool fared better academically in grade school than students who attended only one year of preschool.

Petitioner's job description for supervisor of whole school reform and data analysis stated that he would supervise facilitators from preschool through grade 12. He supervised the preschool supervisor. His job functions were to work cooperatively and collectively with preschool-through-grade-12 principals and other supervisors. He reviewed their work to ensure fulfillment of core curriculum line requirements. These requirements were set to prepare preschoolers to function effectively at grade-school level. He also was involved in the professional development of teachers and supervisors, preschool through grade 12. This development concerned making teachers and supervisors able to make data-driven decisions. This was done

districtwide. He has made presentations to teachers and students at levels from preschool through grade 12.

Prior to his work at Vineland, petitioner worked as the program specialist for the Community Concern #13 Multipurpose Learning Center in North Philadelphia from 1976 to 1979. This was a private consortium involved with Head Start programs. In Philadelphia there was no requirement for public school students to attend kindergarten. The purpose of this consortium was to create a nurturing system and chart development of preschool-through-twelfth-grade students. However, during public school hours, that is, 9 a.m. to 3 p.m., his group dealt exclusively with preschool students. He had ten preschool teachers, six of whom were certified, working for him. He was a program specialist responsible for these school teachers. He evaluated them, developed programs, and interacted with other teachers. He did direct observations of lesson plans of preschool teachers. He made recommendations for better performance. This was a preschool program. He evaluated all preschool teachers at the center. The center served sixty preschool students, who were three to four years old. The curriculum dealt with four modes of instruction which taught preschoolers at different intensities and used different modalities. His preschool teachers taught language arts and other basic disciplines. He ensured that there was proper teacher interaction with students. He also would meet with all preschool students' parents.

On cross-examination petitioner acknowledged that he never developed a curriculum that met New Jersey Department of Education preschool requirements, nor did he ever implement a New Jersey early learning assessment system. He was not sure of what the master teacher requirements were for a preschool teacher. He never developed a New Jersey early childhood progress aid plan. With respect to his work as a data analyst, he did not give the tests, he just analyzed the results. His job at Vineland was to make sure that preschool was viable. His in-service work at Vineland required him to speak about the data that he had analyzed and how to integrate that data with preschool-through-twelfth-grade students.

The consortium in North Philadelphia was involved with preschool-through-junior-high students. It was licensed as a private daycare center. His teachers at that facility

did prepare lesson plans. The State of Pennsylvania and the City of Philadelphia licensed this facility as a private daycare facility and provided some funding. The consortium was made up of the sending schools.

CONCLUSION OF LAW

The parties agreed that the only issue to be decided is whether or not petitioner has "experience in preschool education" as required by N.J.A.C. 6A:10A-2.2(a)(19), which reads as follows:

> Each district board of education shall ensure that supervisors of preschool programs hold a New Jersey Supervisor's Certificate, have experience in preschool education and participate in annual training specific to preschool program implementation.

In an opening statement, counsel for respondent cited the definition of the word "experience," as found in the Merriam-Webster Dictionary, as "direct participation in events as a basis of knowledge; practical knowledge, skill or practice derived from direct participation in a particular activity."

Respondent was asked to supply, in its brief, any additional authority that interprets, defines or explains the word "experience" as used in the above-quoted regulation. In its brief, respondent acknowledges that the terminology in question is not defined in the New Jersey Administrative Code, and then refers to the regulatory scheme adopted as a result of the Abbott v. Burke decisions, N.J.A.C. 6A:10A-2.1 et seq. It is recognized by this judge that Vineland City is an Abbott district. However, none of the regulations give any guidance for interpreting or explaining the "experience" contemplated by N.J.A.C. 6A:10A-2.2(a)(19). The next reference in respondent's brief is to a Self-Assessment Validation System (SAVS) referred to in N.J.A.C. 6A:10A-2.2(a)(9). That system was to be the basis of a two-year program submitted by all Abbott districts by November 15, 2007. It is quoted by respondent as requiring, by September 2007, that all early childhood administrators possess early childhood credentials, meaning, "Preschool through Grade three certification, Nursery school

certification and/or a Master's Degree in Early Childhood Education." See Respondent's Brief, Attachment A. If such a "system" were in effect at the time of the appointment in question it would be a relevant consideration in this matter. However, the requirement that early childhood administrators have early childhood credentials was not in effect until September 2007. Indeed the copy of the SAVS enclosed with respondent's brief indicates that it was revised in November 2007. The appointment of Ms. Bleistine as supervisor of early childhood education occurred on August 30, 2006, more than a year prior to the completion of the "system" and well before the Board was to submit its two-year program based on the "system." Clearly, this recommendation from a task force that, interestingly, included Ms. Bleistine, is not relevant to the appointment made in August 2006. Moreover, the inclusion of the recommendation for preschool certification is evidence that such certification was not a requirement before the "system" was completed and the program implemented.

I am left to an interpretation of the regulation that is evident from the plain meaning of the regulatory language. Oberhand v. Director, Div. of Taxation, 193 N.J. 558 (2008). Adopting the dictionary definition of "experience" offered by respondent, "direct participation in events as a basis of knowledge; practical knowledge, skill or practice derived from direct participation in a particular activity," petitioner's participation in preschool education will be examined.

There is no temporal qualifier on the experience requirement in the regulation. Thus, it is appropriate to review petitioner's experience as far back as may be relevant. Clearly, his experience from 1976 to 1979 in Philadelphia dealt significantly with preschool education. From 9 a.m. to 3 p.m. he worked exclusively with preschool children. He directly supervised six preschool teachers. These responsibilities would unquestionably qualify as preschool experience and the regulation does not clearly exclude them just because they occurred thirty years ago.

The job description for supervisor of whole school reform in Vineland gave petitioner various responsibilities, including:

> 2. Work cooperatively and collectively with grades PreSchool–12 principals and other supervisors to ensure that instructional programs and services are coordinated in the elementary schools and are administered uniformly and equitably and meet the standards of School Reform and the district model(s) for School Reform.
>
> 3. Ensure coordination of services and articulation between the secondary and elementary levels of the instructional program by communicating frequently with instructional supervisors and principals on the grades PreSchool–12 level.
>
> [J-1, Exhibit A.]

In carrying out these responsibilities petitioner convened conferences for all teachers, including preschool, and prepared performance analyses. He observed preschool 3 and 4 classes to assess the effect preschool education had on three- and four-year-old children. This was done in conjunction with the NJ ASK 3 program. He also supervised the facilitators that worked with this program for preschool through grade 12. His responsibilities also covered the administration of the preschool supervisor, as well as ensuring that Ms. Bleistine effectively developed the core curriculum content standards and that they were followed throughout the school district. He was also involved with the professional development of teachers and supervisors, preschool through grade 12, in their ability to make data-driven decisions.

Although he has never developed a preschool curriculum, nor did he ever implement a New Jersey early childhood progress aid plan, petitioner's experience over the last thirty years has touched on numerous aspects of preschool education. This experience was never of the hands-on variety, he never personally taught a preschool class. But the wording of the regulation does not require that kind of experience. Nor does the regulation exclude experience gained in conjunction with other aspects of education. Indeed, the regulation covers supervisors, and does not exclude administrators whose preschool experience is limited to non-teaching duties.

Based on the foregoing, I **CONCLUDE** that the experience described by petitioner meets the regulatory requirements of "experience in preschool education"

found at N.J.A.C. 6A:10A-2.2(a)(19). Since this hearing was limited, by the agreement of the parties, to this sole issue, respondent's reference to the requirement in that regulation of annual training is not addressed.

ORDERS

I hereby **ORDER** that the Vineland Board of Education provide to petitioner all back pay and emoluments owed from the date he was removed from employment, September 20, 2006, until the date he returned to employment at Vineland, July 2, 2007. I further **ORDER** that any income he received, including that derived from his work in the Bridgeton School District, during that period, be considered in mitigation.

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

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

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

April 11, 2008
DATE

DENNIS P. BLAKE, ALJ

Date Received at Agency:

4-11-08

Mailed to Parties:

APR 14 2008

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

WITNESSES

For Petitioner

Carey Savage

For Respondent

None

EXHIBITS

For Petitioner

None

For Respondent

R-1 Job description, supervisor of early childhood education

Joint

J-1 Stipulation of Facts with exhibits attached

Hatrak, Marianne

From: System Administrator
To: EDU2; EDU3
Sent: Friday, April 11, 2008 3:00 PM
Subject: Delivered: Initial Decision; OAL Dkt. No. EDU 8747-06; Agency Dkt. No. 389-10/06; Savage v. Vineland BOE

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To: EDU
Subject: Initial Decision; OAL Dkt. No. EDU 8747-06; Agency Dkt. No. 389-10/06; Savage v. Vineland BOE
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EDU2 on 4/11/2008 2:59 PM
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247-08

NINA L. CHAVIS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF CRIMINAL HISTORY REVIEW,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Former school teacher, now employed in a new position as Parent Center Educator, sought nullification of the Department's determination disqualifying her from school employment pursuant to *N.J.S.A.* 18A:6-7.1, as a consequence of her conviction on child abuse charges resulting from hitting her 8 year-old son with a plastic jump rope. Petitioner contended that in her new position – which is not enumerated in the statute – she has no regular contact with students, and should therefore not be subject to the disqualification law.

The ALJ found that the petitioner is not employed in a school but in an administrative office, in a building that does not house classrooms, and therefore is not employed in a position that has regular contact with students. The ALJ concluded that the criminal history record check law does not apply to petitioner, and she is therefore not disqualified from the position of Parent Center Educator.

The Commissioner rejected the Initial Decision, finding that: the ALJ misread and misapplied the controlling statute, which is properly interpreted to encompass any position with a potential for access to students; petitioner has full access to school grounds and the ability to hold or observe parent education classes in school buildings while school is in session; and there are no safeguards in place that would prevent petitioner from coming into contact with unattended children. The Commissioner determined that there is no basis for concluding that the criminal history disqualification law does not apply in this case, and dismissed the petition.

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

May 30, 2008

OAL DKT. NO. EDU 8547-07
AGENCY DKT. NO. 248-9/07

NINA L. CHAVIS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF CRIMINAL HISTORY REVIEW,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have exceptions filed by the Department of Education (Department) pursuant to *N.J.A.C.* 1:1-18.4.[1]

On exception, the Department urges rejection of the Initial Decision and reiterates its stance that *N.J.S.A.* 18A:6-7.1 must be interpreted broadly so as to effectuate the legislative intent of protecting public school students from persons deemed to be a danger to them, as reflected in that statute. According to the Department, *N.J.S.A.* 18A:6-7.1 applies on its face – without regard to particular assignment or location – to all teaching staff members and to a number of other specifically enumerated positions, several of which – such as school secretaries and maintenance workers – do not typically entail student contact in the performance of job duties; therefore, the Department asserts, the Legislature plainly intended its prohibition against school employment by persons convicted of a disqualifying offense to apply to *any* person whose position or credentialing provides potential access to the district's schools, and

[1] Petitioner did not reply to the Department's exceptions.

hence, regular opportunity for contact with students. The Department contends that petitioner – by virtue of her qualifications, duties and compensation status as detailed at hearing – is both a teaching staff member and in a position providing unfettered access to district schools, so that *N.J.S.A.* 18A:6-7.1 must be read to preclude her employment in New Jersey public schools. (Department's Exceptions at 6-10; see also Letter Brief in Lieu of Answer and in Support of Motion to Dismiss at 4-9, Letter Brief in Reply to Petitioner's Brief in Opposition to Motion to Dismiss at 2-4, and Post-Hearing Brief at 6-11)

Upon careful review and consideration, the Commissioner must concur with the Department that the Administrative Law Judge (ALJ) has misread and misapplied the controlling statute in finding that the criminal history record check law does not apply to petitioner.

Prelminarily, the Commissioner finds that the language of *N.J.S.A.* 18A:6-7.1 applies categorically to all of the positions it specifically enumerates, regardless of their particular individual character. This being so, the ensuing phrase "or any other person serving in a position which involves regular contact with pupils" must necessarily be understood, as contended by the Department, in a similarly expansive manner – encompassing any position with a potential for access to students comparable to that of the enumerated positions.

In the present matter, the Atlantic City school district has attempted to accommodate petitioner's wish for continued employment, following her disqualification as a teacher, by fashioning a position intended to remove her from the purview of *N.J.S.A.* 18A:6-7.1. However, the record is clear that petitioner continues to function in a manner that subjects her to the strictures of that statute: First, notwithstanding that the job description for Parent Center Educator (Exhibit P-2/R-10) permits a four-year college degree to serve as an alternative credential to teaching certification, the duties of the position are fully consistent with those of a

certified teaching staff member;[2] accordingly, they command commensurate compensation, and petitioner was hired to perform them specifically based on her certification status and past experience as a teacher. Moreover, although petitioner's office may be in a separate administration building, it was uncontroverted on record that 1) parent education classes – which petitioner both teaches and supervises – can be held in school buildings while school is in session, 2) petitioner, as an administrator, has full access to school grounds, and 3) no safeguards are in place that would prevent petitioner from coming into contact with unattended children. (Testimony of Donna Haye,[3] as recited by the Department in Exceptions at 3-5[4] without objection from petitioner[5]) Under these circumstances, the Commissioner cannot reasonably find that petitioner's status and opportunity for contact with students are materially outside the scope of coverage envisioned by the Legislature; thus, there can be no basis for concluding, as did the ALJ, that the criminal history disqualification law does not apply to petitioner.

In so holding, the Commissioner is fully aware that application of the statute in this instance may appear unduly harsh; however, the inquiry in this matter is not – and *cannot* be, in light of the Legislature's 1998 action expressly foreclosing it – whether petitioner's

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[2] Duties include assisting the principal in determining parent needs, providing demonstration lessons and technical assistance, assisting the principal in the development of instructional programs and evaluation procedures of program participants, and assisting appropriate administrative personnel in all matters relating to the Parent Center. The Parent Center Educator job description was presumably not submitted to the County Superintendent for review pursuant to *N.J.A.C.* 6A:9-5.5 (the record is silent on this point); however, the position arguably should not be held by an uncertificated employee.

Additionally, according to hearing testimony referenced by both petitioner and the Department, petitioner was actually hired as a "Parent Coordinator" (supervisor of Parent Center Educators) rather than as a Parent Center Educator; however, no job description for that position was brought to the record and all employment actions by the Atlantic City Board of Education refer to petitioner as a Parent Center Educator. (Petitioner's Post-hearing Brief at 2; Department's Post-hearing Brief at 4-5; Department's Exceptions at 4-5; Exhibits R-11, R-12 and R-13)

[3] Assistant Superintendent Donna Haye is erroneously referenced, at various places in the Initial Decision, as Donna Hays or Donna Hayes. Her name appears correctly in the parties' papers, as verified through the district's staff directory at http://www.acboe.org.

[4] Reiterating its Post-hearing Brief at 3-5.

[5] The record of this matter did not include a transcript of the February 6, 2008 hearing, erroneously identified by the ALJ (Initial Decision at 2) as having occurred on February 7, 2008.

employment should be allowed because she poses no danger to children notwithstanding her conviction for a disqualifying offense, and will be eligible to have her conviction expunged in about two years. Although it is evident from the record that both the Atlantic City school district and the ALJ were influenced by their belief to this effect (Initial Decision at 2 and 4; Testimony of Donna Haye, Exhibit R-8), there can be no question that *N.J.S.A.* 18A:6-7.1 – as amended by P.L. 1998, c. 31 – no longer allows considerations such as the specific parameters of an applicant's position, the nature, seriousness, date and circumstances of an applicant's offense, and the applicant's history vis-à-vis other offenses and evidence of rehabilitation to enter into a determination of qualification for school employment. Were the Commissioner to hold otherwise, she would fail in her obligation to effectuate the Legislature's unequivocal intent to preclude judgment of individual applicants in the interest of ensuring the maximum degree of protection for children.

Accordingly, the Initial Decision of the OAL is rejected for the reasons set forth herein, and the petition of appeal is dismissed.[6]

IT IS SO ORDERED.[7] [8]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 5/30/08

Date of Mailing: 5/30/08

[6] The Initial Decision (at 5) erroneously dismisses "the petition seeking to disqualify petitioner from her position as a Parent Center Educator filed herein."

[7] The Commissioner stresses that the within decision does not preclude petitioner from applying for a new criminal history record check if her conviction is expunged as anticipated "on or about 2010" (Exhibit R-8).

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8547-07
AGENCY DKT. NO. 248-9/07

NINA L. CHAVIS,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF CRIMINAL HISTORY REVIEW,
Respondent.

Ned P. Rogovoy, Esq., for petitioner

Joyce D. Atkins, Deputy Attorney General, for respondent (Anne M. Milgram, Attorney General of New Jersey, attorney)

Record Closed: March 31, 2008 Decided: April 21, 2008

BEFORE **EDGAR R. HOLMES**, ALJ, T/A:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On January 8, 1999, in the Atlantic County Criminal Division of the Superior Court, the petitioner, Nina Chavis, after having pled guilty to an accusation charging her with child abuse contrary to N.J.S.A. 9:6-3, was sentenced to two years probation and

costs of $180.00. The crime to which she entered a plea was described as "...hitting her 8 year old son with a plastic jump rope."

At the time of the offense, the petitioner enjoyed an excellent reputation as an elementary school teacher. The respondent learned of the petitioner's conviction on April 3, 2007, and notified her and the Atlantic City School Superintendent that it would seek to disqualify the petitioner pursuant to N.J.S.A. 18A:6-7.1, et seq. from her position as a certified elementary school teacher.

On May 9, 2007, the petitioner's resignation from the position of teacher at the Texas Avenue School in Atlantic City was accepted by the Atlantic City Board of Education.

On June 26, 2007, the Atlantic City Board of Education appointed the petitioner to the position of Parent Center Educator, effective July 1, 2007. The position of parent educator is not enumerated in the disqualification statute but may be such a position "...which involves regular contact with pupils..." N.J.S.A. 18A:6-7.1.

The petitioner requested a plenary hearing and the matter was transmitted to the Office of Administrative Law (OAL) to be heard as a contested case pursuant to the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-1 to 15 and the Act creating the OAL, N.J.S.A. 52:14F-1 to 13.

A plenary hearing convened in Atlantic City on February 7, 2008, and the record closed on March 21, 2008, upon receipt of briefs and closing arguments.

As explained below, the petitioner is not disqualified from the position of Parent Center Educator because she will have no regular contact with pupils.

THE RELEVANT STATUTE

N.J.S.A. 18a:6-7.1 provides, in pertinent part:

> A facility, center, school, or school system under the supervision of the Department of Education and board of education which cares for, or is involved in the education of children under the age of 18 shall not employ for pay or contract for the paid services of any teaching staff member or substitute teacher, teacher aide, child study team member, school physician, school nurse, custodian, school maintenance worker, cafeteria worker, school law enforcement officer, school secretary or clerical worker or any other person serving in a position which involves regular contact with pupils unless the employer has first determined consistent with the requirements and standards of this act, that no criminal history record information exists on file ... which would disqualify that individual from being employed or utilized in such capacity or position....
>
> An individual, except as provided in subsection g. of this section, shall be permanently disqualified from employment or service under this act if the individual's criminal history record check reveals a record of conviction for any crime of the first or second degree; or
>
> a. An offense as set forth ... in R.S.9:6-1 et seq.

The statute clearly seeks to protect children from the possibility of abuse or sexual predation by excluding convicted persons from employment in schools.

FACTS

The Assistant Superintendent of Atlantic City Schools, Donna Hays, is the person responsible for the supervision of petitioner. She recommended petitioner for the position of Parent Center Educator. She furnished a copy of the petitioner's job description. Petitioner's sole function as a Parent Center Educator "...is to provide assistance (instructional, corrective, remedial) to build leadership capacity for parents." She has no contact with students.

Hayes reviewed petitioner's credentials for the job. Petitioner is a former "Teacher of the Year" and Hayes rates her teaching ability as "excellent." She believed petitioner would be an excellent administrator. She is the person who hired petitioner.

Petitioner's office is on the sixth floor of the Administration Building. There are no students on the sixth floor of the Administration Building. In fact, there are no students assigned anywhere in that building.

The Department established that a parent meeting with petitioner might bring a child to the meeting. The Department also established that a student may become a parent herself and bring her child to the meeting. These are possibilities only and do not raise any flags. If such contact occurred, it would certainly not be regular contact. It would in fact be very irregular contact.

Petitioner is not a sexual predator. Her conviction is for striking her own child with a plastic jump rope, apparently on one occasion.

DISCUSSION

Petitioner Chavis is not employed in a school but in an administrative office in a building that houses no classrooms. Her clientele consists of teachers and parents. She less apt to encounter a student in her office than in the community. The only way that she may encounter a student is if a parent or parents, meeting with petitioner, brings his or her or their child to the meeting or if a student herself has a child and utilizes petitioner as a resource for her own child.

That children need to be protected from those who may injure them is an important function of the law and its prosecution. But the law should be enforced consistent with its legislative purpose. Removing petitioner from her position as a parent educator simply because, qua educator, she may appear to come within the ambit of the statute is overreaching. The persons "protected" here would not be children but parents for whom there is no need of protection. After all, petitioner's conviction was for a single act of corporal punishment on her own child at home.

FINDING, CONCLUSION AND ORDER

I **FIND** that petitioner is not employed in a position that has regular contact with students.

I **CONCLUDE** that petitioner is not disqualified for the position of Parent Center Educator with the Atlantic City Board of Education.

I **ORDER** that the petition seeking to disqualify petitioner from her position as a Parent Center Educator filed herein be dismissed.

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

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

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

4 21 08

DATE

EDGAR R. HOLMES, ALJ, T/A

Date Received at Agency:

4-21-08

APR 24 2008

DATE

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

sd

WITNESSES AND DOCUMENTS IN EVIDENCE

WITNESSES

For Petitioner:

Donna Hayes

For Respondent:

Carl Carabelli

EXHIBITS

For Petitioner:

P-1 Atlantic City Boad Minutes, June 26, 2007

P-2 Job Description of Parent Center Educator

For Respondent:

R-1 Promise Gavel Detail

R-2 Letter, Department of Education to Petitioner, April 3, 2007

R-3 Letter, Department of Education to Office of Licensing, April 3, 2007

R-4 Letter, Department of Education to Atlatnic City School Superintendent, April 3, 2007

R-5 Letter, Department of Education to Atlantic City Board of Education, July 30, 2007

R-6 Letter, Rogovoy to Carabelli, August 22, 2007

R-7 Letter, Carabelli to Rogovoy, August 22, 2007

R-8 Letter, Rogovoy to Atlantic City Superintendent, April 27, 2007

R-9 Atlantic City Board Minutes, May 9, 2007

R-10 Job Description of Parent Center Educator

R-11 Request for Board Action, June 26, 2007

R-12 Atlantic City Boad Minutes, June 26, 2007

R-13 Atlantic City Board Minutes, August 28, 2007

249-08

OAL DKT. NO. EDU 1517-08
AGENCY DKT. NO. 349-11/07

R.C.-F., on behalf of minor child, A.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of failure to appear transmitted by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 – along with copies of notifications sent to the parties by OAL on April 29, 2008, providing an opportunity to submit an explanation for such nonappearance – have been reviewed. There being no explanation filed by either party,[1] this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.[2]

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 6/02/08
Date of Mailing: 6/02/08

[1] The Board had filed a counterclaim seeking tuition for A.C.'s period of ineligible attendance in the district pursuant to *N.J.S.A.* 18A:38-1.

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

250-08

OAL DKT. NO EDU 8169-07
AGENCY DKT. NO. 245-8/07

IN THE MATTER OF THE TENURE HEARING OF WENDELL LEE, SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY.	COMMISSIONER OF EDUCATION DECISION

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

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

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 6/02/08

Date of Mailing: 6/02/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8169-07

AGENCY DKT. 245-8/07

IN THE MATTER OF THE TENURE HEARING OF WENDELL LEE, SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY.

Thomas W. Sumners, Esq., appearing for petitioner, School District of the City of Trenton (Sumners George, attorneys)

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

Record Closed: April 14, 2008 Decided: April 14, 2008

BEFORE **DENNIS P. BLAKE**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on October 2, 2007, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14F-1 to 13. The matter was heard on November 1, 2007, and January 18, 2008. The hearing dates of January 24 and 29, 2008, were adjourned due to a possible settlement.

The parties have agreed to a settlement and have prepared a Settlement Agreement, indicating the terms thereof, which is attached and fully incorporated herein. (J-1). Upon its receipt on April 14, 2008, the hearing record closed.

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

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

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

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

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

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

April 14, 2008
DATE

DENNIS P. BLAKE, ALJ

Date Received at Agency:

APR 17 2008

Mailed to Parties:

CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

/cs

EXHIBITS

Jointly submitted

J-1 Settlement Agreement

SETTLEMENT AGREEMENT

RECEIVED
2008 APR 14 A 11: 16
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

In the Matter of the Tenure Hearing
of Wendell Lee
Trenton Board of Education

This ***SETTLEMENT AGREEMENT*** ("Agreement") is made between the Petitioner, Board of Education of the City of Trenton ("Board"), and the Respondent, Wendell Lee ("Lee").

WHEREAS, the Board filed tenure charges with the Commissioner of Education, Agency Docket No. 245-8/07, OAL Docket No. EDUTH 08169-2007S ("tenure proceeding"), in which Lee was charged with engaging in conduct unbecoming of a Board employee, specifically, inappropriate use of physical force against two high school students (striking one with a ruler and shoving another one) and inappropriate language towards students; and

WHEREAS, the Board can only rely on three students of the seven student witnesses to prove the allegations contained in the Charges because two students have left the School District and are not available to testify, one student is not available to testify because she is performing community service in New Orleans, LA and one student feels Lee's hitting another student with a ruler was an accident; and

WHEREAS, Lee is 76 years old and has been continuously employed by the Board for approximately 20 years without any disciplinary charges after working in the private sector for 35 years; and

WHEREAS, Lee denies that he used inappropriate physical force and denies using inappropriate language; and

WHEREAS, Lee intends to present testimony statements from other students to dispute statements made about his classroom behavior; and

WHEREAS, the Parties feel it is in the best interest of all involved and all issues related that the tenure proceeding be settled allowing for the expeditious resolution of this matter, and saving students from having to testify, and saving both Parties the cost of legal fees and uncertainty of litigation;

NOW, THEREFORE, in consideration of the covenants and mutual promises contained herein, it is hereby agreed as follows:

1. The Board agrees to dismiss the tenure charges against Lee;

2. Lee agrees to submit a letter of retirement effective June 30, 2008;

3. The Parties agree that Lee will not receive back pay for the one hundred twenty (120) days for the period of suspension without pay which occurred between August 27, 2007 and December 25, 2007 in accordance with *N.J.S.A.* 18A:25-6;

4. Lee will remain on the payroll but will be placed on administrative assignment through the end of the 2007-2008 school year

5. Lee further agrees to voluntarily relinquish his teaching certification to the New Jersey State Board of Examiners effective this same date;

6. The Parties agree and covenant that neither party, nor any person, organization, or other entity on their behalf will file any charge, claim, lawsuit against any Party based upon the fact that the Board filed tenure charges or that Lee defended those charges;

7. The Parties recognize that each of them has had input into the drafting of this Agreement and agree that if there should arise a dispute as to its terms, this Agreement shall not be construed against either party based upon the identity of its drafters;

8. The Parties understand that this Agreement and its validity is contingent upon the approval of Administrative Law Judge Dennis Blake and the Commissioner of Education, and

that if any terms of this Agreement are rejected, this Agreement shall be deemed null and void, and in such event, neither Party's position in relation to the tenure charge shall be prejudiced and the matter shall be returned to the Office of Administrative Law for a hearing in relation to the tenure proceeding, and that in such event, the Parties may again attempt to settle the matter in a manner which is satisfactory to Administrative Law Judge Blake and the Commissioner of Education.

9. The Parties request that the tenure hearing be held in abeyance in order to obtain the approval of this Agreement by Administrative Law Judge Blake and the Commissioner of Education, and in the event that approval is not obtained by the proposed effective date of Lee's retirement, but is later approved, Lee is not entitled to salary payments during the pendency of obtaining approval of this Agreement after June 30, 2008 (the proposed effective date of Lee's retirement);

10. The Parties acknowledge that this Agreement is based upon their analysis and understanding of the evidence which would be presented should the hearing continue, and that in the event that this Agreement is not approved and the hearing is reconvened, neither this Agreement or anything in this Agreement shall be admissible in evidence;

11. In settling this matter, the Parties acknowledge that they are waiving their rights to a hearing before the Office of Administrative Law and the right to file exceptions to the Commissioner of Education as well as appeals in accordance with state law;

12. The Parties further acknowledge and agree to the terms of this Agreement and are satisfied with the legal representation that they have received in this matter;

13. The Parties warrant that this Agreement is entered into voluntarily, without any duress, or without any other promises or agreements not expressed herein, and with the

understanding that neither Party is compelled to do so, and that by entering into this Agreement, each Party waives their right to a hearing and disposition on the merits of the charges;

14. Lee has approved the terms of this Settlement Agreement as acknowledged by his signature below;

15. The Board has approved the terms of this Agreement by a roll call majority vote and acknowledged by the execution of this Agreement by the Board President.

APPROVED:

Joyce M. Kersey

Joyce M. Kersey, President
Trenton Board of Education

Sworn and subscribed to before me
this 11 day of February, 2008

Thomas W. Sumners

Thomas W. Sumners, Jr., Esq.
Attorney at Law, State of New Jersey

Wendell Lee

Wendell Lee, Respondent

Sworn and subscribed to before me
this 20th day of March, 2008

Michael T. Barrett, Esq.
Attorney at Law, State of New Jersey

#251-08E

251-08

OAL DKT. NO. EDU 7015-08
AGENCY DKT. NO. 135-5/08

M.R., ON BEHALF OF MINOR CHILD, J.R.,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON APPLICATION
BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,	:	FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this matter – including the audiotape of proceedings – and the recommended order of the Office of Administrative Law (OAL) have been reviewed.

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia, supra,* and *N.J.A.C.* 6A:3-1.6. The Commissioner so holds, however, for reasons different than those stated by the ALJ.[1]

Initially, unlike the ALJ, the Commissioner finds that petitioner has met the threshold standard of irreparable harm notwithstanding that prom attendance is a privilege rather than a right, since the opportunity to participate cannot be regained once lost and dismissal of an emergent application on this criterion alone would effectively insulate a school district's actions in matters of this type from any meaningful review.[2]

[1] The ALJ delivered an oral decision from the bench that was somewhat more detailed than the written order embodying it; however, the basis for the ALJ's final recommendation is the same in both.

[2] In so holding, the Commissioner is fully cognizant of the well-established principle that a prohibition from attending events of this type does not, in and of itself, rise to the necessary level of irreparable harm so as to warrant extraordinary remedy. However, harm is "irreparable" when there can be no adequate after-the-fact remedy in law or in equity, and monetary damages cannot adequately redress the intangibles of a lost experience after the event is over. In past cases denying similar applications for emergent relief, the irreparable nature of the harm and the degree or severity of the harm have frequently been addressed together; they are, however, two separate factors, and it is on the basis of the *severity* of the harm – which pertains to the weighing of interests – and not its irreparable nature that applications of this kind typically fail. *Martin A. Domacasse v. Board of Education of the North Warren*

However, applicants seeking extraordinary remedy must also demonstrate a likelihood of success on the merits of the underlying appeal and show that the balance of interests and equities under the circumstances rests in their favor. Here, the Commissioner cannot find that petitioner has met the necessary burden. Rather, the Commissioner finds – based on the testimony educed at hearing – that the petitioner has little, if any, likelihood of prevailing in a claim that the Board's decision to deny prom attendance to J.R. under the circumstances was arbitrary, capricious, unreasonable or unlawful, or that J.R.'s interest in attending his senior prom outweighs the Board's interest in maintaining consistency in its application of discipline and a safe and orderly environment in school and at school events.[3]

Accordingly, the recommended Order of the OAL denying petitioner's application is adopted with modification as set forth above. Because the present decision fully disposes of all issues in dispute between the parties, no further proceedings are necessary, and this matter is, therefore, dismissed with the request that the Clerk of the OAL return the file to the agency pursuant to *N.J.A.C.* 1:1-3.3.

IT IS SO ORDERED.[4]

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: May 30, 2008
Date of Faxing: May 30, 2008

Regional School District, Warren County, decided by the State Board April 17, 1996; *L.J. on behalf of minor child, S.J., and David Wickham v. Board of Education of the Township of Manchester, Ocean County*, decided by the Commissioner May 2, 2003. See *D.M.S., on behalf of minor child, E.B., and Gregory Heck v. Board of Education of the Pinelands Regional School District, Ocean County, et al.*, decided by the Commissioner May 9, 2008.

[3] The Commissioner notes that the Board's policy on loss of extracurricular activities in conjunction with a student suspension does not clearly appear in the student handbook, and she suggests that the Board consider such inclusion in the future. This omission has no bearing on the present matter, however, since it is undisputed that the student body was fully aware of the policy, having been advised – and regularly reminded – of it through school assemblies during all four years of high school.

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

253-08

OAL DKT. NO EDU 546-08
AGENCY DKT. NO. 30-1/08

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

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

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

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 6/05/08

Date of Mailing: 6/05/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 546-08

AGENCY DKT. NO. 30-1/08

M.B. ON BEHALF OF MINOR CHILD, R.D.,

Petitioner,

v.

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

Respondent.

M.B., petitioner, pro se

Kimberly A. Sukinik, Esq., on behalf of respondent (Comengo Law Group, attorneys)

Record Closed: April 22, 2008 Decided: April 24, 2008

BEFORE **DANIEL B. MCKEOWN,** ALJ:

This matter arises out of respondent's determination that R.D. is not domiciled in the district and thus is not entitled to a free public education, N.J.S.A. 18A:38-1. A petition was filed with the Commissioner, and this matter was transmitted to the Office

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

4-24-08

Daniel B McKeown

DATE

DANIEL B. MCKEOWN, ALJ t/a

Date Received at Agency:

MAY - 1 2008

DATE

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

/lam

of Administrative Law on February 13, 2008, for a hearing pursuant to N.J.S.A. 52:14F-1 to –13. Thereafter, the matter was schedule on an expedited basis for a hearing on April 29, 2008.

On April 22, 2008, attorney for the school board faxed a copy of a fully executed Consent Order withdrawing petitioner's appeal and dismissing respondent's counterclaim.

Based on the foregoing, the April 29, 2008, hearing date was adjourned. Upon receipt of the faxed Consent Order on April 22, 2008, the record in this matter closed.

I have reviewed the record and the terms of the Consent Order and I **FIND**:

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

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

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

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

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

COMEGNO LAW GROUP, P.C.
521 Pleasant Valley Avenue
Moorestown, New Jersey 08057
856.234.4114
856.234-4262 Fax
Attorneys for Respondent

BY: ARTHUR F. RISDEN, ESQUIRE
KIMBERLY A. SUKINIK, ESQUIRE

M.B. o/b/o R.D., Petitioner, v. LENAPE REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION, Respondent.	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION DOCKET NO: EDUOS 00546-2008S AGENCY REF: 30-1/08 **CONSENT ORDER FOR WITHDRAWAL AND DISMISSAL OF PETITION AND COUNTERCLAIM**

THIS MATTER having been brought by Petitioner, M.B. o/b/o R.D., appearing *pro se*, against the Lenape Regional High School District Board of Education ("the Board"), being represented by Comegno Law Group, P.C.;

AND Petitioner having submitted a copy of an Order to Respondent from the Family Court of the State of New York, Suffolk County, which grants custody of R.D. to M.B.;

AND Respondent having accepted that custody order, and admitting R.D. to attend Respondent Schools for as long as the above-referenced custody order remains effective and R.D. resides with M.B. within the Respondent school district;

AND this Consent Order does not indicate that Respondent accepts Petitioner's initial application for non-resident "affidavit" student status, or that such initial application was sufficient under the requirements of N.J.S.A. 18A:38-1, et. seq. to warrant admitting student R.D. on that basis absent submission of the above-referenced custody order;

IT IS on this 17th day of April, 2008, **ORDERED** that:

(1) Petitioner M.B. hereby **WITHDRAWS** her Petition in the above matter which sought an appeal of the residency determination made by Respondent pursuant to N.J.S.A 18A:38-1, et. seq. The above matter is thereby **DISMISSED WITH PREJUDICE**.

(2) Respondent Board's Counterclaim filed in the above matter is hereby WITHDRAWN and is **DISMISSED WITH PREJUDICE**.

HONORABLE DANIEL B. McKEOWN, A.L.J.

We hereby understand and consent to the form and substance of the above Order, and enter into same without duress, coercion, or undue influence :

Kimberly A. Sukinik, Esquire
Counsel for Respondent
DATED:

Mecca Baker, Petitioner
Pro Se
DATED: 4-17-08

254-08

254-08

OAL DKT. NO. EDU 9715-07
AGENCY DKT. NO. 215-8/07

JEANNETTE GILLILAND,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

Lucille Davy

COMMISSIONER OF EDUCATION

Date of Decision: 6/05/08

Date of Mailing: 6/05/08

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 09715-07
AGENCY DKT. NO. 215-8/07

JEANNETTE GILLILAND,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG, WARREN COUNTY,

Respondent.

David Nash, Esq., for petitioner (New Jersey Principals and Supervisors Association)

Lester E. Taylor, Esq., for respondent (Floria, Perrucci, Steinhardt & Fader, attorneys)

Record Closed: April 28, 2008 Decided: May 1, 2008

BEFORE **J. HOWARD SOLOMON,** ALJ:

This matter involving an appeal by a non-tenured principal seeking reinstatement to employment was transmitted to the Office of Administrative Law on September 19, 2007 for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The matter was scheduled for hearing to commence on April 29, 2008. Prior to that date the parties reached a settlement and forwarded the enclosed Settlement Agreement and Release indicating the terms of settlement which was received by the undersigned on April 28, 2008.

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

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

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

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

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

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

5-1-08
DATE

J. HOWARD SOLOMON, ALJ

Date Received at Agency: 5-5-08

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAY 5 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

pb

SETTLEMENT AND RELEASE AGREEMENT

This is a Settlement and Release Agreement (hereinafter "Agreement") between Jeanette Gilliland ("Gilliland"), residing at 5326 Wagonwheel Drive, Schnecksville, Pa., 18078, and the Phillipsburg School District ("*Board*" or "District"), 445 Marshall Street, Phillipsburg, New Jersey 08865.

WITNESSETH:

WHEREAS, Gilliland *was* employed as a Principal at the Andover-Morris School;

WHEREAS, On or about May 14, 2007, the Board voted to non-renew Gilliland's employment contract pursuant to NJSA 18A:*27-10*;

WHEREAS, Gilliland filed a petition in the Office of Administrative Law under *OAL Docket Number EDU 09715-2007N; Agency Reference Number 215-8/07* challenging said non-renewal;

WHEREAS, prior to a determination on the merits considering such petition the District through its counsel and Gilliland through her counsel engaged in settlement negotiations for the purposes of avoiding protracted litigation between them; and

WHEREAS, the parties, without admitting liability or fault, and after an opportunity to consider and to confer with competent counsel of their choice, have reached a voluntary agreement with respect to any and all disputed issues in connection with Jeanette Gilliland's employment relationship with the District and the separation thereof, and with a full understanding of the terms of this Agreement, desire to memorialize their settlement herein; and

WHEREAS, the parties, desire to resolve all claims, between them, except as is specifically provided herein,

NOW, THEREFORE, in consideration of the mutual covenants contained herein and as set forth in further detail herein, the parties agree as follows:

1. **Payment.** Gilliland shall immediately receive a lump sum payment in the amount of thirteen thousand two hundred sixty six dollars and thirty eight cents ($13,266.38), which is equivalent to what she would have earned had she remained a District employee for the period December 1, 2007 through January 15, 2008. Ms. Gilliland shall be reinstated as an employee of the District retroactive to July 1, 2007

through November 30, 2007. The District shall pay to Gilliland an award of back pay in the amount of Forty Four Thousand Two Hundred Twenty One Dollars and Twenty Five Cents ($44,221.25) less applicable payroll taxes, and other standard and ordinary withholdings which is representative of five months of salary covering the period July 1, 2007 through November 30, 2007, calculated at the 2007-2008 annual base salary of $106,131.00. Gilliland shall be paid back pay in accordance with the following schedule:

a. *Gilliland shall receive retroactive payment for the period July 1, 2007 through November 30, 2008 to be paid out in the following manner:*

   1. *bi-monthly payment on November 30, 2007 covering the period July 1, 2007 through July 15, 2007, minus all applicable required pension and contributory life contributions for the period July 1, 2007 through November 30, 2007*
   2. *bi-monthly payments on the 15th and 30th of each month from January 30 through May 30, 2008 covering employment for the period July 15, 2007 through November 30, 2007.*

b. *In addition to the foregoing payment schedule, the District shall also pay immediately to Gilliland the amount of $943, which shall be equal to the sum of $725.00 for NJPSA Dues and $218.00 for NAESP Dues.*

2. **Gilliland's Voluntary Resignation.** Gilliland will immediately submit a signed letter voluntarily resigning her employment effective *at the end of the work day on November 30, 2007*. The district shall make ordinary pension and/or 403B contributions for employee for *the period referenced in 1(a) above*. The district shall cooperate with Gilliland in connection with any communication or provision of documentation with the New Jersey Division of Pensions that is necessary to ensure that she receives pension credit for the period July 1, 2007 through November 30, 2007.

3. **Gilliland's Release.** Except for claims relating to the enforcement of this Agreement, Gilliland hereby releases and forever discharges the District and all of their former and current employees, Board members, superintendents, officers, directors,

overseers, trustees, students, consultants, vendors, attorneys, agents, successors and assigns ("Releasees") from any and all manner of action and actions, cause and causes of action, suits, claims, grievances, debts, sums of money, wages, compensation, bills, claims for attorneys' fees, interest, expenses and costs, controversies, agreements, promises, variances, trespasses, damages, judgments, executions, claims and demands of any nature whatsoever known or unknown, suspected or unsuspected, vested or contingent, which Gilliland ever had or now has against the Releasees arising out of Gilliland's former and existing employment relationship with them or for any other reasons which were asserted or could have been asserted by Gilliland under any local, state or federal statute, constitution, ordinance, contract or the common law, including, but not limited to, all claims under: the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 6, et seq. ("ADEA"); Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. §§ 2000e, et seq., ("Title VII"); the Reconstruction Era Civil Rights Act, as amended, 42 U.S.C. §§ 1981, § 1983, et seq. ("Civil Rights Act"); the Civil Rights Act of 1991, as amended, 42 U.S.C. § 1981a, et seq. ("CRA of 1991"); the Americans with Disabilities Act, 42 U.S.C. §§ 12101, et seq. ("ADA"); the Family and Medical Leave Act, 29 U.S.C. §§ 2601, et seq. ("FMLA"); the Fair Labor Standards Act, 29 U.S.C. § 201, et seq. ("FLSA"); the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, et seq. ("ERISA"); the Equal Pay Act, 29 U.S.C. § 201, et seq., (EPA"); the Rehabilitation Act, 29 U.S.C. §§ 701, et seq. ("RA"); the Pregnancy Discrimination Act, 42 U.S.C. §§ 2000, et seq. ("PDA"); the Whistleblower Protection Statutes, 10 U.S.C. § 2409, 12 U.S.C. § 1831j, 31 U.S.C. § 5328, 41 U.S.C. § 265, (collectively as "WPS"); the Sarbanes-Oxley Act, 18 U.S.C. 1514A, the False Claims Act, 31 U.S.C. §§ 3729, et seq.; the New Jersey Civil Rights Act, N.J.S.A. 10:6-1, et seq.; the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et seq. ("LAD"), the New Jersey Family Leave Act, N.J.S.A. 34:11B-1, et seq. ("FLA"); the New Jersey Conscientious Employee Protection Act, N.J.S.A. 34:19-1, et seq. ("CEPA"); the New Jersey Worker Freedom from Intimidation Act, N.J.S.A. 34:19-9, et seq.; the New Jersey Wage and Hour Law, N.J.S.A. 34:11-56a, et seq. ("WHL"); the New Jersey Discrimination in Wages Law, N.J.S.A. 34:11-56.1, et seq. ("DWL"); the New Jersey Workers' Compensation Law, N.J.S.A. 34:15-39.1, et seq. ("NJWC"); and the New Jersey Wage Payment Law, N.J.S.A. 34:11-4.1, et seq. ("WPL). Gilliland expressly

understands and acknowledges that it is possible that unknown losses or claims exist or that present losses may have been underestimated in amount or severity. Gilliland expressly accepts and assumes the risk of such unknown or underestimated losses or claims and acknowledges and agrees that the benefits to be provided to ~~him~~ her pursuant to this Agreement fully compensate her for such risks. Gilliland acknowledges that none of the benefits given to her pursuant to this Agreement have been assigned or are subject to alienation (i.e., personal bankruptcy).

4. **District's Release.** Except for claims relating to the enforcement of this Agreement, the District hereby releases and forever discharges Gilliland from any and all manner of actions, claims, suits, grievances, debts, sums of money, claims for attorneys fees, sums of money, wages, compensation, bills, claims for attorneys' fees, interest, expenses and costs, controversies, agreements, promises, variances, trespasses, damages, judgments, executions, claims and demands of any nature whatsoever known or unknown, suspected or unsuspected, vested or contingent, which it ever had or has against Gilliland arising out of Gilliland's former or existing employment relationship with the District or for any other reasons which were asserted or could have been asserted under any local, state or federal statute, constitution, ordinance, contract or the common law.

5. **Dismissal of Pending Lawsuit/Covenant Not to Sue.** Within five (5) days after execution of this agreement, the parties shall file a Stipulation of Dismissal with prejudice as to all claims asserted against each other, including cross claims. The parties further covenant not to sue each other for actions arising out of their former and/or existing relationship.

6. **Non-Admission of Liability.** The execution of this Agreement and the settlement made hereunder shall not be construed as an admission of liability by any party to this Agreement, such liability being expressly denied. It is agreed that there is no prevailing party in this litigation. Gilliland is responsible for her own attorneys' fees and costs.

7. **Confidentiality.** To the extent permitted by law, the parties shall hold confidential the terms of this Agreement, the amount paid in consideration thereof, any claims or purported admissions made during the settlement negotiations, and any information required hereunder the terms of settlement (the "Confidential Information")

and shall not disseminate the Confidential Information to anyone other than the parties, their accountants, and their counsel, other than to state in response to an inquiry that the differences between them have been resolved to their mutual satisfaction.

8. **Entire Agreement/Severability/Not Construed Against Drafter.** This Agreement constitutes the entire understanding between the parties as it relates to the subject matter of this Agreement and supersedes all other representations, statements, and understandings or agreements pertaining to such subject matter. The provisions of this Agreement are severable, and if any provision of it is found to be unlawful or unenforceable, it shall be deemed narrowed to the extent required to make it lawful and enforceable. The Agreement was negotiated at arms-length and shall not be construed against its drafter as each party participated equally in its drafting.

9. **Return of District Property.** Gilliland represents and warrants that she has turned over to the District all property of the District.

10. **Consideration and Revocation Period.** Gilliland represents and warrants that she has had an adequate time to consider the terms and conditions of this Agreement and that she has consulted with her own counsel, David Nash, Esq., about it. Gilliland has a period of seven (7) calendar days after delivering the executed Agreement to the District's attorney to revoke acceptance of the Agreement. To revoke, she must deliver timely written notice revoking her acceptance of this Agreement to the attention Lester E. Taylor, Esq., Florio Perrucci Steinhardt & Fader, L.L.C., 235 Frost Avenue, Phillipsburg, New Jersey 08865. This Agreement shall become effective on the eighth (8^{th}) day after delivery of this executed Agreement by the parties, provided that Gilliland has not revoked acceptance or rescinded the Agreement (the "Effective Date").

11. **Neutral Letter of Reference/Non-Disparagement.** The parties agree not to disparage each other to any third party. The District agrees, upon request, to prepare a letter on its stationary setting forth Gilliland's administrative, teaching, coaching, and/or extra curricular positions with the District as well as her dates of employment and rates of pay. In response to any telephone inquiries the District agrees to send the aforesaid letter to any prospective or existing employer of Gilliland's upon request. Nothing in this agreement shall preclude any individual from serving as a reference for Gilliland provided that Ms. Gilliland requests such a reference and the individual agrees to such request. No comments made by such an individual shall be attributable to the board of

education and no such comments may be held in any manner against the board of education.

12. **Violation of Material Provision(s).** In the event that either party violates any material provision of this Agreement, the parties will have the right to petition a court of competent jurisdiction for appropriate legal remedies, equitable remedies, or both, to compensate the aggrieved party or parties for any such violation. If a party is deemed to be the "prevailing party" in an action to enforce the terms of this Settlement Agreement, the non-prevailing party(ies) shall pay the prevailing party(ies) its reasonable legal fees and costs. For purposes of the foregoing, if either party is lawfully compelled to disclose the terms of settlement pursuant to an OPRA request, court order or other lawful directive, the party required to make such a disclosure shall not be considered to be in breach and the remainder of the Agreement shall remain in full force and effect.

13. **Voluntary and Knowing Agreement.** Gilliland acknowledges that she has executed this Agreement after consulting with her attorney, David Nash, Esq., and after considering the terms of the Agreement, and further acknowledges that she has read this Agreement in its entirety, understands all of the terms and freely, voluntarily and knowingly, without duress or coercion, assents to all the terms and conditions contained herein.

By signing below, all Parties indicate that they have carefully read and understand the terms of this Agreement, enter into this Agreement knowingly, voluntarily and of their own free will, understand its terms and significance and intend to abide by its provisions without exception.

JEANETTE GILLILAND

Jeanette Gilliland

STATE OF NEW JERSEY :
: S.S.:
COUNTY OF :

On November 26, 2007, before me personally came Jeanette Gilliland to me known and known to me to be the individual described in, and who executed the foregoing Settlement Agreement and General Release, and duly acknowledged to me that she executed the same.

Sworn to before me on this
26th day of November, 2007.

David Nash
Attorney-At-Law
Member of New Jersey State Bar - 2004

PHILLIPSBURG SCHOOL DISTRICT

By: [SIGNATURE]

W Paul Rummerfield [PRINTED NAME]

Board President [TITLE]

Date: 11/26/07

Agreed as to form:

David Nash, Esq.

Attorneys for Jeanette Gilliland

By: _____
David Nash, Esq.

FLORIO PERRUCCI STEINHARDT
& FADER, L.L.C.
235 Frost Avenue
Phillipsburg, New Jersey 08865
Attorneys for Phillipsburg School District

By: _____
Lester E. Taylor, Esq.

EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG, WARREN COUNTY, NJ AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the Town of Phillipsburg in the County of Warren, NJ, convened in Regular Session on Monday, November 12, 2007, at 7:30 p.m., in the Commons of the Phillipsburg Middle School, 525 Warren Street, Phillipsburg, New Jersey.

The following members of the Board of Education were present:

Mr. Bernard Brotzman	Mr. James Hanisak
Mrs. Rosemarie Person	Mr. Richard Turdo
Mr. Kevin DeGerolamo	Mr. Chafik "Steve" Zarbatany
Mr. Thomas McGuire	President Mr. Paul Rummerfield

The following members of the Board of Education were absent: Mr. Salvatore Patti

The following resolution was offered by Mr. Brotzman and seconded by Mr. DeGerolamo and adopted by the Board of Education by the following Roll Call vote:

TITLE: Settlement in the matter of Jeanette Gilliland vs. Phillipsburg Board of Education

RESOLVED: Move to approve the resolution authorizing the settlement to be entered by and between the parties on or about this date in the total amount of $58,430.63 payable to petitioner.

AYES: Mr. Brotzman, Mr. DeGerolamo, Mr. Hanisak, Mr. McGuire, Mrs. Person, Mr. Turdo, Mr. Zarbatany, Mr. Rummerfield

NAYS: None

STATE OF NEW JERSEY)
COUNTY OF WARREN)

I, William W. Poch, Secretary of the Board of Education of the Town of Phillipsburg, in the County of Warren, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of said district duly called and held on **November 12, 2007**, has been compared by me with the original minutes as officially recorded in the minute book of said Town of Phillipsburg, Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this **28th** day of **April , 2008.**

AFFIX SEAL:

William W Poch
Signature of Secretary

255-08

OAL DKT. NO. EDU 11086-07
AGENCY DKT. NO. 227-8/07

ANTHONY MENDES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 6/05/08

Date of Mailing: 6/05/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11086-07
AGENCY DKT. NO. 227-8/07

ANTHONY MENDES,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,

Respondent.

Jennifer Borja, Esq., for petitioner (Timothy R. Smith & Associates, attorneys)

Karen A. Murray, Esq., for respondent (The Murray Law Firm, attorneys)

Record Closed: April 23, 2008 Decided: April 28, 2008

BEFORE **JAMES A. GERAGHTY,** ALJ:

This matter was transmitted to the Office of Administrative Law on October 11, 2007 for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

Following several telephone conferences, the parties reached a settlement and executed the enclosed Settlement Agreement indicating the terms of settlement, which was received by the undersigned on April 23, 2008.

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

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

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

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

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

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

4/28/08
DATE

James A. Geraghty
JAMES A. GERAGHTY, ALJ

Date Received at Agency: 5-2-08

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAY 2 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

pb

THE MURRAY LAW FIRM, LLC.
3 Revmont Drive, Suite 318
Shrewsbury, New Jersey 07702
(732) 389-1010
Attorneys for Respondent, Elizabeth Board of Education

ANTHONY MENDES, Petitioner, v. ELIZABETH BOARD OF EDUCATION, Respondent.	STATE OF NEW JERSEY COMMISSIONER OF EDUCATION OAL DKT. NO.: EDUOR 11086-2007N AGENCY DOCKET NO.: 227-8/07 SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release is made by and between the Elizabeth Board of Education (the "Board") whose administrative offices are located at 500 North Broad Street, Elizabeth, New Jersey 07207 and the law offices of Timothy R. Smith & Associates, L.L.C. whose offices are locates at 76 South Orange Avenue, Suite 211, South Orange, New Jersey, 07079 for the New Jersey Education Association (N.J.E.A.), which incurred legal expenses on behalf of its member Anthony Mendes ("Mendes"). In consideration of mutual promises and undertakings contained in this Settlement Agreement and General Release and for good and valuable consideration the receipt of which is hereby acknowledge, the undersigned parties state:

WHEREAS, on September 29, 2004, Mendes was employed as a Teacher by the Board; and

WHEREAS, on that date, a Criminal Complaint was issued against Mendes for certain acts alleged to have occurred while Mendes was in the employ of the Board. A copy of the Municipal Court Complaint, Docket No.: S-2004-007606-004 is attached hereto; (Exhibit A) and

WHEREAS, on December 23, 2004, the Elizabeth Municipal Court dismissed the above-referenced criminal Complaint against Mendes. A copy of the disposition reflecting said dismissal is attached hereto; (Exhibit B)

WHEREAS, pursuant to N.J.S.A. 18A:16-6.1, Mendes' defense counsel filed a Petition of Appeal for Indemnification, OAL Dkt. No.: EDUOR 11086-2007N, Agency Dkt. No.: 227-8/07, on or about August 16, 2007, seeking reimbursement from the Board for Mendes' attorney's fees and costs associated with Mendes' legal defense relative to the Elizabeth Municipal Court Complaint, Docket No.: S-2004-007606-2004.

WHEREAS, the parties have determined that it is in their respective best interests to enter into this Settlement Agreement and General Release in order to avoid the need for further litigation; and

NOW, THEREFORE, in consideration of mutual promises and covenants, the parties agree as follows:

1. The Board will pay to the New Jersey Education Association (N.J.E.A.) the sum of Two Thousand Nine Hundred and Twenty-Five Dollars ($2,925). The aforementioned amount represents full and complete indemnification of the attorney's fees and costs incurred by Mendes in relation to Elizabeth Municipal

Court Complaint, Docket No.: S-2004-007606-2004. A check for this amount shall be drawn to Timothy R. Smith & Associates L.L.C., and sent to their office at 76 South Orange Avenue, Suite 211, South Orange, New Jersey, 07079.

2. For and in consideration of the Indemnification set forth in Paragraph One (1) above, Mendes and his heirs, executors, administrators, successors and assigns, hereby forever release and discharge the Elizabeth Board of Education, its members, successors and assigns and all of its or their past or future members, officers, agents, employees, administrators, attorneys, fiduciaries, successors and assigns (whether acting as agents for the Board, its affiliates or its related entities or in their individual capacities) from any and all claims, demands, causes of action, fees and liabilities of any kind whatsoever (upon any legal or equitable theory, whether contractual, common-law, statutory, federal, state, local, or otherwise), whether known or unknown, which Mendes ever had, now has or hereafter may have against the Board by reason of any actual or alleged act, omission, transaction, practice, conduct, occurrence or other matter relating to any and all allegations contained in Municipal Court Complaint, Docket No.: S-2004-007606-2004.

3. For and in consideration of the Indemnification set forth in Paragraph One (1) above, Mendes shall withdraw his Petition of Appeal, OAL Dkt. No.: EDUOR 11086-2007N, Agency Dkt.: No. 227-8/07, with prejudice, within seven (7) business days after the Board approves the Settlement in this matter.

4. The parties agree that if any of the provisions, terms, clauses, waivers and releases of claims and rights contained in this Settlement Agreement and General Release are declared illegal, unenforceable, or ineffective in a legal forum of competent jurisdiction, such provisions, terms, clauses, waivers and releases of claims or rights shall be modified, if possible, in order to achieve, to the extent possible, the intentions of the parties. If any such provisions, terms, clauses, waivers and releases of claims and rights contained in this Settlement Agreement and General Release cannot be modified, the remaining provisions, terms, clauses, waivers and releases of claims and rights contained in this Agreement shall remain in full force and effect.

5. This Settlement Agreement and General Release set forth the entire terms between the parties and fully supersede any and all prior Agreements or understanding between them pertaining to the subject matter thereof.

Nothing contained in this Settlement Agreement and General Release constitutes an admission of any wrongdoing by either party and neither party shall be considered to be a prevailing party in this matter.

7. All terms of this Settlement Agreement and General Release are deemed material. The parties agree that this Settlement Agreement and General Release may not be altered, amended, modified, superseded, canceled or terminated except by an express written Agreement duly executed by all the parties or their attorneys on their behalf, which makes specific reference to this Settlement Agreement and General Release.

8. Mendes agrees that he has been fully and fairly represented by legal counsel throughout this proceeding.

9. This Settlement Agreement and Release contains the entire Agreement between the parties, and no other representations, whether verbal or in writing shall be binding upon them.

10. This Settlement Agreement and General Release is an Agreement that shall be construed in accordance with the laws of the State of New Jersey.

11. All parties hereby agree that the terms of this Settlement Agreement and General Release are binding upon all parties, their heirs and their assigns.

ANTHONY MENDES

Anthony Mendes

Anthony Mendes

Dated: 2/15/08

ELIZABETH BOARD OF EDUCATION

Harold E. Kennedy, Jr.
Board Secretary/School Business Administrator
Dated: 4/15/2008

TIMOTHY R. SMITH & ASSOCIATES, L.L.C.

Jennifer Borja, Esquire
Attorney for Anthony Mendes

Dated: 02/20/08

THE MURRAY LAW FIRM, LLC

Karen A. Murray, Esquire
Attorney for the Elizabeth Board of Education
Dated:

Notarizing for only ANTHONY MENDES

Jayasri Saha

JAYASRI SAHA
NOTARY PUBLIC
STATE OF NEW JERSEY
COMMISSION EXPIRES JULY 12, 2011

POLICE CASE NO. 04-25279

The State of New Jersey

vs.

7-2004 / 7608-2004
PAGE 1 OF 1

COURT (NAME, ADDRESS, TELEPHONE NO.)
ELIZABETH CITY
ONE POLICE PLAZA
ELIZABETH NJ 07201
908-558-6800

COUNTY/ORI# UNN N.J. | COURT CODE

COURT DOCKET NUMBER(S)
1 THRU 1

Defendant: Name MR. MENDES

Address THIRD AVE SCHOOL #15

City, State ELIZABETH NJ 07202 | SS No.

Date of birth 00-00-0000 Date of arrest 00-00-0000

Number of co-defendants 000 Dr. Lic.# SBI No.

COMPLAINT - SUMMONS

Complainant Name: PHILLIP DASILVA of: (IDENTIFY DEPARTMENT OR AGENCY REPRESENTED)

Residing at 400 1/2 THIRD AVE ELIZABETH NJ 07202 (ADDRESS OF PRIVATE CITIZEN COMPLAINANT)

Upon oath says that, to the best of (his) (her) knowledge, information and belief, the named defendant on or about the 29 day of 09 2004 in ELIZABETH CITY MUNICIPAL CODE NO. 2004 County of UNN N.J.

did;

WITHIN THE JURISDICTION OF THIS COURT, DID ENGAGE IN A COURSE OF ALARMING CONDUCT BY HARASSING THE COMPLAINANT'S SON AGE 10YRS. THREATENING HIM, AND OTHER CHILDREN, PUTTING HIM IN FEAR.

In Violation Of: ☐ Domestic Violence - Confidential

Charge Number 1		Charge Number		Charge Number	
N.J.S. 2C:33-4A	ACSX	N.J.S.	ACSX	N.J.S.	ACSX
Charge Number 1 As Amended		Charge Number As Amended		Charge Number As Amended	
N.J.S.	ACSX	N.J.S.	ACSX	N.J.S.	ACSX

Subscribed and sworn to before me this 2 day of Oct, 20 04

Signed [signature] (NAME AND TITLE OF PERSON ADMINISTERING OATH)

Signed [signature] (COMPLAINANT)

YOU ARE HEREBY SUMMONED TO APPEAR BEFORE THIS COURT TO ANSWER THIS COMPLAINT. IF YOU FAIL TO APPEAR ON THE DATE AND AT THE TIME STATED, A WARRANT WILL BE ISSUED FOR YOUR ARREST.
DATE SUMMONS ISSUED 10/07/2004 DATE TO APPEAR 10/21/2004 TIME 09:45 AM

[signature] (SIGNATURE PERSON ISSUING SUMMONS) OCA TITLE

COURT ACTION (Where Judgement or Conditional Discharge is Entered)

☐ ADVISED OF RIGHTS | METHOD OF SERVICE:

...RGES	...WAIVER (NOT. / JURY)	PLEA	DATE OF PLEA	ADJUDICATION OR COND. DISCH.	DATE	COND. DISCHARGE TERM	JAIL TERM	FINE	COSTS	PROBATION TERM	SUSP. IMP.
...BER 1											
...BER											
...BER											

OTHER COURT ACTION | Total DEDR Penalty Amount: | Total Violent Crimes Assessment Amount:

...TE	DEFENDANT DISCHARGED AS TO PROBABLE CAUSE PROSECUTOR GIVEN FINAL NOTICE	Total Lab Fee	Conditional Disc. Fee	DL Susp.	Institution to Which Sentenced
...TE	COMPLAINT REFERRED TO PROSECUTOR	Community Service	Restitution		JAIL TIME CREDIT

...stic Violence: ☐ NO PHONE OR PERSONAL CONTACT WITH VICTIM ☐ NO POSSESSION FIREARMS / WEAPONS | Other (Specify)

(FTA OR BAIL) INFORMATION ☐ BAIL FORM ATTACHED

	AMOUNT BAIL SET	REL. ON BAIL 1	R.O.R. 2	COMMITTED DEFAULT 3	COMMITTED WITHOUT BAIL 4	PLACE COMMITTED

...COMPANY - PERSON POSTING BAIL - RELEASED W/ CUSTODY OF - ADDRESS

PROSECUTING ATTORNEY AND DEFENSE COUNSEL INFORMATION

...UTING ...EY	NONE	STATE 2	COUNTY 3	MUNICIPAL 4	OTHER 5	DEFENSE COUNSEL	NONE 1	RETAINED 2	PUBLIC DEFENDER 3	ASSIGNED 4	WAIVED 5	OTHER 6

MISCELLANEOUS INFORMATION

...dination COR number(s) (including Co-defendants):

JUDGE DATE

ORIGINAL

...R (3/94)

ALL-STATE LEGAL®

EXHIBIT A

UNICIPAL COURT

OF THE CITY F ELIZABETH

COMPLAINT / SUMMONS NO. S-2004-3,406

DOCKET NO.

NAME OF DEFENDANT Mr. Menaes

ADDRESS Third Ave. School #15, Elizabeth, NJ

OFFENSE 2C:33-4A

DATE OF OFFENSE 9-29-04

DATE OF PROCESS 10-7-04

DATE PROCESS SERVED 10-7-04

NAME OF COMPLAINING WITNESS Phillip Nasilva

ADDRESS 400 1/2 Third Avenue, Elizabeth, NJ 07202

HOW DEFENDANT PLEADS AND DATE NG 11-17-04

BAIL N/A

NAME AND ADDRESS OF BONDSMAN N/A

ATTORNEY'S APPEARANCE Timothy Smith, Esq

REMARKS AND MISCELLANEOUS ENTRIES

TRIAL AND HEARING DATE 12-23-04

HOW DISPOSED AND SENTENCE Dismissed

FINE PAID N/A

I, Margaret Gonzalez, Administrator, Municipal Court of the City of Elizabeth, NJ certify the above to be a true copy entered in records of the Municipal Court of the City of Elizabeth, NJ

Margaret Gonzalez

MARGARET GONZALEZ, C.M.C.A.

1-12-05

DATE

EXHIBIT B

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DISPO CERTIFICATION.doc

101

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Y

BOARD OF EDUCATION

RESOLUTION

WHEREAS, the law offices of Timothy R. Smith and Associates, L.L.C. has submitted a request for indemnification of legal expenses on behalf of employee, Anthony Mendes, for the attorney's fees and costs associated with Mendes' legal defense concerning the Elizabeth Municipal Court Complaint, Docket No. S-2004-007606-2004; and

WHEREAS, in the interest of cost effectiveness and judicial economy, the parties have amicably agreed to resolve the above-referenced case, and the related Administrative Law case, OAL Docket No. EDUOR 11806-2007, Agency Docket No. 227-8/07, with prejudice;

NOW, THEREFORE, BE IT RESOLVED, that the Board hereby agrees to accept the Confidential Settlement Agreement on file with the School Business Administrator/Board Secretary.

Elizabeth, New Jersey
TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD MARCH 19, 2008

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary

07-206

256-08

OAL DKT. NO. EDU 1485-08
AGENCY DKT. NO. 31-1/08

MAVERICK BUILDING SERVICES, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY, RESPONDENT.	:	DECISION

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

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

IT IS SO ORDERED.

Lucille Davy
COMMISSIONER OF EDUCATION

Date of Decision: 6/05/08

Date of Mailing: 6/05/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 01485-08

AGENCY DKT. NO. 31-1/08

MAVERICK BUILDING SERVICES, INC.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWN WEST NEW YORK, HUDSON COUNTY,

Respondent.

Maeve E. Cannon, Esq. appearing for petitioner Maverick Building Services, Inc. (Hill Wallack, LLP, attorneys)

Bruce W. Padula, Esq., appearing for respondent Board of Education of the Town West New York, Hudson County (Scarinci & Hollenbeck, attorneys)

Record Closed: April 28, 2008 Decided: May 5, 2008

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

This matter was transmitted to the Office of Administrative Law (OAL) on January 25, 2008 for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

An hearing was scheduled on July 3, 2008. The attached Settlement Agreement was submitted on April 28, 2008, indicating the terms of agreement which are incorporated herein by reference.

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

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

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

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

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

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

5/5/08
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency:

5-7-08

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAY 7 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

tbj

SCARINCI & HOLLENBECK, LLC
ATTORNEYS AT LAW
1100 Valley Brook Avenue
P.O. BOX 790
LYNDHURST, NEW JERSEY 07071-0790
Telephone: (201) 896-4100
Attorneys for West New York Board of Education
Our File No. 150.3310

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MAVERICK BUILDING SERVICES, INC.,
Petitioner,

v.

WEST NEW YORK BOARD OF EDUCATION,
Respondent.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL Docket No.: EDUOT 01485-2008N
Agency Ref. No.: 31-1/08

STIPULATION OF SETTLEMENT

WHEREAS, on October 17, 2007, the Board issued specifications for general custodial services for "summer cleaning" and "weekly cleaning," such bids to be opened on October 31, 2007; and

WHEREAS, Maverick Building Services, Inc. ("Maverick") submitted a bid pursuant to the aforementioned specifications in the amount of $69,418.00 for summer cleaning and $47,016.00 for weekly cleaning; and

WHEREAS, Pritchard Building Services ("Pritchard") submitted a total bid of $70,714 and did not itemize its bid between "summer cleaning" and "weekly cleaning;" and

WHEREAS, an unauthorized Board employee informed Pritchard that it need not itemize its bid between "summer cleaning" and "weekly cleaning;" and

WHEREAS, Pritchard did not include a Public Works Certificate or Bid Bond with its bid; therefore, its bid was nonresponsive; and

WHEREAS, bids were received from three (3) other entities besides Maverick and Pritchard, all of which either did not bid a particular portion of the work or submitted a bid in

excess of that submitted by Maverick; and

WHEREAS, based on the bids received and the unauthorized representation to one bidder by a Board employee, the Board rejected all bids pursuant to N.J.S.A. 18A:18A-22(e), and advertised for new bids, which were scheduled to be opened on December 5, 2007; and

WHEREAS, Maverick filed a lawsuit against the Board in the Superior Court of New Jersey contesting the Board's decision to rebid the contract and asserting that Maverick should be awarded the contract as the lowest responsible bidder; and

WHEREAS, on December 5, 2007, the Superior Court entered an Order enjoining the Board from opening any bids received for the December 5, 2007 bid opening; and

WHEREAS, by Order dated January 14, 2008, the Superior Court transferred this matter to the Commissioner of Education for resolution; and

WHEREAS, the Parties engaged in settlement discussions; and

WHEREAS, there is no longer a need to perform weekly cleaning throughout the school year as the Board is performing that work with its current custodial staff; and

WHEREAS, while the Board contends that the Public School Contracts Law, N.J.S.A. 18A:18A-22 permits the Board to rebid the contract at issue in this matter, the Board understands that its decision to rebid may be overturned by the Office of Administrative Law and the Commissioner of Education and it may be ordered to award the contract to Maverick; and

WHEREAS, although Maverick contends that it is the lowest responsible bidder and should be awarded the contract as bid, Maverick understands that the Office of Administrative Law and the Commissioner of Education may permit the rebid as conducted by the Board pursuant to N.J.S.A. 18A:18A-22;

WHEREAS, the parties desire to resolve the matter amicably and avoid further litigation

and expenditure of time and attorneys' fees.

NOW, THEREFORE, in consideration of the mutual promises and other consideration described herein, the receipt and sufficiency of which are hereby acknowledged, the parties hereto, intending to be legally bound, hereby agree as follows with respect to the settlement of this matter and hereby request that the Administrative Law Judge and the Commissioner of Education approve the following terms as the settlement agreement:

1. Maverick shall be awarded a contract for summer cleaning pursuant to the bid specifications in an amount not to exceed $50,000.00;

2. Maverick withdraws its Petition and this matter shall be dismissed in its entirety, with prejudice, and with each party responsible for its own costs, including, but not limited to attorneys' fees;

3. Maverick releases the Board, its employees, officers, directors, representatives , independent contractors and assigns from any and all claims which are or could have been raised in this matter, including, but not limited to any claim for attorneys' fees;

4. The Board releases Maverick, its employees, officers, directors, representatives , independent contractors and assigns from any and all claims which are or could have been raised in this matter, including, but not limited to any claim for attorneys' fees;

5. All terms of this Agreement are deemed material. This document constitutes the entire understanding of the parties and may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties. Duly executed copies of this Agreement shall be deemed originals.

[This remainder of this page is intentionally left blank.
The next page is the signature page.]

Date: 4/15/08

MAEVE E. CANNON
HILL WALLACK, LLP
ATTORNEYS FOR MAVERICK BUILDING SERVICES, INC.

Date: 4/21/08

BRUCE W. PADULA
SCARINCI & HOLLENBECK, LLC
ATTORNEYS FOR WEST NEW YORK BOARD OF EDUCATION

SCARINCI & HOLLENBECK, LLC
ATTORNEYS AT LAW
1100 Valley Brook Avenue
P.O. BOX 790
LYNDHURST, NEW JERSEY 07071-0790
Telephone: (201) 896-4100
Attorneys for West New York Board of Education
Our File No. 150.3310

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MAVERICK BUILDING SERVICES, INC.,
Petitioner,

v.

WEST NEW YORK BOARD OF EDUCATION,
Respondent.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL Docket No.: EDUOT 01485-2008N
Agency Ref. No.: 31-1/08

STIPULATION OF SETTLEMENT

WHEREAS, on October 17, 2007, the Board issued specifications for general custodial services for "summer cleaning" and "weekly cleaning," such bids to be opened on October 31, 2007; and

WHEREAS, Maverick Building Services, Inc. ("Maverick") submitted a bid pursuant to the aforementioned specifications in the amount of $69,418.00 for summer cleaning and $47,016.00 for weekly cleaning; and

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WHEREAS, an unauthorized Board employee informed Pritchard that it need not itemize its bid between "summer cleaning" and "weekly cleaning;" and

WHEREAS, Pritchard did not include a Public Works Certificate or Bid Bond with its bid; therefore, its bid was nonresponsive; and

WHEREAS, bids were received from three (3) other entities besides Maverick and Pritchard, all of which either did not bid a particular portion of the work or submitted a bid in

excess of that submitted by Maverick; and

WHEREAS, based on the bids received and the unauthorized representation to one bidder by a Board employee, the Board rejected all bids pursuant to N.J.S.A. 18A:18A-22(e), and advertised for new bids, which were scheduled to be opened on December 5, 2007; and

WHEREAS, Maverick filed a lawsuit against the Board in the Superior Court of New Jersey contesting the Board's decision to rebid the contract and asserting that Maverick should be awarded the contract as the lowest responsible bidder; and

WHEREAS, on December 5, 2007, the Superior Court entered an Order enjoining the Board from opening any bids received for the December 5, 2007 bid opening; and

WHEREAS, by Order dated January 14, 2008, the Superior Court transferred this matter to the Commissioner of Education for resolution; and

WHEREAS, the Parties engaged in settlement discussions; and

WHEREAS, there is no longer a need to perform weekly cleaning throughout the school year as the Board is performing that work with its current custodial staff; and

WHEREAS, while the Board contends that the Public School Contracts Law, N.J.S.A. 18A:18A-22 permits the Board to rebid the contract at issue in this matter, the Board understands that its decision to rebid may be overturned by the Office of Administrative Law and the Commissioner of Education and it may be ordered to award the contract to Maverick; and

WHEREAS, although Maverick contends that it is the lowest responsible bidder and should be awarded the contract as bid, Maverick understands that the Office of Administrative Law and the Commissioner of Education may permit the rebid as conducted by the Board pursuant to N.J.S.A. 18A:18A-22;

WHEREAS, the parties desire to resolve the matter amicably and avoid further litigation

and expenditure of time and attorneys' fees.

NOW, THEREFORE, in consideration of the mutual promises and other consideration described herein, the receipt and sufficiency of which are hereby acknowledged, the parties hereto, intending to be legally bound, hereby agree as follows with respect to the settlement of this matter and hereby request that the Administrative Law Judge and the Commissioner of Education approve the following terms as the settlement agreement:

1. Maverick shall be awarded a contract for summer cleaning pursuant to the bid specifications in an amount not to exceed $50,000.00;

2. Maverick withdraws its Petition and this matter shall be dismissed in its entirety, with prejudice, and with each party responsible for its own costs, including, but not limited to attorneys' fees;

3. Maverick releases the Board, its employees, officers, directors, representatives , independent contractors and assigns from any and all claims which are or could have been raised in this matter, including, but not limited to any claim for attorneys' fees;

4. The Board releases Maverick, its employees, officers, directors, representatives , independent contractors and assigns from any and all claims which are or could have been raised in this matter, including, but not limited to any claim for attorneys' fees;

5. All terms of this Agreement are deemed material. This document constitutes the entire understanding of the parties and may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties. Duly executed copies of this Agreement shall be deemed originals.

[This remainder of this page is intentionally left blank.
The next page is the signature page.]

Date: 4/15/08

MAEVE E. CANNON
HILL WALLACK, LLP
ATTORNEYS FOR MAVERICK BUILDING SERVICES, INC.

Date: 4/21/08

BRUCE W. PADULA
SCARINCI & HOLLENBECK, LLC
ATTORNEYS FOR WEST NEW YORK BOARD OF EDUCATION

257-08

OAL DKT. NOS. CRT 4059-03 AND EDU 6638-02 (CONSOLIDATED)
AGENCY DKT. NOS. EC28WE-48921-E AND 284-9/02

LAWRENCE PALMER,	:	
COMPLAINANT,	:	
V.	:	
PEMBERTON TOWNSHIP BOARD OF EDUCATION, BURLINGTON COUNTY,	:	
RESPONDENT,	:	COMMISSIONER OF EDUCATION
AND		DECISION
IN THE MATTER OF THE TENURE HEARING OF LAWRENCE PALMER, SCHOOL DISTRICT OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY.	:	

The record of these consolidated matters, the parties' proposed Agreement and General Release, and the Initial Decision issued by the Office of Administrative Law have been reviewed – with respect to those issues under the Commissioner's jurisdiction – pursuant to *N.J.A.C.* 1:1-19.1.

Upon such review, the Commissioner concurs with the Administrative Law Judge that the proposed settlement is consistent with established standards governing settlement of tenure matters. *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846; *N.J.A.C.* 6A:3-5.6(a).

Accordingly, for the reasons set forth in the Initial Decision, settlement is hereby approved and the tenure matter is dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Gurleen Day

COMMISSIONER OF EDUCATION

Date of Decision: 6/05/08

Date of Mailing: 6/05/08

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
OFFICE OF THE ATTORNEY GENERAL
DIVISION ON CIVIL RIGHTS
OAL DKT. NO. CRT 4059-03
DCR DKT. NO. EC28WE-48921-E
EEOC CHGE. NO. 17EA310226

LAWRENCE PALMER, Complainant, v. PEMBERTON TOWNSHIP BOARD OF EDUCATION, Respondent.	ADMINISTRATIVE ACTION ORDER APPROVING SETTLEMENT

APPEARANCES:

Steven R. Cohen, Esq. for the complainant (Selikoff & Cohen, attorneys)

LaTonya Bland, Esq. for the respondent (Capehart & Scatchard, attorneys)

BY THE DIRECTOR:

These matters are before the Director of the New Jersey Division on Civil Rights (DCR) pursuant to a verified complaint filed on December 16, 2002 by the complainant, Lawrence Palmer (Complainant), alleging that the respondent, Pemberton Township Board of Education (Respondent), subjected him to unlawful employment discrimination because of his disability and reprisal in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, and also before the Commissioner of the New Jersey Department of Education (DOE) pursuant to charges of unbecoming conduct filed by Pemberton Township Board of Education against Lawrence Palmer, a custodian with

tenure status in its employ.

Complainant also filed a corresponding charge under federal law with the Equal Employment Opportunity Commission (EEOC). Pursuant to a work-sharing agreement between EEOC and DCR, Complainant waived further processing of his EEOC charge pending DCR's investigation of his LAD complaint.

On April 22, 2003, Respondent filed an answer to the verified complaint denying Complainant's charges of discrimination. On May 30, 2003, at the request of Complainant's counsel, DCR transmitted this action to the Office of Administrative Law (OAL) for a hearing pursuant to N.J.S.A. 52:14B-1 to -21 and N.J.S.A. 52:14F-1 to -13. The matter before DOE was also transmitted to the OAL for a hearing pursuant to N.J.S.A. 52:14B-1 to -21 and N.J.S.A. 52:14F-1 to -13. By order dated February 26, 2004, the DCR matter (Lawrence Palmer v. Pemberton Township Board of Education, OAL Docket No. CRT 4059-03) and the DOE matter (Pemberton Township Board of Education v. Lawrence Palmer, OAL Docket No. EDU 6638-02) were consolidated for hearing, with the predominant interest assigned to the New Jersey Division on Civil Rights.[1]

The parties subsequently reached an agreement to resolve their disputes. On February 1, 2008, the parties filed with OAL a signed Agreement and General Release, which was dated February 22, 2007, the terms of which were approved by the Board of Trustees of the Public Employee Retirement System (PERS) on December 12, 2007. On April 10, 2008, the Honorable Daniel B. Mc Keown, Administrative Law Judge (ALJ), issued an initial decision dismissing the verified complaint filed with DCR and the charges before

---

[1] In his April 10, 2008 initial decision, the Honorable Daniel B. Mc Keown, Administrative Law Judge (ALJ), issued a lengthy and comprehensive procedural history which is not restated here, but incorporated by reference and made a part of this administrative order.

DOE.

Having reviewed the pleadings and the initial decision which incorporates by reference the Agreement and General Release, the Director finds good cause to adopt the ALJ's initial decision approving the settlement and dismissing the complaint. Accordingly, the parties are ordered to comply with the terms of the settlement, and the complaint in the matter of Lawrence Palmer v. Pemberton Township Board of Education, OAL Docket No. CRT 4059-03, DCR Docket No. EC28WE-48921-E, is hereby **DISMISSED WITH PREJUDICE.** The initial decision and the Agreement and General Release are incorporated herein by reference and made a part of this administrative order.

Pursuant to N.J.A.C. 1:1-17.8, upon the signing of this order, the record, including the initial decision and this order, shall be forwarded to the Commissioner of DOE, who may render a final decision on any issues which may be within its statutory grant of authority. The DCR shall request an extension of time to permit the Commissioner of DOE to render a final decision within forty-five (45) days of the date of this order.

DATED: 4/30/08

J. FRANK VESPA-PAPALEO, ESQ.
DIRECTOR
DIVISION ON CIVIL RIGHTS

STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS

ADMINISTRATIVE ACTION
ORDER FOR EXTENSION

LAWRENCE PALMER,

Complainant,

v.

PEMBERTON TOWNSHIP BOARD OF EDUCATION

Respondent.

DIVISION ON CIVIL RIGHTS

OAL DOCKET NO. CRT 4059-03
DCR DOCKET NO. EC28WE-48921-E

PEMBERTON TOWNSHIP BOARD OF EDUCATION,

Petitioner,

v.

LAWRENCE PALMER,

Respondent.

DEPARTMENT OF EDUCATION

OAL DOCKET NO. EDU. 6638-02
AGENCY DOCKET NO. 284 9/02

By order dated November 20, 2006, the above captioned matters before the Division on Civil Rights (DCR) and the Commissioner of the Department of Education (EDU) were consolidated, and predominant interest in these matters was assigned to DCR. An initial decision approving settlement of these consolidated cases was received by DCR on **April 18, 2008**; therefore, the 45-day statutory period for issuing a final decision will expire on **June 2, 2008**. On April 30, 2008, the Director of DCR issued his final decision approving

settlement of the claims in the DCR complaint. Pursuant to N.J.A.C. 1:1-17-8, the Director requests a 45-day extension of time from the date of his order to permit the Commissioner of the Department of Education (EDU) sufficient time to review and issue a final order addressing the settlement of the issues presented in the EDU complaint.

Good cause having been shown, pursuant to N.J.S.A. 52:14B-10(c) and N.J.A.C. 1:1-17.7, **IT IS ORDERED** that the time limit for the Commissioner of EDU to issue a final decision on these matters is extended until **July 17, 2008**.

4/30/2008
Date

J. FRANK VESPA-PAPALEO, ESQ.
DIRECTOR, DIVISION ON CIVIL RIGHTS

Date agency mailed proposed order to OAL: 5/1/08
Date

c: Parties

DATE: 5/1/08

LAURA SANDERS, DIRECTOR AND CHIEF
ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

Date OAL mailed executed order to agency: 5/2/08
Date

Date agency mailed executed order to parties: 5/6/08
Date

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

LAWRENCE PALMER,
Complainant,
v.
PEMBERTON TOWNSHIP BOARD OF EDUCATION,
Respondent,
and
PEMBERTON TOWNSHIP BOARD OF EDUCATION,
Petitioner,
v.
LAWRENCE PALMER,
Respondent.

OAL DKT. NO. CRT 4059-03
AGENCY DKT. NO. EC28WE-48921-E

OAL DKT. NO. EDU 6638-02
AGENCY DKT. NO. 284 9/02
(CONSOLIDATED)

Steven R. Cohen, Esq., for complainant-respondent Lawrence Palmer (Selikoff & Cohen, attorneys)

LaTonya Bland, Esq., for respondent-petitioner Pemberton Township Board of Education (Capehart & Scatchard, attorneys)

Record Closed: April 7, 2008 Decided: April 10, 2008

BEFORE **DANIEL B. MC KEOWN**, ALJ (t/a):

PROCEDURAL HISTORY

Despite the matters listed above having been settled between and among the parties by virtue of the Board of Trustees of the Public Employment Retirement System having granted Lawrence Palmer an ordinary disability retirement, and my recommendation being that the Director of the Division on Civil Rights and the Commissioner of Education accept the settlement attached hereto and incorporated herein as if set forth in full, the procedural history of the matter is presented because of the length of time these cases have been pending.

On August 29, 2002, the Pemberton Township Board of Education (Board) certified charges of unbecoming conduct to the Commissioner of Education for determination against Lawrence Palmer (or Palmer), a custodian with a tenure status in its employ. Respondent was simultaneously suspended without pay from his employment. Respondent filed an Answer within 30 days to the charges in which he denied the factual allegations and, among other defenses, set up as a Second Separate Defense his allegation that the Board acted in violation of the New Jersey Law Against Discrimination, N.J.S.A. 105-1, et seq. The matter was transferred to the Office of Administrative Law (OAL) on October 3, 2002, as a contested case under the provisions of N.J.S.A. 52:14F-1 to -13 and assigned to administrative law judge, Steven R. Reback.

On December 16, 2002, Palmer filed a verified complaint before the Director of the Division on Civil Rights by which he alleges the Pemberton Township Board of Education subjected him to unlawful discrimination because of his multiple handicaps, that the Board failed to make reasonable accommodation for his handicaps, and that it unlawfully reprised against him. At the request of counsel for Palmer, the Director transferred the matter to the OAL on May 30, 2003. At or about the same time the verified complaint was filed with the Director, Palmer also filed a verified complaint with the Equal Employment Opportunity Commission, Charge No. 17EA310226.

On January 9, 2004, the Honorable Steven C. Reback issued a recommended ruling granting the motion of the parties to consolidate the cases for purposes of adjudication. He also ruled that the Division on Civil Rights has the predominant interest in the matters. In a joint decision by the Director of the Division on Civil Rights and the Commissioner of Education dated February 26, 2004, the recommended rulings of ALJ Reback on consolidation and predominant interest were affirmed. The last paragraph of the joint ruling states:

> IT IS FURTHER ORDERED that the Division on Civil Rights has the predominant interest in this consolidated matter. The Administrative Law Judge will issue a single initial decision recommending findings of fact and conclusions of law pursuant to N.J.A.C. 1:1-18.3. Upon transmittal of the initial decision to both agencies, the underlying record will be forwarded to the Director of the Division on Civil Rights to render his final decision, and award relief and assess a penalty, if warranted. The Director's decision and the complete record will then be sent to the Commissioner to take any action or grant any relief he deems appropriate.

In a letter ruling dated April 6, 2004, ALJ Reback granted the Board's motion to compel Palmer to undergo a psychological examination prior to hearing. An appeal of that ruling was taken to the Director of the Division who, on May 3, 2004, reversed ALJ Reback and held that sufficient examination results were already available to the Board. In an Order filed June 17, 2004, the New Jersey Superior Court, Appellate Division, denied the Board's motion for interlocutory review of the Director's ruling.

At or about the same time of the Order being entered by the Court, ALJ Reback retired. On August 9, 2004, the undersigned agreed to take the cases. During a telephone conference call held December 21, 2004, it was agreed to adjourn the scheduled hearing dates, and to reschedule the hearing for dates to be agreed upon at another conference call to be held December 27, 2004. The hearing was eventually scheduled to begin in March 2005 (See, Letter, December 27, 2004). The scheduled hearing was adjourned on the strength of a letter request dated March 7, 2005, joined

in by both counsel and the deputy attorney general assigned to monitor the case for the Division on Civil Rights. The letter states in part:

> The parties are engaged in a serious but highly complicated settlement discussion which requires consultation with third party experts regarding the impact on certain proposals on Complainant/Petitioner Palmer. Because Mr. Palmer is mentally limited, and does not read nor write aside from a barely legible signature, the negotiations are further complicated by the special considerations required to protect his interests. Only because both parties consider these discussions may yield a settlement do they join in the request for additional time so they can devote their time to the require analysis rather than preparation for a hearing which may not be necessary.

The record shows that on or about September 19, 2005, Palmer submitted a proposed settlement to the Board regarding the case before the Division on Civil Rights, the matter pending before the Commissioner of Education, and the complaint filed before the Equal Employment Opportunity Commission. Efforts toward bringing these matters to conclusion continued by counsel and this ALJ. (See, letters dated October 5, 2005, November 5, 2005, August 24, 2006, September 6, 2006, October 10, 2006, October 23, 2006, and, November 30, 2006). In addition, counsel for the Board did provide periodic status reports of the matters.

Finally, by letter dated December 18, 2007, counsel advised that the Public Employees' Retirement System Board of Trustees, at its meeting on December 12, 2007, approved Palmer's application for ordinary disability retirement. A signed settlement agreement was eventually filed here on February 1, 2008, even though the date of the Agreement and General Release is February 22, 2007. Counsel explains in a cover letter to the settlement agreement:

> . . . [A]pproval of Mr. Palmer's application for ordinary disability retirement was the only contingency in the settlement agreement . . . which is why the Agreement and General Release is dated February 22, 2007. The PERS Board of Trustees acted to grant Mr. Palmer's disability pension on December 12, 2007.

I reviewed the settlement signed by the parties on February 22, 2007, and relied upon them to dispose of all issues in the consolidated cases including the Equal Employment Opportunity Commission case.

Parties seeking approval of a settlement agreement in a matter before the OAL must fully disclose the terms of the settlement and establish that the agreement is voluntary, consistent with the law, and dispositive of all issues in controversy. N.J.A.C. 1:1-19.1(a) and (b).

To the extent Lawrence Palmer has been represented by effective counsel throughout this entire proceeding, and the Board has been represented by effective counsel as well, the settlement agreement is accepted as a full, fair, and final disposition of all issues presented and considered here, including the complaint filed before the Equal Employment Opportunity Commission. The granting of an ordinary disability retirement allowance by the Public Employment Retirement Service Board of Trustees, and the concurrent withdrawal of all claims Palmer may have against the Board for any reason related to his employment, and the Board's withdrawal of tenure charges against Palmer, are terms acceptable under law to dispose of the verified complaint brought by Lawrence Palmer against the Pemberton Township Board of Education before the Director of the Division on Civil Rights, and justify the withdrawal of tenure charges, none of which are of moral turpitude, certified to the Commissioner of Education for determination by the Board against Palmer.

Accordingly, the Settlement Agreement and General Release, along with the Resolution of the Pemberton Township Board of Education's approving this settlement, received by the undersigned on April 7, 2008, attached hereto and incorporated herein dispose of Lawrence Palmer v. Pemberton Township Board of Education, OAL Dkt. No. CRT 4059-03, Agency Dkt. No. EC28WE – 48921E, Pemberton Township Board of Education v. Lawrence Palmer, OAL Dkt. No. EDU 6638-02, Agency Dkt. No. 284-9/02,

and the complaint identified as Charge No. 17EA310226 filed before the Equal Employment Opportunity Commission.

I hereby **FILE** my initial decision with the **DIRECTOR OF THE DIVISION ON CIVIL RIGHTS** for consideration.

This recommended decision may be adopted, modified or rejected by the **DIRECTOR OF THE DIVISION ON CIVIL RIGHTS**, who by law is authorized to make a final decision in this matter. If the Director of the Division on Civil Rights does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Pursuant to N.J.A.C. 1:1-17.8, upon rendering its final decision the **DIRECTOR OF THE DIVISION ON CIVIL RIGHTS** shall forward the record, including this recommended decision and its final decision, to the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who may subsequently render a final decision on any remaining issues and consider any specific remedies which may be within its statutory grant of authority.

Upon transmitting the record, the **DIRECTOR OF THE DIVISION ON CIVIL RIGHTS** shall, pursuant to N.J.A.C. 1:1-17.8(c) request an extension to permit the rendering of a final decision by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** within forty-five days of the predominant agency decision. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not render a final decision within the extended time, this recommended decision on the remaining issues and remedies shall become the final decision.

April 10, 2008 Daniel B McKeown

DATE **DANIEL B. MCKEOWN**, ALJ t/a

Date Received at Division on Civil Rights: _____

Mailed to Parties:

APR 14 2008

DATE OFFICE OF ADMINISTRATIVE LAW

lam

SELIKOFF
& COHEN, PA
A Labor and Employment Law Firm for more than 25 years

January 29, 2008

Keith Waldman[*]
Steven R. Cohen[◇*]
Carol H. Alling
Michael C. Damm
Joel S. Selikoff,[◇] *Of Counsel*

members NJ bar
[◇]*members DC bar*
[*]*members PA bar*

307 Fellowship Road
Suite 314
Mount Laurel, New Jersey
08054-1233

t 856-778-6055
f 856-778-6056
selikoff.cohen@verizon.net

Honorable Daniel B. McKeown, ALJ
Office of Administrative Law
9 Quakerbridge Plaza, P.O. Box 049
Trenton, NJ 08625-0049

Re: *Palmer v. Pemberton Township School District Board of Education,*
Agency Ref No. EC28WE-48921E; OAL Dkt. No. CRT 04059-2003S
CONSOLIDATED WITH *In the Matter of the Tenure Hearing of Lawrence Palmer, School District of the Township of Pemberton, Burlington County*
Agency Ref. No. 284-9/02; OAL Dkt No. EDU 06638-2002S
▸**Enclosure of Fully Executed Agreement and General Release**
Our File No. 4540

Dear Judge McKeown:

I am following up on my December 18, 2007 letter and Ms. Bland's letter of January 24, 2008. We are hopeful that the parties' settlement agreement may be presented to the Commissioner of Education and the Division on Civil Rights for approval in the near future, now that the Public Employees' Retirement System Board of Trustees has approved Mr. Palmer's application for ordinary disability retirement. As you know, approval of Mr. Palmer's application for ordinary disability retirement was the only contingency in the settlement agreement (¶10), which is why the Agreement and General Release is dated February 22, 2007. The PERS Board of Trustees acted to grant Mr. Palmer's disability pension on December 12, 2007.

In reviewing our files, Ms. Bland and I realized that you were never presented with a fully executed copy of the Agreement and General Release. I am enclosing a copy for your records and use in writing your Initial Decision Approving Settlement. I have already provided you with the a copy of the PERS Board of Trustees' letter.

I called the Office of Administrative Law yesterday to see if I could get in touch with you by phone, and left a message for you with Judge Tassini's secretary. Please call me if you need any additional information.

Thank you for your continuing assistance to the parties in this matter.

Very truly yours,
SELIKOFF & COHEN, P.A.

BY: Steven R. Cohen
STEVEN R. COHEN
scohen@selikoffcohen.com

SRC:kaz
Enclosure
c: LaTonya Bland, Esq. (w/out encl.)
Larry Palmer (w/out encl.)

AGREEMENT AND GENERAL RELEASE

WHEREAS, LAWRENCE PALMER (hereinafter "PALMER") has been employed by the Pemberton Township Board of Education, COUNTY OF Burlington (hereinafter "BOARD") as a tenured custodian; and

WHEREAS, PALMER and BOARD mutually desire to terminate amicably PALMER's employment and/or affiliation with BOARD effective upon the date the Public Employees' Retirement System ("PERS") grants PALMER's petition for an ordinary disability retirement and to settle and terminate any and all disputes between them by executing this AGREEMENT AND GENERAL RELEASE ("AGREEMENT");

WHEREAS, PALMER has caused a complaint of discrimination to be filed with the New Jersey Division on Civil Rights, in *Palmer v. Pemberton Township School District Board of Education*, Agency Ref No. EC28WE-48921E; OAL Dkt. No. CRT 04059-2003S ("DCR Case");

WHEREAS, the BOARD has caused tenure charges to be certified to the Commissioner of Education *In the Matter of the Tenure Hearing of Lawrence Palmer, School District of the Township of Pemberton, Burlington County,* Agency Ref. No. 284-9/02; OAL Dkt No. EDU 06638-2002S("Tenure Case") currently pending before the Office of Administrative Law;

WHEREAS, PALMER and the BOARD (sometimes jointly referred to as "the PARTIES") seek to bring all controversies between them to an amicable conclusion;

IT IS HEREBY AGREED by and between the PARTIES, as follows:

1. PALMER, for and in consideration of the undertakings of BOARD set forth herein, and intending to be legally bound:

L.P

(a) agrees to apply for an ordinary disability retirement effective March 1, 2007 and will take all acts necessary to cooperate in the processing of the petition with the goal of securing an ordinary disability;

(b) agrees that if he has not been approved for his pension by July 1, 2007, or if his pension application is denied prior to that date, then this AGREEMENT will terminate unless mutually extended in writing by the Parties; and

(c) does hereby remise, release and forever discharge BOARD and its officers, members, employees and agents, its and their respective successors and assigns, heirs, executors and administrators, of and from any and all manner of actions and causes of actions, suits, debts, claims and demands whatsoever in law or in equity, which he ever had or now has, or which his heirs, executors or administrators hereafter may have by reason of any matter, cause or thing whatsoever, from the beginning of his employment with BOARD to the date of these presents, and particularly, but without limitation, of the foregoing general terms, any claims arising from or relating in any way to his employment relationship and/or the termination of his employment relationship and/or affiliation with BOARD, including but not limited to, any claims which have been asserted or could have been asserted or could be asserted under any and all federal, state or local laws and any common law claims now or hereafter recognized, and any and all claims arising out of his employment with BOARD. Without limiting the generality of the foregoing, PALMER specifically releases and forever discharges any and all claims relating to PALMER's employment with the Board and all related issues thereto, including but not limited to:

(1) any and all claims for wages and benefits except as provided in this AGREEMENT

L, P

(including without limitation salary, stock, commissions, royalties, license fees, health and welfare benefits, severance pay, vacation pay, and bonuses);

(2) any and all claims for wrongful discharge and breach of contract (whether express or implied), and implied covenants of good faith and fair dealing;

(3) any and all claims for alleged employment discrimination on the basis of age, race, color, religion, sex, national origin, veteran status, disability, handicap and/or retaliation, in violation of any federal, state or local statute, ordinance, judicial precedent or executive order, including but not limited to claims under the following statutes:

- Title VII of the Civil Rights Act of 1964, as amended;
- The Civil Rights Act of 1991;
- Sections 1981 through 1988 of Title 42 of the United States Code, as amended;
- The Employee Retirement Income Security Act of 1974, as amended;
- The Immigration Reform and Control Act, as amended;
- The Americans With Disabilities Act of 1990, as amended;
- The Age Discrimination in Employment Act of 1967, as amended;
- The federal Older Worker's Benefit Protection Act;
- The Rehabilitation Act of 1972, as amended;
- The federal Equal Pay Act;
- The federal Americans With Disabilities Act;
- The Workers Adjustment and Retraining Notification Act, as amended;
- The Occupational Safety and Health Act, as amended;
- The New Jersey Law Against Discrimination;
- The New Jersey Family Leave Act;
- The federal Family and Medical Leave Act;

L.P

- The New Jersey State Wage and Hour Law;
- The New Jersey Conscientious Employee Protection Act;
- The New Jersey Equal Pay Law;
- The New Jersey and/or federal Constitution;
- Any other federal, state or local civil or human rights law or any other local, state or federal law, regulation or ordinance; and
- Any allegation for costs, fees, or other expenses including attorneys' fees incurred in any matter.

(4) any and all claims in tort (including but not limited to any claims for misrepresentation, defamation, interference with contract or prospective economic advantage, intentional infliction of emotional distress and negligence); and

(5) any and all claims for indemnity, contribution and/or indemnification and/or damages of any nature, including any and all claim or claims, known or unknown, past or present, which were or could have been asserted in the aforementioned lawsuit are released as to all parties. This Release excludes potential occupational exposure claims arising under the Workers' Compensation Act, *N.J.S.A. 34:15-1 et seq.*, the PERS Act, *N.J.S.A.* 43:15A-1 *et seq.*, and claims arising from the breach of this AGREEMENT. The Parties specifically represent that as of the date of the execution of this Release, there are no such claims pending or presently contemplated and they are unaware of any basis for any such claims.

2. BOARD, for and in consideration of the undertakings of PALMER set forth herein, and intending to be legally bound, does hereby remise, release and forever discharge PALMER and his heirs, executors and administrators, of and from any and all manner of actions and causes of actions, suits, debts, claims and demands whatsoever in law or in equity, which it ever had or now has or which its officers, members, employees and/or agents, its and its respective successors and assigns, heirs, executors or administrators hereafter may have by

reason of any matter, cause or thing whatsoever, from the beginning of his employment with BOARD to the date of these presents, and particularly, but without limitation, of the foregoing general terms, any claims arising from or relating in any way to his employment relationship and/or the termination of his employment relationship and/or affiliation with BOARD to date, including but not limited to, any claims which have been asserted or could have been asserted or could be asserted under any and all federal, state or local laws and any common law claims now or hereafter recognized, and any and all claims arising out of his employment with BOARD to date, except for claims arising from the breach of this AGREEMENT.

3. PALMER agrees that he shall resign and no longer be employed by BOARD effective upon the date PERS grants PALMER's petition for an ordinary disability retirement. PALMER further agrees that his signature on this AGREEMENT constitutes an acknowledgment that he is relinquishing all present and future rights to employment and re-employment with BOARD effective upon a final determination by PERS granting PALMER's petition for an ordinary disability retirement.

4. In full consideration of the mutual execution of this AGREEMENT, and the mutual agreement to be legally bound by its terms, and in recognition that PALMER's waiver of his tenure rights and right to a tenure hearing represents good and valuable consideration, BOARD:

(a) will immediately place PALMER on a medical leave of absence with pay, benefits and pension contribution from his duties as a custodian. The medical leave of absence with pay, benefits and pension contribution will be retroactive to January 1, 2006 and will continue through June 30, 2007 or such earlier date as the Board of Trustees of PERS approves PALMER's application. During the medical leave of absence, PALMER will have the unconditional right to full salary and emoluments of employment. In the event that his ordinary

disability pension is not approved by the Board of Trustees of PERS by July 1, 2007, then this AGREEMENT will terminate unless mutually extended in writing by the Parties.

(b) AND will exercise its discretion pursuant to *Probst v. Bd. of Ed. of Haddonfield*, 127 *N.J.* 518 (1992), and restore PALMER's salary and adjustment increments for the 2003-2004, 2004-2005 and 2005-2006 school years and recognize PALMER's service as a custodian from July of 2003 through June of 2006 so that his salary for these years will be properly reflected as $30,011, $33,259 and $35,728, respectively. The PARTIES recognize that the restoration of the increments will result in a payment of $19,438.42 in back pay.

(c) AND will submit a Corrected Salary Form notifying the Division of Pensions of PALMER'S corrected salary for the 2003-2004, 2004-2005 and 2005-2006 school years, such that his pension will be adjusted upward to reflect an increase in the average of his three highest years' salaries, AND will pay directly to PERS $1,166.30 in additional pension contributions on PALMER's corrected salary, AND will issue an IRS Form 1099 INT to PALMER for the $1,166.30 to be paid by the BOARD to PERS.

(d) AND will pay PALMER the following sums:

(1) $19,438.42 in back pay. The Board will pay this sum to PALMER within fourteen (14) days of PALMER's tender of a partially executed copy of this AGREEMENT to the BOARD into an interest-bearing escrow account located at INSERT BANK NAME AND LOCATION in the name of "LAWRENCE PALMER" and this account will remain in place until either: (a) the final approval of the settlement memorialized by this AGREEMENT without modification by the Director of the DCR and the Commissioner of Education; (b) the granting of his ordinary disability pension application by the PERS or (c) the denial of his ordinary disability pension application by the PERS, whichever comes later. Provided that PALMER receives the ordinary disability pension and the settlement is approved as is contemplated by this AGREEMENT, the

L.P

BOARD will cause the principal and all accrued interest to be paid to PALMER. The principal will be treated as wages and subject to usual and customary payroll deductions and the BOARD will issue an IRS Form W-2 to PALMER for the wages. The BOARD will issue an IRS Form 1099 INT for the accrued interest. In the event that PERS denies the pension application, the escrow arrangement will come to an end and the BOARD will receive all proceeds from the escrow account.

(2) $94,395.38 as payment of emotional distress damages in good faith reliance upon Murphy v. Internal Revenue Service. The BOARD will pay this sum to PALMER upon either: (a) the final approval of the settlement memorialized by this AGREEMENT without modification by the Director of the DCR and the Commissioner of Education or (b) the granting of his ordinary disability pension application by the PERS, whichever comes later.

(3) Neither the BOARD, nor its counsel, nor PALMER's counsel makes any representations as to the taxable status of the payments or credits set forth above, or any portion of them. It is further understood and agreed that PALMER retains full and complete responsibility for any taxes, penalties and assessments of any kind which may become due in connection with all payments made on behalf of the BOARD.

(e) AND will, to the extent requested, cooperate and assist PALMER in making his application for an ordinary disability pension effective December 1, 2006, including but not limited to the prompt completion of all necessary forms, such as the Employer Certification for Disability Retirement, the referral to BOARD-selected doctors for medical examination and the issuance of medical reports in support of his application for an ordinary disability pension, and including any appeals arising from any denial of his application, with the common goal being to attempt to get him an ordinary disability pension.

(f) AND will provide PALMER with all benefits and emoluments to which he would otherwise be entitled under the collectively negotiated AGREEMENT, federal law and/or state law, including but not limited to providing pension contributions and PALMER's existing health insurance coverage (including but not limited to major medical, dental, vision and prescription plans) until a determination by PERS granting PALMER's petition for an ordinary disability retirement.

(g) AND agrees to dismiss the Tenure Case with prejudice and without costs.

(h) AND will provide a neutral letter of reference in the form attached hereto as Exhibit A upon request to prospective employers of PALMER, which shall be limited to the period of PALMER's employment by BOARD, his salary history, and positions held.

(i) AND will provide neutral references upon request to prospective employers of PALMER, which shall include such information as the period of PALMER's employment by BOARD, his salary history, and positions held. Such references shall indicate that he remained an employee of the BOARD until his retirement. Any prospective employer who inquires as to PALMER's employment history shall be referred to the Superintendent of Schools and informed of his retirement. In no event shall BOARD, its officers, members, employees and agents make any statement to any prospective employer, verbal or written, which is adverse to PALMER's interests. All such references shall be cleared through the Superintendent of Schools.

(j) AND agrees that PALMER has been "terminated (other than by reason of gross misconduct)" effective upon a final determination by PERS granting PALMER's petition for an ordinary disability retirement pursuant to 29 *U.S.C.* § 1163(2), so as to qualify PALMER for continued health care coverage under the Consolidated Omnibus Budget

Reconciliation Act, ("COBRA"), 29 *U.S.C.* §§1161-1168, should he elect such coverage. BOARD agrees to cooperate with PALMER to the extent necessary for his to be eligible for and receive COBRA benefits.

(k) AND agrees that BOARD, its officers, agents, administrators will be bound by a covenant of good faith and fair dealing with respect to performance under this AGREEMENT. BOARD expressly warranties that neither BOARD nor its agents or administrators will take any retaliatory action against PALMER.

5. PALMER further agrees and covenants that neither he, nor any person, organization or other entity on his behalf, will file, charge, claim, sue or cause or permit to be filed, charged or claimed any action for legal or equitable relief (including damages, injunctive, declaratory, monetary or other relief) involving any matter occurring at any time in the past up to the date of this AGREEMENT.

6. BOARD agrees and covenants that neither it nor anyone on its behalf will file, charge, claim, sue or cause or permit to be filed, charged, or claimed any action for legal or equitable relief (including damages, injunctive, declaratory, monetary or other relief) involving any matter occurring at any time in the past up to the date of this AGREEMENT or involving any continuing effects or any acts or practices which may have arisen or occurred prior to the date of this AGREEMENT.

7. PALMER hereby agrees and recognizes that his employment relationship with BOARD will be permanently and irrevocably severed effective upon a final determination by PERS granting PALMER's petition for an ordinary disability retirement, and that BOARD does not have any obligation, contractual or otherwise, to hire, rehire, or re-employ him in the future.

8. It is expressly understood that the determination of whether PALMER is eligible for an ordinary disability pension is solely within the discretion of the Division of Pensions and the Board of Trustees of the PERS, and neither BOARD, the New Jersey Education Association, the Pemberton Education Association or anyone else can guarantee that he will receive an ordinary disability pension. If, for any reason, his application is denied, his employment status will be restored to the *status quo ante*, it being understood that BOARD reserves the right should this occur to take whatever action it deems appropriate regarding his continued status as an employee of BOARD. Should PALMER's application for an ordinary disability pension be denied, the Parties agree, in advance, that neither this AGREEMENT, any medical facts discovered by the BOARD through the examination process by its doctors nor any reports or opinions issued by its doctors be presented by either Party in the trial of any tenure or discrimination case, nor will either party present any medical testimony of any other medical professional which refers to or relies upon such medical facts, reports or opinions in any way.

9. If PALMER's application for ordinary disability is granted, within one month of the granting of the application, the BOARD will give PALMER an opportunity to review his personnel file and designate items for removal. PALMER will prepare a complete inventory of the file and will mark the inventory and the original of each document to be removed from the file with an "R." The BOARD will immediately remove all copies of each document designated with an "R" from PALMER's official personnel file and turn them over to him for destruction. With those documents removed, only the documents designated on the inventory without an "R" will remain in PALMER's personnel file. The Parties specifically agree that all documents leading up to and relating to the cessation of PALMER's employment (including this AGREEMENT and the inventory) will be removed from PALMER's personnel file. The BOARD further agrees that no other documents will be placed in PALMER's personnel

file and that no other files containing personnel information related to PALMER shall be maintained by BOARD, its officers, members, employees and agents;

10. PALMER agrees and acknowledges that the agreement by BOARD described herein and the settlement and termination of any claims against BOARD as set forth herein, are not and shall not be construed to be an admission of any violation of any federal, state or local statute or regulation, or of any duty owed by BOARD to him. PALMER further agrees and acknowledges that he has consented to the termination of his employment with BOARD effective upon a final determination by PERS granting PALMER's petition for an ordinary disability retirement, and to the execution of this AGREEMENT to provide an amicable conclusion of his employment relationship with BOARD.

11. Should BOARD fail to pay all monies owed to PALMER directly or to be paid on his behalf under this AGREEMENT as said monies become due, PALMER shall be entitled to have any arrearage thereon reduced to a judgment against BOARD upon the filing of appropriate documents with any tribunal having jurisdiction.

12. The Parties agree that each paragraph of this AGREEMENT is material. In the event that any portion of this AGREEMENT is determined to be illegal or the Director of the Division on Civil Rights or the Commissioner of Education fail or refuse to approve the settlement as memorialized in this AGREEMENT without change , the Parties agree, in advance, to reform the AGREEMENT in good faith to provide each Party with the full benefit of the settlement memorialized by the AGREEMENT to the extent permitted by law.

13. By signing this AGREEMENT, the Parties certify that they have had the opportunity to discuss this AGREEMENT with counsel. They are fully satisfied with the services of their counsel with respect to both this AGREEMENT and all other aspects of this

13. By signing this AGREEMENT, the Parties certify that they have had the opportunity to discuss this AGREEMENT with counsel. They are fully satisfied with the services of their counsel with respect to both this AGREEMENT and all other aspects of this case and they enter into this AGREEMENT knowingly, willingly and without any coercion or improper inducements.

14. By signing this AGREEMENT, each signatory represents that he or he is a Party or has been duly authorized by a Party to sign on that Party's behalf.

15. The parties agree that this AGREEMENT may be signed in counterparts and that facsimiles of signatures will have the same force and effect as original signatures.

Intending to be legally bound hereby, the PARTIES execute the foregoing AGREEMENT this 22nd day of February, 2007

WITNESS:

WILLIAM PALMER

LAWRENCE PALMER

WITNESS:

Pemberton Township Board of Education,
COUNTY OF Burlington

BOARD SECRETARY

BOARD PRESIDENT

RECEIVED
MAR 1 2007
CAPEHART & SCATCHARD, P.A.

PEMBERTON TOWNSHIP SCHOOL DISTRICT

P.O. BOX 228, ONE EGBERT STREET
PEMBERTON, NEW JERSEY 08068-0228
PHONE: 609-893-8141
FAX: 609-894-0933

JOHN A. MAZZEI, Interim Superintendent
email: jmazzei@pemb.org

February 22, 2007

Re: Lawrence Palmer

To Whom It May Concern:

Please be advised that LAWRENCE PALMER was employed by the Pemberton Township Board of Education as a custodian from February 23, 1990 until his retirement, effective March 1, 2007.

Sincerely,

Pemberton Twp. Board of Education

By: John A. Mazzei
Superintendent of Schools

CAPEHART SCATCHARD
ATTORNEYS AT LAW

RECEIVED
2008 APR -7 P 2:17
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

LaTonya N. Bland
lbland@capehart.com

April 3, 2008

VIA FACSIMILE and REGULAR MAIL

Honorable Daniel B. McKeown
Office of Administrative Law
Building 9
Quakerbridge Plaza
Quakerbridge Road
P.O. Box 49
Mercerville, NJ 08625-0049

Re: Pemberton Township Board of Education ads. Lawrence Palmer
OAL Docket No. CRT 04059-2003S
DCR Agency Docket No. EC28WE-48921-E
OAL Docket No. EDU 6638-02S
Department of Education Agency Docket No. 284-9/02
Our File No. 6982-12102

Dear Judge McKeown:

In accordance with your previous request, enclosed, please find a copy of the Resolution of the Pemberton Township Board of Education's Resolution approving the settlement with Lawrence Palmer. Thank you. Should you have any questions, please feel free to contact me.

Respectfully submitted,

CAPEHART & SCATCHARD, P.A.

LaTonya N. Bland

LaTonya N. Bland

LNB/pc
Enclosure
cc: Steven Cohen, Esq.
Mr. Michael Gorman
963370

PAT AUSTIN, Business Administrator, Board Secretary
JAMES J. FLANAGAN, CPA, Assistant Business Administrator

PEMBERTON TOWNSHIP SCHOOL DISTRICT

P.O. BOX 228, ONE EGBERT STREET
PEMBERTON, NEW JERSEY 08068-0228
PHONE: 609-893-8141

MICHAEL R. GORMAN, Ed.D., Superintendent

This is a certified true copy of a resolution approved by the Pemberton Township Board of Education at its meeting held on March 20, 2008.

Pat Austin, Board Secretary

RECEIVED
2008 APR -7 P 2:18
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

ADMINISTRATIVE

D. Legal

1. **Settlement #EC28WE-48921-E Recommend the Board approve a settlement of case Docket # EC28WE-48921-E for $115, 00 as per recommendation of counsel.**

Mr. Doyle	Yes	Mr. Kent	Yes	Mr. Thacher	Absent
Mr. Gregory	Yes	Mr. Pinto	Absent	Mr. Wells	Yes
Mr. Jerome	Yes	Mrs. Prickett	Yes	Mrs. Pryor	Yes

Motion for approval: Mr. Jerome **Seconded by:** Mr. Gregory

Approved: Yes X No ____ **Other Action:** ____

258-08

#258-08E

OAL DKT. NO. EDU 4282-08
AGENCY DKT. 137-5/08 and 139-5/08 (CONSOLIDATED)

G.J., on behalf of minor child, E.J.,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF BERLIN, CAMDEN COUNTY,	:	COMMISSIONER OF EDUCATION
RESPONDENT,	:	DECISION ON APPLICATION FOR EMERGENT RELIEF
AND		
G.J., on behalf of minor child, E.J.,	:	
PETITIONER,	:	
V.	:	
WESLEY HILL, BERLIN COMMUNITY ELEMENTARY SCHOOL, CAMDEN COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the audiotape of proceedings at the Office of Administrative Law (OAL) and the recommended order of the Administrative Law Judge (ALJ) have been reviewed.[1]

Upon such review, the Commissioner concurs with the ALJ that the petitioner has failed to meet the requisite standard for the granting of emergent relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) and *N.J.A.C.* 6A:3-1.6. In particular, the Commissioner notes that applicants seeking such extraordinary remedy must demonstrate a likelihood of success on the

[1] Exceptions to the OAL order were submitted on behalf of each respondent; however, applicable rules make no provision for such exceptions, and the Commissioner has not considered them herein.

merits of the underlying appeal, and – for the reasons set forth by the ALJ in her recommended order – petitioner herein cannot be found to have done so.[2]

Accordingly, the ALJ's recommendation that petitioner's application be denied is adopted as the final order in this emergent matter, which shall be returned to the OAL for such proceedings as are necessary to bring it to closure.[3]

IT IS SO ORDERED.[4]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 6/05/08

Date of Mailing: 6/06/08

[2] Since applicants for emergent relief must meet *all* the requisite criteria, the Commissioner does not reach the ALJ's findings on the remaining criteria.

[3] The Commissioner stresses that this matter was transmitted to the OAL solely on the question of whether the Board acted unreasonably in determining not to remove respondent Hill – in the interest of student safety and protection of witness integrity – from contact with students during the pendency of its investigation into the underlying incident involving petitioner's child.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

EMERGENCY ORDER

OAL DKT. NO. EDU 04282-08

AGENCY DKT. NO. 137-5/08 and 139-5/08 (Consolidated)

G.J. ON BEHALF OF MINOR CHILD, E.J.,

Petitioner,

v.

WESLEY HILL, BERLIN COMMUNITY ELEMENTARY SCHOOL, CAMDEN COUNTY,

Respondent.

and

G.J. ON BEHALF OF MINOR CHILD, E.J.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF BERLIN, CAMDEN COUNTY,

Respondent.

G.J., petitioner, pro se

Allan P. Dzwilewski, Esq., for respondent Berlin Borough Board of Education (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Michael Damm, Esq., for respondent Wesley Hill (Selikoff & Cohen, attorneys)

BEFORE **LISA JAMES-BEAVERS**, ALJ:

STATEMENT OF THE CASE

Petitioner G.J. o/b/o E.J., a minor child, has petitioned the Commissioner of Education (Commissioner), pursuant to N.J.A.C. 6A:3-1.1 et seq., for an order (1) seeking immediate removal of a teacher from his classroom assignment due to his alleged assault against E.J.; and (2) removing the teacher from any contact with minors at all for the safety of the other students.

PROCEDURAL HISTORY

On May 19, 2008, petitioner G.J., E.J.'s mother, filed a petition with the Commissioner seeking emergent relief. On May 21, 2008, the Director of the Bureau of Controversies and Disputes of the New Jersey Department of Education notified petitioner that the Bureau could take no action regarding her request for termination of respondent's employment or loss of his license due to the fact that such matters are within the exclusive purview of the local district board of education and State Board of Examiners, respectively. However, the Bureau set forth that it would construe her petitions as an emergent appeal of the Berlin school district's determination not to suspend teacher Wesley Hill while its investigation into her allegations is pending pursuant to N.J.S.A. 18A:25-6 and N.J.S.A. 18A:6-8.3. The Bureau advised her that she would have to demonstrate the standards set forth in N.J.A.C. 6A:3-1.6. The Director thereafter transmitted the matter to the Office of Administrative Law (OAL), where it was filed on May 22, 2008, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13 for determination as a contested case. I heard the application for emergent relief on May 27, 2008.

DISCUSSION

For a request for interim relief or stay, N.J.A.C. 6A:3-1.6 requires as follows:

> (b) A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall

address the following standards to be met for granting such relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982):

1. The petitioner will suffer irreparable harm if the requested relief is not granted;

2. The legal right underlying petitioner's claim is settled;

3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

I have heard the arguments of all parties and read their submissions.

E.J. is thirteen years old and is in eighth grade at the Berlin Community School in Berlin, New Jersey. Wesley Hill is a teacher at the Berlin Community School. He is not E.J.'s teacher.

In her Motion for Emergent Relief, petitioner contends:

1. Her son, E.J., was assaulted by teacher Wesley Hill on a school bus during a field trip on May 16, 2008, resulting in a split lip.

2. G.J. reported the assault to the school principal. He took a report and said he could not follow up until Monday because the teacher had left for the day.

3. G.J. reported the assault to the police department, and Michael Merlino witnessed the injury to her son's lip.

4. Despite her report to the principal, G.J. arrived at the school on Monday May 19, 2008, and found Mr. Hill still teaching in the school. The principal's superior assured her and her husband that the matter was being investigated.

5. As a result of being injured and humiliated by Mr. Hill in front of his classmates, E.J. is extremely intimidated and afraid of Mr. Hill.

6. Mr. Hill never apologized for his actions or reported the incident to anyone, as would have been proper procedure.

G.J. requests that Mr. Hill no longer be employed in the school that her son attends, and, for the safety of other students, that he not be dealing with minors at all.

Counsel for the Board has responded that the Board's investigation showed that E.J. and other students were on a bus on a school field trip when they began playing with water bottles. Mr. Hill interceded and asked E.J. to give him the water bottle. In the process of taking the bottle from E.J., the movement of the bus and the way E.J. handed it to him caused the bottle to hit E.J. on the lips causing a "split lip." The District reviewed the videotape taken on the bus and interviewed five students. Neither the tape nor the students' statements proved allegations of assault. The District concluded that the incident was an accident and no disciplinary action against Mr. Hill was warranted. The Board argues that the standards for emergent relief have not been met. In view of the fact that the Board has already acted to investigate this matter and already concluded that no disciplinary action is warranted, it also argues that the demand for emergent relief pending investigation is moot.

With regard to whether petitioner has met the first standard of demonstrating irreparable harm, petitioner has established that her son was humiliated by the incident. Mr. Hill's discussion of the incident with E.J.'s classmates, saying that E.J. was trying to get him fired, is causing E.J. to be harassed by his classmates. Further, because Mr. Hill was not suspended, E.J. is intimidated by Mr. Hill every time he sees him and he is fearful of attending school in general because he no longer feels safe if teachers can assault him without consequences. I **CONCLUDE** that petitioner has established irreparable harm.

The next standard, that the legal right underlying the petitioner's claim is settled, cannot be met. Petitioner argues that she meets this standard because assault on a

student is conduct unbecoming a teacher and is therefore just cause for suspension. Although this is true, there is no precedent for a parent to compel such action when the local board refuses to act. Clearly, as set forth in the letter to petitioner from the Bureau of Controversies and Disputes, teaching staff members may be suspended. N.J.S.A. 18A:25-6. However, the statute gives such authority to the superintendent of schools, with the approval of the president of the board employing him. Similarly, N.J.S.A. 18A:6-8.3 provides for the suspension with pay of any employee of a board of education pending any investigation, hearing or trial. This statute gives local boards of education the authority to suspend pending an investigation; it does not require that they do so, nor does it authorize a parent to compel the board to suspend pending an investigation if the board does not feel it is necessary. I therefore **CONCLUDE** that the legal right underlying the petitioner's claim is not settled.

For the same reason that the legal right underlying the petitioner's claim is not settled, the petitioner has not established a reasonable probability of success on the merits. The petitioner must clearly and convincingly show that the material facts are not in dispute and the legal claim upon which the application is based is settled or free from doubt. Sherman v. Sherman, 330 N.J. Super. 638, 645 (Ch. Div. 1999). In the present case, all the material facts are in dispute. The tape of the incident neither exonerates nor implicates Mr. Hill in an assault against E.J. The representations of the parties are completely at odds. Further, because discipline of board employees is solely within the purview of the local board of education, there is no legal authority on which I can rely to suspend or ultimately terminate the employment of a teaching staff member separate from the process established by law for removal of tenured employees. N.J.S.A. 18A:6-10 et seq. I therefore **CONCLUDE** that the petitioner has not established a likelihood of success on the merits.

Although the petitioner persuasively set forth why a balancing of the interests of the parties favors E.J.'s interests over the Board's, we need not reach this standard due to the inability of the petitioner to satisfy two of the four standards as set forth above.

In conclusion, petitioner has not demonstrated that the legal right underlying this claim is settled, nor has she established that she has a reasonable probability of success on the merits. Therefore, she does not satisfy the Crowe v. DeGioia standards and the Motion for Emergent Relief must be denied.

ORDER

It is hereby **ORDERED** that petitioner's application for emergent relief is **DENIED**. Based on the limited issue that the Bureau of Controversies and Disputes transmitted for consideration by the OAL, no other issues remain for this forum once the emergent matter is resolved.

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

05/28/08

DATE

LISA JAMES-BEAVERS, ALJ

jh

259-08

#259-08M

OAL DKT. NO. EDU 8821-07
AGENCY DKT. NO. 336-11/07

VINCENT CRAPELLI, WILLIAM M. MOORE AND JOSEPHINE LEE,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF TRUSTEES OF THE RED BANK CHARTER SCHOOL, MONMOUTH COUNTY,[1]	:	DECISION
RESPONDENT.	:	

Petitioners' motion for reconsideration and respondent's reply have been fully reviewed.

The Commissioner finds that petitioners have failed to meet the requirements of *N.J.A.C.* 6A:3-1.15(b)(2), and accordingly denies petitioners' motion.

IT IS SO ORDERED.

Lucille T Davy

COMMISSIONER OF EDUCATION

Date of Decision: 6/06/08

Date of Mailing: 6/09/08

[1] The New Jersey Department of Education, Office of Charter Schools was originally a named respondent but has been dismissed by agreement of the parties.

261-08

OAL DKT. NO. EDU 6493-07
AGENCY DKT. NO. 179-6/07

CHARLES SHEPPARD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 6/09/08

Date of Mailing: 6/09/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6493-07

AGENCY DKT. 179-6/07

CHARLES SHEPPARD,

Petitioner,

v.

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

Respondent.

Cristal Holmes-Bowie, Esq., appearing for petitioner Charles Sheppard
(Law Office of Michael A. Armstrong, attorneys)

Regina Waynes Joseph, Esq., appearing for respondent Board of Education of the City of Camden, Camden County

Record Closed: May 13, 2008 Decided: May 14, 2008

BEFORE **DENNIS P. BLAKE**, ALJ:

This matter was transmitted to the Office of Administrative Law on August 15, 2007, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The hearing commenced on March 17, 2008, at which time

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

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

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

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

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

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

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

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

5·14·08
DATE

Dennis P. Blake, ALJ

Date Received at Agency:

MAY 19 2008
DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/mamf

EXHIBITS

Jointly submitted

J-1 Settlement Agreement

RESOLUTION #214-SY '07
RESOLUTION OF THE
CAMDEN CITY BOARD OF EDUCATION TO CONFIRM SETTLEMENT OF LITIGATION WITH CHARLES SHEPHERD

WHEREAS, the Camden Board of Education ("the Board") and Charles Shepherd have been involved in litigation; and

WHEREAS, the Board's Labor Counsel and representatives for Charles Shepherd have been involved in negotiations to reach an amicable settlement in this matter; and

WHEREAS, the Board does not admit any liability with regard to the underlying action, entitled ***Charles Shepherd v. Camden Board of Education***, OAL Docket No. EDUOA 06493-2007S, Agency Ref. No.179-6/07, including any and all matters Mr. Shepherd presently has before the New Jersey Office of Administrative Law, or any other administrative agency or court; and

WHEREAS, both parties desire to settle this matter and dismiss, with prejudice and without an award of costs or attorneys' fees, the complaint filed in the above matter; and

WHEREAS, the Board agrees to pay to Mr. Shepherd, in full satisfaction of all claims arising out of the underlying action, a one-time payment of the sum of Five Thousand Dollars ($5,000.00), which has no precedential value nor will such payment affect or increase Mr. Shepherd's salary, possible increments, longevity or otherwise. Mr. Shepherd, as a result of the receipt of these monies, will also be responsible for all applicable taxes; and

WHEREAS, the Board agrees to return Mr. Shepherd to his former position and step with all benefits, medical, dental, vision, accrued sick time, vacation, pension, and entitlements in place as of Shepherd's separation from employment on March 26, 2007.

NOW, THEREFORE, BE IT RESOLVED, that the Board approves of this settlement with Mr. Shepherd, and authorizes counsel to execute all documents pertaining thereto.

Adopted: April 22, 2008

WITNESS: James Devereaux
JAMES DEVEREAUX

RECEIVED
2008 MAY 12 A 10:42
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

SETTLEMENT AGREEMENT REGARDING ACTIONS PENDING BEFORE THE COMMISSIONER OF EDUCATION

This SETTLEMENT AGREEMENT is entered into by and between the Board of Education of the City of Camden ("Board") and its employee, Charles Shepherd ("Shepherd").

WHEREAS, Shepherd has been continuously employed by the Board in various capacities, since in or around 1987, and most recently as an Acting Bus Aide; and

WHEREAS, on March 26, 2007 the Board voted to terminate Shepherd due to "Conduct Unbecoming of a Board Employee"; and

WHEREAS, Shepherd appealed the termination of his employment by the Board, which resulted in a contested case before the Commissioner, State of New Jersey, Department of Education, OAL Docket No. EDUOA 06493-2007S, Agency Ref. No. 179-6/07; and

WHEREAS, both parties are aware that the basis of Shepherd's termination by the Board was a refusal by Shepherd to take a drug test at the Board-appointed laboratory on the day requested by Board employees; and

WHEREAS, both parties acknowledge that the reason for the Board's requirement for Shepherd to take a drug test upon his return to work was because Shepherd had enrolled in an in-patient drug rehabilitation facility without prior knowledge to the Board; and

WHEREAS, both parties acknowledge and agree that, as Shepherd is employed as an Acting Bus Aide, his position is governed by all of the governance policies of the Board including, in particular, Policy 4119.23/4219.23 Smoking, Drinking and Use of Drugs on School Premises; Employee Substance Abuse which requires that employees with commercial driving

licenses and/or who perform safety-sensitive functions fall under the requirements of the Omnibus Transportation Employee Testing Act of 1991; and

WHEREAS, the Board and Shepherd have each retained independent counsel of their own choosing, and have been advised of their respective rights and responsibilities pursuant to Title 18A and now wish to resolve the disputed matters between them amicably; and

WHEREAS, neither party acknowledges any liability or wrongdoing in this disputed matter;

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

1. The above recitals are repeated and made a part of this Settlement Agreement by reference;

2. The Board will seek the Commissioner's approval for this Settlement Agreement, and if the Commissioner approves the Settlement Agreement without modification, the Board shall return Shepherd to his former position and step with all benefits, medical, dental, vision, accrued sick time, vacation, pension, and entitlements in place as of Shepherd's separation from employment on March 26, 2007;

3. This Agreement constitutes the last chance Shepherd has to continue his employment with the Board. Any breach of the terms of this Last Chance Agreement by Shepherd will result in Shepherd's termination of employment from the Board and Shepherd and the Board agree that Shepherd shall not ever serve as an employee of the Board again;

4. Should the Commissioner fail to approve this Settlement Agreement without modification, the parties have agreed to make every reasonable effort to reform this

Settlement Agreement to meet any objections. In the event that such reformation is not possible, this Settlement Agreement will become null and void, the parties will return to the status quo as it existed before this Settlement Agreement was drafted, the matter will be listed for a plenary hearing and the parties agree, in advance that neither the settlement, this Settlement Agreement, the Joint Request for Approval of Settlement, nor any representations of fact set forth in the settlement, this Settlement Agreement or the Joint Request for Approval of Settlement will be admissible for any purpose in the hearing or any appeals arising therefrom.

5. Shepherd shall not be entitled to any "back-pay" as a result of this Settlement Agreement, but shall receive a one-time payment of $5,000.00, which shall not have any precendential value nor will such payment in any way affect or increase Shepherd's salary, possible increments, longevity or otherwise;

6. For a period of eighteen (18) months from the Commissioner's final approval of this agreement by and between Shepherd and the Board, Shepherd consents in advance to submit to any alcohol testing or drug testing, e.g. Breathalyzer analysis, blood testing, urine testing, upon request by the Board or its administrators for the presence of alcohol and/or any controlled dangerous substance ("CDS") in his body. Such testing is to take place at a licensed, Board-designated hospital, laboratory or clinic utilizing the then-current standards accepted by the United States Department of Transportation and in use by the Board. In the event that the sample tests of Shepherd are positive, it will be considered a violation of this agreement by Shepherd and the Board shall immediately terminate Shepherd from his employment with the Board. In the event of a violation of this agreement by Shepherd, following the principles articulated in *Yaniello*, Shepherd acknowledges that his employment will be terminated.

7. Upon termination of employment from the Board, Shepherd agrees that he will have breached this Last Chance Agreement and agrees that his termination from the Board is not appealable in any forum or court of law but shall be deemed final and determinative. This includes, but is not limited to, the New Jersey Office of Administrative Law, New Jersey Department of Personnel, grievance arbitrations, Public Employment Relations Commission, state courts, and federal courts under any law or theory of law;

8. Shepherd agrees that he has been fairly and adequately represented and advised at all stages of these proceedings, that he is fully satisfied with the services of counsel and that he is voluntarily, without coercion and with a full understanding of his rights and the ramifications of this Settlement Agreement, entering into it on his own accord. Shepherd fully understands that this Settlement Agreement is subject to the approval of the Commissioner of Education.

9. The signatory for the Board acknowledges that the Board has ratified this Settlement Agreement at a duly-noticed meeting.

10. The Agreement shall not take effect until the expiration of the Governor's statutory veto period, which is fifteen (15) days after a certified copy of the Board's minutes is received in the Governor's office.

11. The parties further agree in consideration of this Settlement Agreement that, if it is approved by the Commissioner, they will not assert in any judicial or administrative proceeding that any statements concerning reasons they believe this settlement is not inconsistent with the public's interest are admissions, admissions against interest or competent evidence of any fact.

WITNESS:

Cristal Holmes-Bowie

CRISTAL HOLMES-BOWIE, ESQ.
MICHAEL A. ARMSTRONG & ASSOC., LLC
Attorney for Charles Shepherd

Charles Shepherd

CHARLES SHEPHERD

DATED: 4/22/08

SARA T. DAVIS
President, Board of Education
of the City of Camden

DATED:

WITNESS:

Cristal Holmes-Bowie
CRISTAL HOLMES-BOWIE, ESQ.
MICHAEL A. ARMSTRONG & ASSOC., LLC
Attorney for Charles Shepherd

Charles Shepherd
CHARLES SHEPHERD

DATED: 4/22/08

SARA T. DAVIS
President, Board of Education
of the City of Camden

DATED: 4/23/08

CERTIFICATION

I, JAMES J. DEVEREAUX, SCHOOL BUSINESS ADMINISTRATOR/ BOARD SECRETARY OF THE BOARD OF EDUCATION OF THE CITY OF CAMDEN, IN THE COUNTY OF CAMDEN, STATE OF NEW JERSEY, **HEREBY CERTIFY** THAT THE FOREGOING ANNEXED EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF SAID CITY DULY CALLED AND HELD ON **TUESDAY, APRIL 22, 2008** HAS BEEN COMPARED BY ME WITH THE ORIGINAL MINUTES AS OFFICIALLY RECORDED IN MY OFFICE IN THE MINUTE BOOK OF SAID BOARD OF EDUCATION AND IS A TRUE, COMPLETE AND CORRECT COPY THEREOF AND OF THE WHOLE OF SAID ORIGINAL MINUTES SO FAR AS THE SAME RELATES TO THE SUBJECT MATTERS REFERRED TO IN SAID EXTRACT.

IN WITNESS WHEREOF, *I HAVE SET MY HAND AND AFFIXED THE CORPORATE SEAL OF SAID BOARD OF EDUCATION THIS 23RD DAY OF APRIL, 2008*

2008 MAY 12 A 10:42

MR. JAMES J. DEVEREAUX/ SCHOOL BUSINESS ADMINISTRATOR/ BOARD SECRETARY

264-08

OAL DKT. NO. EDU 7735-08
AGENCY DKT. NO. 154-5/08

KENTWOOD ACADEMY, PETITIONER, V. LUCILLE DAVY, COMMISSIONER, NEW JERSEY STATE DEPARTMENT OF EDUCATION, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION ON APPLICATION FOR EMERGENT RELIEF

The record of this matter – including the audiotape of proceedings – and the recommended order of the Office of Administrative Law (OAL) have been reviewed.[1]

Upon such review, the Commissioner finds that she cannot concur with the Administrative Law Judge (ALJ) that petitioner has demonstrated entitlement to emergent relief pursuant to *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and *N.J.A.C.* 6A:3-1.6.

Initially, the Commissioner does agree with the ALJ – for the reasons expressed in the OAL order (at 3) – that petitioner has met the threshold standard of irreparable harm. However, applicants seeking the extraordinary remedy of emergent relief must also demonstrate a likelihood of success on the merits of the underlying appeal and show that the balance of interests and equities under the circumstances rests in their favor, and the Commissioner cannot find that petitioner here has done so.

With respect to settled law and likelihood of success on the merits, the Commissioner finds that petitioner has not shown the Department of Education (Department) to have acted in any

[1] Respondent filed exceptions to the OAL order, and a reply was subsequently filed by petitioner; however, because applicable rules make no provision for such submissions, these have not been considered by the Commissioner in reviewing this matter.

manner inconsistent with either controlling law or the May 15, 2007 settlement agreement (Petitioner's Exhibit N, Respondent's Exhibit J) by which the parties – both represented by counsel – voluntarily, fully and with finality concluded their lengthy history of differences, including the alleged wrongs perpetrated against petitioner by the Department. That agreement provided on its face that petitioner had until March 31, 2008 to comply with the regulatory requirement for an average daily enrollment of 24 public school placement students, and that such average would be based on enrollment between April 1, 2007 through March 31, 2008; petitioner does not claim to have met this requirement as stipulated, and does not even allege that the Department failed to accord petitioner the requisite time to do so. Further, petitioner's contention that the Department failed to issue the stipulated letter to sending districts is a bare assertion unsupported by evidence and denied by the Department, so that material facts in this regard are, at a minimum, in dispute.[2] Thus, the Commissioner cannot agree with the ALJ that "interpretation of [the settlement agreement] could result in petitioner's claim being settled as a matter of law," or that "based upon the circumstances and actions taken by the [Department] prior to the settlement, it is likely petitioner will prevail on the merits of its underlying claim." (Order at 3)

Finally, the Commissioner finds the balance of equities and interests in this matter to be in equipoise. While the ALJ noted the potential impact of denial of a stay upon the school and students who will need to obtain new placements for next year (Order at 3), the Commissioner finds that these do not outweigh the Department's interest in enforcing rules designed to ensure effective and efficient provision of public school services or the disruption to students' education that will occur if a stay is granted and petitioner does not prevail on the merits of its claims, resulting in revocation of its approval in mid-year.

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[2] To any extent that petitioner may be relying – as suggested by the petition of appeal at 8, ¶30 – on the fact that the required letter (Respondent's Exhibit K) was dated May 14, 2007 and the stipulation was not executed until May 15, 2007, the Commissioner here rejects that argument as placing form over substance in view of the fact that the May 14, 2007 letter is identical to the May 10, 2007 draft incorporated into the stipulation by reference.

Accordingly, for the reasons set forth above, the recommended Order of the OAL granting petitioner's application for emergent relief is rejected. The application is instead DENIED, and petitioner's claim shall proceed to hearing on the merits.

IT IS SO ORDERED.[3]

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 6/12/08

Date of Mailing: 6/12/08

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
EMERGENT RELIEF
OAL DKT. NO. EDU 7165-08
AGENCY DKT. NO. 154-5/08

KENTWOOD ACADEMY,
Petitioner,
v.
LUCILLE DAVY, COMMISSIONER,
NEW JERSEY STATE DEPARTMENT
OF EDUCATION,
Respondent.

Thomas O. Johnston, Esq., appearing for petitioner (Porzio, Bromberg & Newman, attorneys)

Cynthia Raymond Rimol, Deputy Attorney General, appearing for respondent (Anne Milgram, Attorney General of New Jersey, attorney)

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

Petitioner brings this action seeking emergency relief by way of issuance of temporary restraints enjoining respondent from revoking petitioner's status as an approved private school for the disabled. Petitioner also seeks injunctive relief with the Superior Court of New Jersey regarding the same issues scheduled to be heard on

June 4, 2008. Petitioner requests this court retain jurisdiction if the Superior Court does not. On May 28, 2008, the Commissioner of Education received petitioner's application for emergent relief. The Commissioner of Education transmitted this matter to the Office of Administrative Law (OAL) where it was filed on June 2, 2008. On June 3, 2008, oral argument was presented before the undersigned.

Kentwood Academy is an approved private school that educates disabled children classified with emotional and behavioral limitations. On May 20, 2005, the Department of Education (DOE) notified Kentwood that it had been approved to operate two classrooms with a maximum capacity of nine students per classroom. An unannounced inspection by the DOE was conducted on June 19, 2006. Based upon the findings of that inspection, Kentwood was placed on conditional approval status, preventing Kentwood from accepting new students until they were in compliance.

Upon Kentwood's application for emergent relief in September 2006, the undersigned issued an order restraining the DOE from placing Kentwood on conditional approval status. The parties entered into a partial stipulation of settlement on December 12, 2006, whereby Kentwood was in compliance with the DOE regulations and was not on conditional approval status. The parties reached a final stipulation of settlement on May 15, 2007, whereby it was agreed in part that Kentwood would have until March 31, 2008, to establish an average daily enrollment (ADE) of twenty-four public school placement students. This settlement was predicated upon the rescission of the March 14, 2007 letter by letter dated May 10, 2007.

The standards to be met for emergent relief as set forth in N.J.A.C. 6A:3-1.6(b) and Crowe v. DeGoia, 90 N.J. 126 (1982), are:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying the petitioner's claim is settled;

3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

[N.J.A.C. 6A:3-1.6(b).]

In the instant case, upon a consideration of the testimonial and documentary evidence presented at the hearing, I **FIND** that petitioner is entitled to emergent relief since the standards set forth in Crowe v. DeGoia, 90 N.J. 126 (1982) and N.J.A.C. 6A:3-1.6(b) have been met.

If the current letter issued by the DOE is not rescinded prior to a full hearing, the harm to petitioner will be irreparable. Effectively, petitioner would be out of business before the hearing took place which would make the hearing meaningless.

A settlement agreement was entered into between the parties. This agreement is a contract and interpretation of this agreement could result in petitioner's claim being settled as a matter of law.

Similarly, based upon the circumstances and actions taken by the DOE prior to the settlement, it is likely petitioner will prevail on the merits of its underlying claim.

Finally, upon balancing the equities and interests of the parties, by failing to issue an injunction pending a full hearing, the school would be closed and its twenty-nine students would be forced to find another school. Clearly, under these circumstances, it is petitioner and its students who would suffer the greater harm if relief were not granted.

Therefore, petitioner's motion for emergent relief is **GRANTED.**

It is **ORDERED** that within ten days from the date of the execution of this order, the following is to take place:

a) The DOE is enjoined from revoking Kentwood's approval status effective July 1, 2008;

b) Pending final adjudication of this matter, Kentwood will continue to be considered an approved private school for students with disabilities; and

c) Surrounding sending districts are to be notified in writing that Kentwood is approved to accept student enrollment for the 2008-09 school year.

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

June 5, 2008
DATE

BARRY N. FRANK, ALJ

jb

260-08

OAL DKT. NO. EDU 7383-05
AGENCY DKT. NO. 100-4/05

CHARLENE WILLIAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The advisement of petitioner's failure to appear transmitted by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 – together with the record of this matter, including notifications sent by OAL on April 4, 2008 and April 16, 2008,[1] providing an opportunity for petitioner to submit an explanation for her nonappearance – have been reviewed. There being no explanation filed by petitioner, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.[2]

Lucille E Day

COMMISSIONER OF EDUCATION

Date of Decision: 6/06/08
Date of Mailing: 6/06/08

[1] The OAL notices were sent to counsel who had moved to be relieved of her obligation to represent petitioner; consequently, on May 5, 2008, a further notice was sent directly to petitioner by the Department of Education.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FAILURE TO APPEAR

OAL DKT. NO.: EDU 07383-05

DATE OF FAILURE TO APPEAR:

March 26, 2008

PARTY OR PARTIES WHO DID NOT APPEAR:

Ms. Charlene Williams

DIANA M. BATISTA

March 27, 2008
Date

Secretary

265-08

OAL DKT. NO. EDU 7665-07
AGENCY DKT. NO. 187-7/07

C.W. & S.W., on behalf of minor child, K.W.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BUTLER, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. In that the relief sought by the instant petition of appeal – which was transmitted to the OAL in July 2007 – would be rendered moot subsequent to K.W.'s graduation on June 19, 2008, pursuant to a telephone conference call between the parties and the Director of the Bureau of Controversies and Disputes, it was agreed that the Commissioner's review of this matter would be conducted on an expedited basis. Consequently, it was similarly agreed that the parties would necessarily have a significantly abbreviated schedule for the submission of exceptions and reply exceptions to the Initial Decision (*i.e.*, close of business on June 10 and close of business on June 12, 2008, respectively). Exceptions of the Board and petitioners' reply thereto were filed in accordance with this schedule and were fully considered by the Commissioner in making her determination herein.

Upon her review of the record – which included transcripts of the hearing conducted at the OAL on February 25 and March 27, 2008 – and after full consideration of

exception submissions, the Commissioner agrees with the Administrative Law Judge's (ALJ) conclusion that – under the particular circumstances in this matter – the Board's determination that K.W. was ineligible to apply to the National Honor Society (NHS) in the spring semester of his junior year was arbitrary, capricious and unreasonable and that K.W. should have been allowed to apply.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter for the reasons comprehensively detailed therein. The Commissioner directs that K.W. be invited to immediately apply to the NHS and that an ultimate determination as to his application be made no later than 12:00 p.m. on Monday, June 16, 2008.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 6/13/08

Date of Mailing: 6/13/08
Faxed 6/13/08

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7665-07

AGENCY DKT. NO. 187-7/07

C.W. & S.W. ON BEHALF OF K.W.,

Petitioner,

v.

BORO OF BUTLER BOARD OF EDUCATION,

Respondent.

Stuart J. Moskovitz, Esq., for petitioner C.W. & S.W. o/b/o K.W.

David W. Carroll, Esq., for respondent Boro of Butler Board of Education (Parker McCay, attorneys)

Record Closed: May 13, 2008 Decided: June 4, 2008

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

STATEMENT OF THE CASE

Students who have cheated at Butler High School are not allowed to apply to the National Honor Society (NHS). Respondent Board of Education did not allow petitioner K.W. to apply because the high school principal misremembered that K.W. had been found to have cheated on an exam. Should K.W. have been allowed to apply? Yes. It

is arbitrary and capricious to deem that a student had cheated when no such determination had been made.

PROCEDURAL HISTORY

In the spring semester of his junior year at Butler High School, K.W. was not allowed to apply to the NHS. K.W. filed a grievance with the Board of Education but the Board upheld the determination. As a result, K.W. filed an appeal with the Commissioner of Education.

On July 26, 2007, the Commissioner of Education transmitted the case to the Office of Administrative Law as a contested case under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15. On February 25, 2008, and March 27, 2008, a hearing was held and the parties were permitted to submit closing briefs. The record was closed upon their receipt and only reopened to accept the transcript.

DISCUSSION AND FINDINGS OF FACT

In June 2005, K.W. sat for his final exam in chemistry. It was the last day of school and the end of his sophomore year. An anxious test-taker, K.W. had arrived about half an hour early but the classroom door was locked so he remained outside in the hallway to study until his chemistry teacher, Michael Klobus, arrived.

Klobus arrived about fifteen minutes later and let K.W., together with the other students who had since arrived, into the classroom to continue studying at their desks. K.W. specified that he took his seat, placed his study materials on his desk, and continued studying.

His study materials consisted of his textbook, his notebook, and his notes. Among his notes was a list of formulas that Klobus had handed out in advance of the exam as a study aid. K.W., in preparation for the exam, had written some extra formulas on it. Significantly, it was this piece of paper that K.W. would fail to clear from his desk when it was time to take the exam.

When Klobus first handed out the list of formulas as a study aid, he explained that he would provide a clean copy with the exam. Klobus, however, provided more than just that list. He also provided a copy of the periodic table of elements, a scrap piece of paper, and the "Scantron" answer sheet. These were in addition to the exam questions. There were more than five pieces of paper in all.

According to K.W., he had not fully cleared his desk when Klobus handed out these test papers, and K.W. inadvertently mixed up his list of formulas with them. When asked how it happened, K.W. answered that he had panicked:

> Q: Okay. And how did that piece of paper end up being on your desk while starting the test?
>
> A: I guess, from panicking from when [Klobus] told me to put the – my books away, I guess I accidentally misplaced it under my test papers.

When asked what he did once he realized that he had mixed up his list of formulas with the test papers, K.W. answered that he feared he would be accused of cheating, so he "bunched" his papers together:

> Q: What did you do when you realized it was there?
>
> A: I – I was already nervous about the test, so I took my papers and I bunched them up, because I was afraid I was going [to be accused] of cheating, and I didn't want to get in trouble. So, I just put them together – I bunched them together and I held onto it.

Meanwhile, Klobus noticed that everyone else had their test papers spread out on their desks. "[E]verybody had their papers all spread out," Klobus stated, "and [K.W.'s] were all stacked in a neat – in one neat stack, and it just looked so odd." So Klobus asked K.W. if he could see his papers.

When he saw the list with the extra formulas, Klobus was not pleased. "[I]t was the very last exam of the very last day," Klobus explained, "and I was just not very

pleased that this was happening to [K.W.] and myself." Nevertheless, Klobus allowed K.W. to finish the exam. "I never made a judgment," Klobus said, "but I had to report it."

By all accounts, K.W. is an exceptional student. He had a grade-percentage average of 97 going into the chemistry exam and currently has a cumulative grade point average of 4.3. He is well regarded by both faculty and students alike and was selected by Butler High School the following year as the school's representative to American Legion Jersey Boys' State. Arguably, this is an even more prestigious honor than selection for membership in the NHS because only one junior from each high school in New Jersey is selected to participate in Boys' State.

At the hearing, Klobus implied that K.W. did not use the extra formulas on the exam. He explained that in his years of experience, those who get caught cheating admit it, but K.W. did not. To the contrary, K.W. insisted that he did not refer to his list, if for no other reason than the early part of the exam did not call for it. As both K.W. and Klobus explained, the early part of the exam called for definitions, not equations. Moreover, Klobus stated that K.W. was a "very good student in chemistry" who would have "done well" on the exam without the extra formulas. He also did not think that they would have helped him "very much" anyway.

The exam itself was scheduled for about ninety minutes. About sixty minutes remained when Klobus handed the exam papers back to K.W., but K.W. was too distraught to continue. He continued to plead his case to Klobus by the classroom door and could barely finish the exam when he returned to his desk.

When K.W. finished the exam, he went to the guidance office with Klobus, where they discussed the incident with the head of guidance, Julie Placko. According to K.W., neither Klobus nor Placko stated that K.W. cheated. Meanwhile, his mother, C.W., was in the parking lot waiting to pick him up. When K.W. told her what had happened, C.W. told him to stay in the car with his younger brother so she could go inside the school to discuss the matter with Klobus and Placko herself. When C.W. reached the guidance office, she was also met by the head of curriculum, Wendell Kralovich.

C.W. testified that she believed her son when he told her that he had left his list of formulas out on his desk by mistake. She also testified that she believed her son when he told her that he had not used the extra formulas. "I believe my son," C.W. stated, "He has never given me any reason to lie." In addition, C.W. emphasized how dedicated her son is to his studies. "I know how hard he studies," C.W. protested, "I mean . . . my kid has given up Devil's tickets to study."

Moreover, C.W. insisted that her son be branded a "cheater" if he had really cheated. "You are the teacher in his classroom," C.W. recalled she said to Klobus, "I have respect for you, and I want to tell you right now, if you feel that my son was cheating in any way, if you saw my son cheat, give him a zero right now."

Still, no determination was made that K.W. had cheated and no discipline was imposed. But it looked bad. As a result, it was agreed that there had to be a "repercussion" (as Klobus testified at the hearing) or a "consequence" (as Placko wrote in her report).

The school principal, William Hanisch, was on the upper field preparing for the commencement exercises scheduled to take place later that day when these discussions took place. As soon as he received a phone call on the upper field from Placko about the incident, he returned to his office to discuss the matter with her. When Hanisch reached his office, C.W. again asked that her son be given a zero.

Indeed, C.W. testified that she wanted confirmation that her son had cheated. But no determination was made and no discipline was imposed. According to C.W., Hanisch told her that he would get back to her.

Kralovich recommended to Hanisch that K.W. get a zero because he believed the incident was cheating, but Klobus told Hanisch that a zero would be too "harsh" because K.W. deserved an "A" in his class. It was then that Klobus gave Hanisch his opinion that K.W. was a "very good student in chemistry" who would have "done well" on the exam without the extra formulas and that that they would not have helped him "very much" anyway.

After speaking with Klobus, Hanisch decided that K.W. would not get a zero. "So I found Dr. Klobus and spoke to him," Hanisch recounted, "And we determined that rather than give K.W. a zero, we would base his grade . . . on the portion of the exam that was completed after the material had been removed from his desk." According to Hanisch, the lower grade would be the discipline for the incident.

To conclude the matter, Hanisch told C.W. that there would be no further repercussions and that the incident would not be reported to any college:

> I met with C.W. again and talked to her about what we had determined . . . She also questioned me if there would be any further repercussions as far as discipline, and I told her "No, there would be no further repercussions as far as discipline, and it would not be reported to colleges."

Similarly, Placko wrote in her report that "any action taken was going to be the only consequence."

Moreover, no determination was made that K.W. had cheated. As Placko also wrote in her report, "My assumption at that point was that it wasn't determined that [K.W. had] cheated because he was able to take the exam and receive[] a grade."

The policy that the NHS advisor, Gail Bignell, enforced against K.W. the following year was never discussed. As Bignell explained, the policy – that students "who had been caught cheating" or "had been found to have cheated" are not allowed to apply to the NHS – is not contained in the NHS guidelines or student handbook.

It is not even fully explained to students. As Bignell testified, she merely tells juniors in their spring semester that the NHS is more than a scholarship society: "The [NHS] is not just a scholarship society," she recited, "it is based on scholarship, service, leadership, and above all, character." Therefore, the W.'s could not have been aware of this policy to discuss it with Hanisch – or anyone else for that matter – at the end of K.W.'s sophomore year.

The written policy for admission into the NHS at Butler High School, however, is relatively straightforward. Ostensibly, juniors who have a grade point average of 3.5 or better in their spring semester are invited to apply. They are then rated by the faculty, and ultimately by a faculty council, in the areas of "Scholarship, Service, Leadership, and Character," according to NHS guidelines. Incidentally, these four areas are the same areas considered for selection to Boys' State – which simply adds "Patriotism" as a fifth area for consideration.

The following is an excerpt from the NHS guidelines as it is reprinted in the student handbook:

> Selection for membership in the National Honor Society is the highest honor that can be accorded to a high school student. This honor is bestowed upon students who can meet rigorous standards in four areas:
>
> SCHOLARSHIP, SERVICE, LEADERSHIP and CHARACTER.
>
> Each candidate is evaluated by the entire school faculty, and ultimately by a faculty council, in the four areas using the guidelines listed below. Standards by the National Association of Secondary School Principals have been adopted as the basis for selection to the Butler Chapter of the National Honor Society.

Students who had been caught cheating, however, are not invited to apply. "If there had ever been any documentation or any problems with cheating," Bignell stated, "a letter is not forthcoming." Stated otherwise, "cheaters" were not allowed:

> In 1993 and 94, when a former principal was in charge of the National Honor Society . . . he in fact made calls to the National Honor Society to back that up . . . and he made the decision that there would not be a letter forthcoming to a student who had been caught cheating. Cheaters were not allowed in the National Honor Society.
>
> [Emphasis added.]

Although Bignell testified that this policy has been enforced since 1993, no evidence exists that Bignell actually invoked it at any other time since then. Indeed, those students who are rejected because they are deficient in the areas of "Leadership" or "Service" are given another chance in their senior year. "The policy is that you got one more chance," Bignell said, "as long as your grades [have] been maintained."

This second chance, however, does not apply to those students who have been found to have cheated. When asked, "If a student has been found to have cheated, is there an opportunity for them to reapply under your policies?" Bignell answered, "No, there isn't." (Emphasis added.)

Still, any instance of cheating had to be more than an appearance of cheating. "I think it has to be more than somebody suspecting," Bignell answered in response to a question attempting to clarify the policy, "I think that it has to be an entire process that was seen through." To Bignell, the process was just as important as its outcome:

> [I]f a student got a letter, and then all of a sudden [an instance of cheating] appeared, it would have thrown up a red flag. I would have immediately taken it to Mr. Hanisch, and Mr. Hanisch would have said, "We cannot accept this. You never followed the process." So the process was very important.

And the process included documentation. If the incident was not documented, then it could not be considered. "Mr. Hanisch was very, very clear at faculty meetings," Bignell stated, "That if you had never gone through the process of talking to the parents, talking to guidance counselors, and making this a documented situation, then you could not take that moment to rate a student down for cheating. It was not considered."

Moreover, any outcome or determination had to have been based on personal knowledge, not upon hearsay:

> In that process, Mr. Hanisch and I always spoke, always spoke to the faculty about never, ever rating a student on leadership and character based on hearsay, based on gossip, based on another member talking about the student.

> This was your sole interaction with that student, so we could get as honest picture as possible. And we worked on that and worked on that, to make the faculty understand that at no time are you to take someone else's opinion about a student.

Ironically, Bignell initially believed that K.W. had cheated based upon hearsay. "I had heard of an incident," Bignell recounted, "and I wanted to make sure that . . . we were following the policy that we had followed before . . . that if a student had been caught cheating, they do not get a letter to the Honor Society." (Emphasis added.) To Bignell, this was more "humane" than giving a letter to a student who was "going to be rejected anyway."

Nevertheless, Bignell went to Hanisch to make sure that K.W. had in fact been caught cheating or had been found to have cheated – and Hanisch told her that such a determination had been made by the administration. On direct examination, Bignell testified as follows:

> Q: Okay. Did you speak with Mr. Hanisch about whether there had been a determination by administration, as to whether or not [K.W.] had cheated?
>
> A: Yes, I did.
>
> Q: And what did he tell you?
>
> A: He told me that the decision had been made that – that the discussion had happened, and I had to follow the policy that we had done in the past. It had nothing to do with K.W.
>
> [Emphasis added.]

Bignell was upset. "This was not an easy thing to do," Bignell said, "K.W. is a wonderful young man, he's very respectful. I never had a problem with K.W. in class. And it was very hard to do this."

But no determination had been made by the administration as to whether or not K.W. had cheated.

It wasn't even documented. In fact, the incident wasn't documented until the next year when K.W. was not allowed to apply to the NHS because of it. And then it was mistakenly documented as cheating.

More specifically, on May 14, 2007, Hanisch wrote a memorandum to the superintendent of schools, Rene Rovtar, who had asked him to record his recollection of the events from the previous year, in anticipation of the W.'s meeting with the Board of Education on May 17, 2007. In his memorandum, Hanisch wrote that K.W. was not invited to apply to the NHS because of a "cheating incident." Thus, the incident was documented – and documented as cheating – for the very first time on May 14, 2007, nearly a year after the matter had been resolved.

Procedurally, the request to meet with the Board of Education began when C.W. met with Hanisch to learn why her son was not allowed to apply to the NHS. In trying to figure that out, Hanisch met with Kralovich while C.W. met with Placko. Then Hanisch and Placko met with C.W. together to tell her that they had never discussed the NHS with her the year before when they had met to resolve the matter and had assured her that there would be no further repercussions. Finally, C.W. met with Hanisch to learn that he had deemed the incident "cheating" before she met with Rovtar to ask for the hearing with the Board.

It was after that meeting with C.W. that Rovtar directed Hanisch, Kralovich, Placko, and Klobus to document their recollection of the incident from the year before and the events that followed. Upon her receipt of those documents, Rovtar prepared her own memorandum for the Board of Education in anticipation of its meeting with the W.'s. In her memorandum, dated May 15, 2007, Rovtar informed the Board that K.W. was ineligible to apply to the NHS because he had cheated; and even if he hadn't cheated, he was still ineligible to apply because it appeared that he had cheated:

> In contemplating my decision, I obtained information from the classroom teacher, the guidance counselor, Mr. Hanisch, and Mr. Kralovich. I determined that the student should not be eligible for the NHS based on an issue of academic

> integrity. Whether or not the student actually cheated is secondary in my opinion. What is of primary importance is that the piece of paper with the extra formulas was present on his desk when he was taking the exam . . . I feel strongly that it is important for the student body to know that cheating is not acceptable and will not be tolerated.

In taking these alternative positions, Rovtar expanded Butler High School's unwritten policy about student eligibility for the NHS. Not only were students who had been caught cheating or had been found to have cheated ineligible to apply to the NHS, but so were students who had appeared to have cheated.

She had also rejected Placko's report that K.W. was not determined to have cheated and that any discipline taken was to be the only consequence: "It was my understanding at the meeting that the only action taken was going to be the only consequence," Placko had written in her report, "[C.W.] asked on numerous occasions at the meeting if her son cheated [and t]he response was no."

More significantly, Rovtar had overlooked the threshold issue in this case, which she never presented to the Board of Education: Had a determination been made that K.W. had in fact cheated when the matter was resolved at the end of his sophomore year, or had the matter been resolved at the end of his sophomore year without such a determination having been made? If such a determination had been made, then the unwritten policy applied; if no such determination had been made, then it didn't. Indeed, this was the question before Hanisch when Bignell invoked the unwritten policy about student eligibility for the NHS.

Before the meeting with the Board of Education took place, Rovtar had explained to the W.'s that any request for a meeting had to be in writing. She also explained to them that the Board did not have to grant the request. Toward this end, Rovtar sent the W.'s a copy of the Board's grievance policy.

Consequently, on May 9, 2007, the W.'s, through counsel, submitted their grievance and asked for an opportunity to be heard. On May 15, 2007, the Board of Education, through counsel, granted the request. It also explained that their

presentation would be limited to thirty minutes in closed session and that the Board's determination would be made in executive session.

The meeting took place on May 17, 2007. Earlier in the day, Rovtar, in preparation for the meeting, had sent the members of the Board of Education a copy of the Board's policy on student grievances; a copy of the NHS guidelines from the student handbook; and a copy of all correspondence between the attorneys.

In addition, Rovtar sent them a copy of Board's "Plagiarism" policy, which contains the school's definition of "cheating." Rovtar, however, referred to it as the school's "Plagiarism/Cheating Policy." Similarly, Rovtar enclosed a copy of the documents she had asked Klobus, Kralovich, and Hanisch to prepare in anticipation of this litigation, but she did not include a copy of report she had asked Placko to prepare. Incidentally, only Hanisch spoke at the meeting with the Board of Education; and Placko did not testify at the hearing before this tribunal.

On May 18, 2007, Rovtar informed the W.'s of the Board's decision.

Given this discussion of the facts, I **FIND** the following **FACTS** as salient:

Students with a grade point average of 3.5 or better in the spring semester of their junior year at Butler High School are invited to apply to the NHS. Students who had been caught cheating or were found to have cheated, however, are not allowed to apply. K.W. had better than a 3.5 grade point average in the spring semester of his junior year but the Board of Education did not allow him to apply to the NHS because Hanisch misremembered that K.W. had been found to have cheated on his final exam in chemistry at the end of his sophomore year when the matter was resolved and he was assured there would be no further repercussions.

While K.W. was involved in an incident at the end of his sophomore year in which it appeared that he had cheated, the matter was resolved without a determination having been made that he had cheated. K.W. was simply given a lower grade as the

only discipline and was assured that there would be no further repercussions. The NHS was not discussed.

DISCUSSION AND CONCLUSIONS OF LAW

Courts have uniformly held that the denial of membership in the NHS is not a property interest, see, e.g., Price v. Young, 580 F. Supp. 1, 2 (E.D. Ark. 1983), and only one court has held that the denial of membership in the NHS implicates a liberty interest, see Warren v. National Association of Secondary School Principals, 375 F. Supp. 1043, 1048 (N.D. Tex. 1974). This case, however, is different from those cases. In those cases, the students were evaluated according to NHS guidelines and then denied membership. In this case, K.W. was not even evaluated because he had been deemed to have cheated nearly a year after the matter had been resolved. As such, K.W.'s good name is at stake.

Where a person's "good name, reputation, honor, or integrity" is at stake, "notice and an opportunity to be heard" are essential. Bd. of Regents v. Roth, 408 U.S. 564, 573, 92 S. Ct. 2701, 2707, 33 L. Ed. 2d 548, 558 (1972). An organization may also create procedural rights in addition to the constitutional minimum. Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970). In this case, K.W. was given notice and an opportunity to be heard. He was even given the additional procedural safeguards contained in the Board's grievance policy.

More specifically, the W.'s were given the reason why K.W. was not allowed to apply to the NHS; they were given a copy of the grievance policy itself; their attorney submitted a written grievance according to the policy; and the W.'s were given an opportunity – beyond the policy's requirements – to make a presentation before the Board. Therefore, I **CONCLUDE** that K.W. was not deprived of any liberty interest as protected by the Due Process Clause of the Fourteenth Amendment, and the issue now turns to the determination itself.

Determinations by Boards of Education are presumed correct unless arbitrary, capricious, or unreasonable, and their factual determinations must be accepted if supported by substantial credible evidence. Thomas v. Bd. of Educ. of the Twp. of Morris, 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd o.b., 46 N.J. 581 (1966). In this case, K.W. was involved in an incident at the end of his sophomore year in which it appeared that he had cheated, but the matter was resolved without a determination having been made that he had cheated. K.W. was simply given a lower grade as the only discipline and was assured that there would be no further repercussions. Therefore, I **CONCLUDE** that the Board's factual determination that K.W. had been found to have cheated on his final exam in chemistry at the end of his sophomore year when the matter was resolved is not supported by substantial credible evidence and the unwritten policy about student eligibility for the NHS did not apply to him in the spring semester of his junior year.

Accordingly, I must also **CONCLUDE** that the Board's determination that K.W. was ineligible to apply to the NHS in the spring semester of his junior year was arbitrary and capricious and that K.W. should have been allowed to apply.

Had K.W. been given the opportunity to apply, Klobus could have determined that K.W. had sufficient character for admission to the NHS, and the faculty council could have ultimately determined that Butler High School's representative to Boys' State was equally deserving of membership in the NHS. I strongly urge Butler to consider this possibility and recommend that they invite K.W. to apply to the NHS at once so they can make any ultimate determination before graduation later this month.

ORDER

Given my **FINDINGS of FACT** and conclusions of law, I **ORDER** that K.W. be allowed to apply to the National Honor Society and that a decision be rendered before graduation later this month.

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

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

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

June 4, 2008
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency: 6-4-08

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUN 5 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

tbj

APPENDIX

Witnesses

For Petitioner:

C.W.
Rene Rovtar
K.W.
William Hanisch

For Respondent:

William Hanisch
Michael Klobus
Wendell Kralovich
Gail Bignell
Rene Rovtar

Exhibits

For Petitioner:

P-1 Secondary School Transcript through first marking period of grade 12
P-2 Grade Reports from 2003 through 2008; Transcript Report from grade 9 through grade 11; and Proficiency Assessment from grade 11
P-3 Letter from Harvard University football coach dated March 1, 2007
P-4 Letter of Recommendation by social studies teacher undated
P-5 Letter of Recommendation by English teacher undated
P-6 Letter of Recommendation by advanced placement biology teacher undated
P-7 Letter of Recommendation by guidance counselor undated
P-8 Statement of Klobus undated
P-9 Report of Placko dated April 27, 2007
P-10 Academic Honesty Policy of Board (Policy No. 5701) revised July 2007

P-11 Pupil Grievance Policy of Board (Policy No. 5710) adopted February, 16 1998

P-12 Plagiarism Policy of Board (Policy No. 5701) adopted August-Sept. 1998

P-13 Memorandum of Record re: K.W. by Hanisch dated May 14, 2007

P-14 Excerpt from Student Handbook re: NHS

P-15 Letter from DARE officers dated April 5, 2007

P-16 Excerpt from Boys' State Booklet

P-17 Form letter from Bignell re: NHS undated

P-18 Letter from Moskovitz to Rovtar dated May 9, 2007

P-19 Memorandum from Rovtar to Board Members dated May 15, 2007

P-20 Minutes of Board Meeting dated May 17, 2007

P-21 Letter from Rovtar to W.'s dated May 18, 2007

For Respondent:

R-1 Statement by Kralovich undated

R-2 Letter from Carroll to Moskovitz dated May 15, 2007

R-3 Letter from Rovtar to W.'s dated May 7, 2007

R-4 Cover of Memorandum from Rovtar to Board dated May 17, 2007

R-5 Minutes of Board Meeting dated May 17, 2007

266-08

#266-08

SOPHIA GIACOMAZZI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY	:	DECISION

SYNOPSIS

Petitioner was originally hired as a leave replacement teacher of English for the 2002-2003 school year, and subsequently – in June of 2003 – entered into a regular contract to teach English when a permanent position was vacated by retirement. She claims that her tenure rights were violated when her contract was not renewed in April 2006, contending that she had attained tenure in October 2005 because her assignment remained unchanged after the permanent teacher she had been replacing returned to work in October 2002. Respondent Board urges dismissal of the petition, as petitioner was not hired into a tenure track position until June 2003. Cross motions for summary decision were filed by the parties.

The ALJ found that: summary decision is appropriate in this matter, as there are no material facts in dispute; respondent Board was unable to dispute or show supporting documentation contradicting petitioner's claims in this matter; as of October 2002 – when the teacher whom petitioner was hired to replace returned to work – there was no longer a leave replacement position available in the English department and therefore petitioner's "Leave Replacement Employment Contract" was no longer operative; petitioner began to teach in the capacity of a full-time regular teacher as of October 2002; petitioner has proven that the terms of the Tenure Act, *N.J.S.A.* 18A:28-5, were not implemented in this matter, and that *N.J.S.A.* 18A:16-1.1 does not prevent petitioner from accruing tenure credits beginning in October 2002. Accordingly, the ALJ concluded that petitioner did acquire tenure in respondent's district, and the Board's termination of petitioner's employment was a violation of her tenure rights pursuant to *N.J.S.A.* 18A:28-5. The ALJ ordered respondent to reinstate petitioner to her tenured position.

Upon a thorough and independent review of the record, the Commissioner rejected the Initial Decision of the OAL, finding that: although there were teachers on temporary leave during the 2002-2003 school year, there were no actual vacancies in the English department until June 2003 and therefore no tenure-track positions to which petitioner could lay claim; respondent Board has the discretion to modify teaching assignments and locations; and petitioner's claim that by continuing her assignment to teach the same courses in the same rooms for the remainder of the school year – after the permanent teacher she was hired to replace had returned to work – is without merit. Accordingly, the petition was dismissed.

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

OAL DKT. NO. EDU 9699-06
AGENCY DKT. NO. 233-7/06

SOPHIA GIACOMAZZI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY	:	DECISION

The record, Initial Decision and parties' exceptions in this case have been carefully and independently reviewed. No material facts are in dispute. For the reasons which follow, the Initial Decision granting summary decision to petitioner is rejected.

Petitioner signed a "Leave Replacement Employment Contract" (Leave Replacement Contract) with the respondent district on or about May 20, 2002. (Exhibit D to respondent's motion for summary disposition) The contract recited that petitioner was to serve "as **a Leave Replacement 1.0 FTE[1] Teacher of English at Columbia High School . . . from September 2, 2002 to June 30, 2003** at an annual salary of $35,000 . . . ." *Ibid.* (Emphasis in original.) In the contract was a sentence that indicated that petitioner would be replacing Nelson Trias, who was on military duty, and that petitioner "acknowledge[d] that this leave replacement position [was] only for the term specified above, and that such time [could not] be counted toward tenure." (*Ibid).*

On or about July 22, 2002, another established teacher in the high school English department – Ms. Wessel-Dwyer – was granted family leave. Consequently, another substitute

[1] 1.0 FTE signifies 100% full-time employee. See Exhibit I to respondent's motion for summary disposition.

teacher – Mr. Lampf – was hired for the 2002-2003 school year. It is undisputed that both Trias and Wessel-Dwyer were expected to return to the English department.

After the 2002 Fall term began, Trias returned from military leave – earlier than expected. As a result of his return, there was no need for two substitute teachers in the high school English department. Lampf, who had been hired two months after petitioner, was given notice, and – on or about November 11, 2002 – Trias took over the classes that Lampf had been teaching. (Exhibit I to respondent's motion for summary disposition) Petitioner continued to teach the classes that had been assigned to her at the beginning of the school year.

Since at the time that Trias resumed teaching in the high school English department, respondent anticipated the return of Wessel-Dwyer, it did not post any permanent English teaching positions. Accordingly, petitioner did not apply for and was not awarded a contract for a permanent position, but rather finished the 2002-2003 school year under the Leave Replacement Contract.

At the beginning of the 2003-2004 school year, another member of the Columbia High School English department – Ms. Wastie – retired, resulting in an opening for a permanent teaching position. Petitioner's application for the position was successful, and she entered into a regular contract with respondent – dated June 2, 2003 – to teach high school English during the 2003-2004 school year. (Exhibit J to respondent's motion for summary disposition) That contract was followed by contracts for the 2004-2005 and 2005-2006 school years.

On April 7, 2006, respondent's Superintendent Horoschak sent petitioner a letter advising that she would not be recommended for contract renewal. (Exhibit K to respondent's motion for summary disposition) Subsequently, petitioner was provided with a written

explanation of reasons for the non-renewal, an informal meeting with the Superintendent and union representation, and an informal appearance before the respondent Board of Education. (Exhibits K-O to respondent's motion for summary disposition)

Petitioner urges that respondent's failure to renew her employment was a violation of tenure rights. More specifically, she maintains that she received a tenure track position as of October 21, 2002, when Trias returned to teach in the Columbia High School English Department. To support her position, petitioner relies on a number of facts included within her 21 item "Statement of Facts."

First, petitioner refers to the sentence in her Replacement Leave Contract that relates that she is substituting for Trias. Second, she points to the fact that for the 2002-2003 school year, she remained in '(Trias') classroom' and continued to teach the same classes that she had been teaching before Trias returned to Columbia High School on October 21, 2002. Third, petitioner regards as significant the fact that, upon his return, Trias took over courses that had been previously taught by Wessel-Dwyer and substitute Lampf. Finally, petitioner refers to the fact that upon Trias' return she was not given a different leave replacement contract identifying her as a substitute for Wessel-Dwyer.

Petitioner argues that the foregoing facts bestowed a tenure track position upon her on October 21, 2002, despite the fact that there was – on that date – no open permanent position in the high school English department. She acknowledges that *N.J.S.A.* 18A:16-1.1[2]

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[2] *N.J.S.A.* 18A:16-1.1:

> In each district the board of education may designate some person to act in place of any officer or employee during the absence, disability or disqualification of any such officer or employee subject to the provisions of section *N.J.S.A.*18A:17-13. The act of any person so designated shall in all cases be legal and binding as if done and performed by the officer or employee for whom such designated person is acting but no person so acting shall acquire tenure in

precludes the acquisition of tenure by any person acting in the absence of another employee, but she maintains that by reason of Trias' return, she was no longer acting temporarily for him; rather, she was automatically transformed into a permanent employee, with the tenure clock ticking. Because she remained in 'his classroom' and continued teaching 'his classes' she reasoned that she had permanently acquired his position.

To support her view, petitioner offers *John Calabria v. Board of Education of the Township of Winslow, Camden County,* OAL Dkt. No. EDU 6403-02, Agency Dkt. No. 210-7/02; Initial Decision February 4, 2003; Final Decision adopting Initial Decision, March 14, 2003, Decision # 115-03. Calabria was a substitute teacher who, the Commissioner decided, achieved tenure-track status when the teacher he had been replacing returned to the district. Petitioner maintains that her circumstances are identical to Calabria's.

The Administrative Law Judge (ALJ) in the present case 1) accepted petitioner's reasoning, 2) found that petitioner's tenure eligibility had begun on October 21, 2002 and that petitioner had achieved tenure in October 2005, 3) concluded that petitioner's tenure had been violated by the non-renewal of her contract in April 2006, and 4) ordered petitioner's reinstatement with back pay and benefits. These determinations rested upon the ALJ's "Findings of Fact" – particularly the findings set forth below, both of which include legal conclusions:

> 12. As of October 21, 2002, when Trias returned from military duty and resumed teaching English there was no longer a leave-replacement position available in the English department. Lampf was given a sixty-day notice of termination and Trias completed Lampf's class teaching assignment in the Wessel-Dwyer's English class through June 2003;
>
> and

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the office or employment in which he acts pursuant to this section when so acting.

13. As of October 21, 2002, petitioner's "Leave Replacement Employment Contract" was no longer operative because Trias had returned to work or was no longer on leave; causing petitioner to teach the remainder of the 2002-2003 school year in the capacity of a full-time teacher;

Initial Decision at 10-11.

For the following reasons, the Commissioner is compelled to reject the Initial Decision. First, the reliance of both the petitioner and the ALJ on the fact that petitioner continued to teach the same courses in the same room(s) throughout the 2002-2003 school year is misplaced. There is nothing in the record to indicate that particular class assignments or teaching locations constitute terms of employment. To the contrary, the district's employment contracts only designate the subject area that an employee is to teach, the school to which the employee is assigned, and the number of hours the employee will teach. *See, e.g.* Exhibit J to respondent's motion for summary disposition.

Respondent's administrators have the discretion to modify teaching assignments and locations. The fact that petitioner was allowed to continue the classes she was assigned at the beginning of the 2002-2003 school year, and the fact that she stayed in the same location, hold no significance for a determination about the nature of her contract. Stated differently, neither Trias nor petitioner had any contractual/ownership rights in the particular courses that they taught within the English department, or the room they used. Thus, petitioner cannot rely on the courses and the room to justify her assertion that she inherited Trias' job.

Nor can the Commissioner attach a great meaning to the fact that petitioner's Leave Replacement Contract recited that she would substitute for Trias, and that a letter was sent to parents explaining same. As the record reveals, at the time these documents were issued,

Trias was the only teacher taking leave. Thus, he is the only high school English teacher whom petitioner could replace.

In her reply exceptions, petitioner articulates what she calls "the converse" of *N.J.S.A.* 18A:16-1.1, *i.e.,* "that once the leave replacement teacher ceases replacing someone else, time toward tenure shall begin to accrue." (Reply Exceptions at 2) She leaps from this contention to the assumption that once Trias – whose temporary absence precipitated her employment as a long-term substitute – returned she was no longer replacing someone else, and was entitled to accrue tenure time.

This proposition, again, misconstrues the nature of a teaching position. When the 2002-2003 school year began there were two long-term substitutes – petitioner and Lampf – and a fixed number of permanent positions in the high school English department. When Trias returned, he resumed his permanent position, leaving only one absence requiring a substitute teacher. Either Lampf or petitioner could have been given notice. Petitioner was spared and Lampf was let go. Respondent could have had any number of reasons for choosing to dismiss Lampf instead of petitioner, including the fact that he was hired two months after petitioner.

Similarly, respondent could have had any number of reasons for asking Trias to take over a different set of English classes than the combination he had taught prior to going on military leave. There is nothing in the record or in the education laws to support the notion that a teacher's eligibility for tenure is dictated by the particular combination of courses he or she teaches within his or her certification/endorsements.

In her reply exceptions, petitioner appears to argue that since boards of education have the authority to add or delete teaching positions, they must have added a permanent, tenure-track position for her in the high school English department when Trias returned. However,

petitioner has put no evidence before the Commissioner that respondent did so. To the contrary, petitioner taught under the Replacement Leave Contract for the entire school year, and no offer of a regular contract was made to her until another high school English teacher retired at the end of the 2002-2003 school year. Her argument relies on speculation, which cannot be utilized by the Commissioner in weighing the merits of this controversy.

This latter point also distinguishes the circumstances of the present case from the facts in *Calabria v. Board of Education of the Township of Winslow, supra,* upon which petitioner heavily relies. In *Calabria,* the petitioner began the 1998-1999 school year working as a replacement teacher of seventh-grade study skills in Overbrook Junior High School. The teacher he was replacing, Jean Hamilton, returned to the Winslow district on March 23, 1999, but accepted a different position, *i.e.* the position of secondary school English teacher in Overbrook Senior High School.[3] Significantly, Calabria applied for, interviewed for and was chosen to fill the position of seventh grade study skills teacher in the junior high school, effective March 23, 1999.

Thus, petitioner's situation is not identical to Calabria's. As the *Calabria* ALJ pointed out, Jean Hamilton – the teacher for whom Calabria substituted – left the position teaching seventh grade study skills and took a position teaching a different subject/category in a different school. This created an actual vacancy in the junior high school, for which Calabria applied and interviewed and for which he was awarded a contract. "No one could continue to contemplate Jean Hamilton's return to the seventh grade position once she assumed the position of High School English Teacher." C*alabria* at 6.

Further, in discussing Calabria's situation, the ALJ for that case construed the Appellate Division decision in *Sayreville Education Assoc. on behalf of Rucki et al. v. Board of*

[3] She apparently resigned at the end of that school year.

Education of the Borough of Sayreville, 193 *N.J.* Super. 424, 428 (App. Div. 1984) to have held that it is retirement, resignation or other termination of the employment of the original holder of a position that transforms the job held by a substitute, as per *N.J.S.A.* 18A:16-1.1, to a vacancy. *Calabria* at 5.[4] By way of contrast, there were no vacancies in the Columbia High School English Department. Trias and Wessel-Dwyer were on leave in September 2002. Trias returned. Wessel-Dwyer planned to return at the conclusion of her maternity leave.

The Commissioner notes that, among other considerations, the *Sayreville* court identified economic reasons for holding that only resignation, retirement or other termination creates vacancies:

> A further significant consideration is the fact that when a substitute appointment is made because of a temporary absence, a board of education would have to incur the expense of providing duplicative benefits if both the substitute and the absent teacher were to be regarded as simultaneously entitled to all of the statutory and contractually mandated benefits of regular staff membership. Where, however, the absentee's employment relationship with the board has been terminated at the time the "substitute" is appointed and there is hence a vacancy in that position, no question of duplication of benefits arises. Thus, in terms of a board's legitimate economic concerns, the withholding of regular staff membership from a substitute teacher who fills a position whose incumbent is only temporarily absent is a sensible approach and perhaps even a financial necessity.
>
> *Sayreville Education Assoc.* at 430.

As stated above, Trias did not resign or retire and was not terminated. He returned to his full-time job in the high school English department. This left only one employee (Wessel-Dwyer) on leave, resulting in the need for only one substitute. Petitioner had the good

[4] *See, also, Lammers v. Bd. of Educ.*, 134 *N.J.* 264, 268 (1993) ("The implication drawn by the Appellate Division in Sayreville between a vacancy and an absence is unmistakable. An absence exists when the missing teacher is scheduled ultimately to return to the position. A vacancy exists when the teacher leaves the position permanently, as in the case of a resignation or a retirement.")

fortune to be retained as that substitute, instead of being let go, as Lampf was. If she had been regarded as regular staff (as opposed to long-term substitute), the district would have been paying benefits to three teachers for two positions, a result rejected in *Sayreville Ed. Assoc.*

In summary, Petitioner Giacomazzi did not meet her burden to show that there was a "vacancy" in the position she held during the 2002-2003 school year. The fact that Trias taught a different combination of classes when he returned from military duty at the end of October 2002 – *i.e.,* the classes that had generally been taught by another teacher, Wessel-Dwyer, who was on maternity leave – is a red herring. The operative fact is that Trias returned to his position as one of respondent's permanent English teachers.

After the return of Trias and termination of Lampf, there was one open position in the English department. It was not a vacancy, but rather an absence created by Wessel-Dwyer's maternity leave. Petitioner taught classes because there was a temporary deficit of one regular teaching staff member. Petitioner presented no facts that would suggest that Wessel-Dwyer resigned, or that Trias intended to relinquish his position in respondent's high school English department when Wessel-Dwyer returned to work. Thus, the facts in this case show that there were no vacancies in the English department during the 2002-2003 school year and, consequently, no tenure-track positions to which petitioner could lay claim. Not until the retirement of Wastie was there a vacancy that could provide petitioner with a tenure-track position.

Because petitioner has failed to meet her burden of persuading the Commissioner that a vacancy existed in the Columbia High School English Department before the end of the 2002-2003 school year, the time served by petitioner as a substitute during that year may not be counted as service time for the acquisition of tenure, and she thus fails to meet the statutory

condition for the acquisition of tenure in respondent's district, pursuant to *N.J.S.A.* 18A:28-5.[5]

Accordingly, the Initial Decision in this matter is rejected and the petition is dismissed.

IT IS SO ORDERED.[6]

COMMISSIONER OF EDUCATION

Date of Decision: 6/13/08

Date of Mailing: 6/16/08

[5] *See, e.g., Charles Mills v. Board of Education of the Township of Piscataway,* 92 *N.J.A.R.* 2d (EDU) 375,376.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

SUMMARY DECISION

OAL DKT. NO. EDU 09699-06

AGENCY DKT. NO. 233-7/06

SOPHIA GIACOMAZZI,

Petitioner,

v.

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

Respondent.

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

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

Record Closed: January 31, 2008 Decided: March 14, 2008

BEFORE **SANDRA ANN ROBINSON**, ALJ

CASE STATEMENT AND BACKGROUND

Sophia Giacomazzi, petitioner, seeks a Summary Decision regarding the status of her tenure from October 21, 2002, to June 30, 2003. Petitioner contends she was no longer a leave replacement teacher for respondent South Orange-Maplewood School District, when teacher Trias returned to work on October 21, 2002, from military leave; and further that on October 21, 2002, she commenced a full-time teaching position. Petitioner continued teaching Mr. Trias's class

throughout the 2002-2003 school year; and thereafter continued to teach for respondent without interruption until June 30, 2006.

In September 2002 another English teacher named Wessel-Dwyer was granted a leave of absence and the school district hired a long-term substitute teacher named Lampf to temporarily fill Wessel-Dwyer's position. Lampf was terminated when Trias returned from leave. Trias assumed Lampf's responsibilities for Wessel-Dwyer's class for the entire 2002-2003 school year.

Petitioner contends that on October 22, 2005, she attained tenure status with respondent since she had continuously taught for more than three calendar years commencing October 21, 2002, and had complied with the requirements for obtaining tenure as set forth in N.J.S.A. 18A:28-5. Respondent contends that petitioner could not become tenured until September 2006 because she did not commence teaching under a tenure track contract prior to September 2003. Respondent determined that petitioner served as a leave replacement teacher for the entire 2002-2003 school year because she theoretically replaced Lampf as a long-term substitute teacher, despite the fact that Trias returned to employment in 2002-2003 and actually taught Wessel-Dwyer's class for that school year. Respondent maintains that petitioner was barred from accruing credits towards tenure because her right to accrual did not commence upon Trias's return to employment because her leave replacement teacher contract automatically flipped to cover another teacher's leave, and thereby prevented an end to the exception to eligibility for tenure, as set forth in N.J.S.A. 18A: 16-1.1.

PROCEDURAL HISTORY

The Commissioner of the Department of Education transmitted this matter on September 11, 2006, to the Office of Administrative Law (OAL) for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. Hearings were scheduled for multiple days in March and May 2007. The parties agreed that the basic facts were undisputed and thereafter pursued settlement discussions which ultimately were unsuccessful. Notices of Motions for Summary Decision were filed and the parties submitted cross-petitions. By July 2007 the

parties submitted legal briefs in support of their respective positions. Oral arguments were postponed several times due to vacation schedules and counselors' conflicts with trial dates on other cases. On January 31, 2008, the record was closed after the completion of oral arguments.

ISSUES FOR SUMMARY DECISION

Based on the **FACTS** of this case:

1.) Did respondent Board of Education of the South Orange-Maplewood School District adhere to the terms of the Tenure Act when determining that petitioner had not obtained tenure?

2.) Did petitioner obtain tenure status on October 22, 2005?

3.) If petitioner did become tenured on October 22, 2005, should respondent have renewed the 2006-2007 school year employment contract?

SUMMARY OF LEGAL ARGUMENTS AND ANALYSIS[1]

PETITIONER

N.J.S.A. 18A:1-1 sets forth that a teaching staff member is a professional staff member of any district or regional board of education who holds an office, position or employment of such a nature that the qualifications for the position or employment, require the professional to hold a valid and effective standard, provisional or emergency certificate, appropriate for the office, position or employment, which has been issued by the State Board of Examiners. Petitioner holds a valid and effective standard provisional certificate, which meets the qualifications for teaching English.

The Tenure Act, found at N.J.S.A. 18A:28-1 to 18, specifically defines the conditions by which teachers are entitled to ensure tenure. The Supreme Court in

1 Legal arguments of the parties are produced from the submissions of counsel.

Spiewak v. Board of Education of Rutherford, 90 N.J. 63 (1982), clearly ruled that while a board of education may define a part-time teacher as a supplemental teacher and prevent the acquisition of tenure, the board's designation does not control. In Spiewak, supra, 90 N.J. at 72, the Court noted,

> The statute makes tenure a mandatory term and condition of employment. It therefore supersedes contractual terms.

The Court observed that it was well settled that public employees and employers may not agree to contractual terms that contravene a specific term or condition of employment set by statute. The Court specifically stated that the tenure provisions of N.J.S.A. 18A:28-5 constitutes mandatory contractual terms that may not be waived or bargained away. See also In re Local 195, IFPTE, AFL-CIO v. State, 88 N.J. 893, 403-04 (1982); State v. State Supervisory Employees Ass'n., 78 N.J. 54, 82 at n.7 (1978).

Also in Spiewak, the Court wrote that the purpose of the Tenure Act has not changed even though it was written in 1909. The tenure statute prevents school boards from abusing their superior bargaining power over teachers who negotiate their contracts. The tenure statute protects teachers from dismissal for unfounded or political reasons. In Spiewak, the Court overruled several prior decisions to the extent they implied that the right to tenure derives from a contractual commitment rather than by statute.[2]

> The requirements for tenure as set forth in N.J.S.A. 18A:28-5, in pertinent part for purposes of this case, follows: "The services of all teaching staff members employed in the positions of teacher, . . . and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect . . . shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle

2 Cases overruled in regard to contract rights versus tenure statutes. Schultz v. State Board of Education, 132 N.J.L. 345; Biancardi v. Waldwick, 175 N.J. Super. at 139.

> B of article 2 of chapter 6 of this Title, after employment in such district or by such board for:
>
> (a) Three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
>
> (b) Three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
>
> (c) The equivalent of more than three academic years within a period of any four consecutive academic years.

In Spiewak, supra, the Court said the Tenure Act was designed to serve a remedial purpose and should be "liberally construed to achieve its beneficial ends." Id. at 146. See also Barnes v. Jersey City Bd. of Ed., 85 N.J. Super. 42, 45 (App. Div. 1964). The statute makes tenure a mandatory term and condition of employment, and, therefore the statutory provision supersedes contractual terms. Petitioner notes that her contract and the statute coincide and require that she teach temporarily only during the absence of Trias; and upon Trias' return the she was no longer serving in a temporary or acting position for him and could commence accruing or acquiring time towards tenure credit. Petitioner notes that qualification for tenure status was achieved on sections (a) and (c) of the statute, since she was employed as a full-time teacher from October 21, 2002, when Trias returned, until June 30, 2006. This period is greater than three consecutive calendar years and covers more than three academic years during a period of four academic years, thereby allowing for qualification under two sections of the statute.

Robert Young, supervisor of language arts and petitioner's supervisor until August 31, 2005, submitted a Certification, which notes that he was pleased with petitioner's performance and had advocated for her tenured position during the 2004-2005 school year; since in that year she completed three years of employment in the district and since he believed petitioner would acquire tenure in October 2005. He states in the Certification, "Dr. Corino and Ellen Bass, in-house counsel for the School District, both conferred with me and advised that Ms. Giacomazzi would not earn tenure until September 2006. I was told this was because Ms. Giacomazzi was not earning tenure during the 2001-2002 and 2002-2003 school years, because she

was serving as a replacement teacher for English Department staff who had been granted long leaves of absence."[3]

Petitioner contends that the statutory requirements in N.J.S.A. 18A:28-5 was met because when Trias returned to his teaching position in October 2002 and petitioner ceased to act as a leave replacement teacher. Petitioner continued her employment with the same schedule for teaching Trias's students, and Trias taught another class. Petitioner had contracted to serve as a leave replacement teacher for Trias only. When Trias returned, petitioner became a full-time teacher and was no longer affected by the statutory requirements in N.J.S.A. 18A:16-1.1, which prevents a temporary or acting teacher from accruing or acquiring tenure while serving in a temporary or acting position. When Trias returned, petitioner commenced accumulating time towards attaining tenure and at the completion of more than three consecutive years of teaching, on October 21, 2005, she acquired tenure pursuant to N.J.S.A. 18A:28-5(a). Starting on October 21, 2005, the Tenure Act, N.J.S.A. 18A:28-1, et seq., entitled petitioner to certain securities in the teaching position.

Petitioner adds to the argument about the commencement of tenure credit time by explaining that from October 21, 2002, through June 30, 2006, her employment was no longer considered to be under the statutory exception, excludes substitute teachers from the mandatory tenure provision of N.J.S.A. 18A:28-5. The exception in N.J.S.A. 18A: 16-1.1 states that a board of education may designate some person to "act in place of any . . . employee during the absence, disability or disqualification of any such . . . employee . . . [however,] no person so acting shall acquire tenure in the . . . employment in which he acts pursuant to this section when so acting." In Spiewak, supra, 90 N.J. at 74, the Court specifically noted that N.J.S.A. 18A: 16-1.1 denies tenure only to employees who act in place of another employee who is absent or disabled. See Sayreville Educ. Ass'n v. Bd. of Educ. of Sayreville, 193 N.J. Super. 424, 428 (1984) (where the Court determined that a substitute teacher is hired temporarily to act in the place of another employee who is absent). Sayreville stated, as in Spiewak, that N.J.S.A. 18A: 16-1.1 limits applicability to employees hired "temporarily to take the place of an absent teacher."

3 Dr. Corino is in charge of human resources for respondent's school district.

Moreover, the substitute acts in "the place of another which that other will reclaim when his period of absence is over." Ibid.

In the instant case, petitioner was the leave replacement teacher for Trias, and hired to temporarily fill a position unoccupied while he was on military duty. When Trias returned, petitioner stopped acting in Trias's place because he was present. Petitioner argues that because temporary replacement was over upon Trias's return, the exclusionary provisions of N.J.S.A. 18A:16-1.1 should not have been applied from October 21, 2002, through June 30, 2003.

A case similar to petitioner's case in the instant matter is Calabria v. Winslow Township School District Board of Education, Camden County, EDU 6403-02, Initial Decision (February 4, 2003), http://lawlibrary.rutgers.edu/oal/search.html. Calabria was hired as a leave replacement teacher in September, 1998 for Hamilton, a seventh-grade study skills teacher. In March, 1999, Hamilton returned from her leave and was given a position as a high school English teacher. Calabria applied for the seventh-grade study skills teacher position and was accepted in March, 1999. Winslow Board of Education did not renew Calabria's contract for the 2002-2003 school year and a petition was filed alleging that the board had violated the Tenure Act since Calabria had acquired tenure in March, 2002. N.J.S.A. 18A 16-1.1 was cited in the decision, and the judge noted that a substitute's service is ineligible for tenure only during the time spent filling a position temporarily vacated by another existing staff member whose return is contemplated. Ibid. Regardless of whether or not Calabria was advanced to a new position, the germane point is that she had returned and Hamilton stopped acting in her absence. The exception in N.J.S.A. 18A 16-1.1 "is limited to employees hired to take the place of an absent teacher. The courts are not free to expand that exception by judicial fiat." Ibid.; see also Spiewak, supra, 90 N.J. at 77. The Calabria decision held that petitioner had acquired tenure in March, 2002 because "no one could continue to contemplate Hamilton's return to the seventh grade position once she had actually returned and assumed the position of a high school English teacher." Ibid.

Petitioner in the instant matter contends her situation is the same as Calabria; petitioner was no longer a leave replacement teacher in October 2002 because

Trias was no longer absent upon return from his temporary leave and resuming teaching. Petitioner started teaching full-time towards her tenure requirements in October, 2002 and completed three years plus-a-day of continuous teaching in respondent's district, in October 2005. When Trias actually returned to work, there was no contemplation of whether he returned, his temporary absence had ceased and he was back permanently. He was no longer absent after October 21, 2002.

Before, on or after October 21, 2002, respondent did not void petitioner's, did not alter the contract for her to assume another temporary replacement assignment and did not give her a sixty-day notice of termination. Respondent used petitioner as a full-time English teacher. In Calabria, supra, and in Weigand v. Marlboro Township Board of Education, EDU 5737-83, 84 S.L.D. 534, adopted, 84 S.L.D. 549 (Commissioner of Education, April 9, 1984), the courts held that persons are substitute teachers only when they act in place of another employee who is absent or disabled; the other employee in this case was Trais. Petitioner notes that respondent stipulates the fact that, "Mr. Trais could have been returned to his classroom and Ms. Giacomazzi assigned to take over Ms. Wessel-Dwyer's class." However, the undisputed facts indicate that respondent mad no changes. Mr. Lampf had been employed to teach the Wessel-Dwyer classes and was terminated so Trias could teach the class for the entire school year; Trias's return marked the end of petitioner's leave replacement contract to act in a position for Trais during his leave-of-absence.

RESPONDENT

Respondent South Orange-Maplewood Board of Education argues that service as a long-term substitute does not count toward the acquisition of tenure. Respondent's position is that petitioner did not accrue time towards tenure after Trias returned because she was still a replacement leave teacher. Respondent contends that petitioner has not met the criteria set forth in Spiewak, supra, because she has not worked the required three years and-a-day in the position. Respondent determined that petitioner worked as a long-term substitute teacher from October 21, 2002, to June 30, 2003, to cover teacher Wessel-Dwyer who had been granted family-leave for the 2002-2003 school year.

Respondent contends it is not relevant that petitioner never taught the Wessel-Dwyer classes nor that petitioner never knew of an assignment change in theory. Respondent asserts that the name distinctions made regarding petitioner on all candidate-interview documents, all payroll documents and all employment-personnel contracts, which indicated that petitioner was hired as a leave replacement teacher specifically assigned to replace Trias during his military leave are irrelevant. Finally, respondent contends that N.J.S.A. 18A:16.1.1 should not be construed to mean that a teacher providing substitute or temporary services is eligible for accruing tenure credit time when the staff member for whom the teacher is temporarily covering returns to work, and the temporary teacher continues employment with the same school district as a full-time teacher.

FINDINGS OF FACT

With the understanding that the parties do not dispute the **FACTS**, and based on the arguments, the documents submitted into evidence with the cross-petitions for summary decision, I **ADOPT** and **FIND** the following as relevant **FACTS**:

1. On October 11, 2001, respondent completed a candidate-transmittal notice, which indicated that petitioner would serve as a long-term substitute for an English teacher named Trias who was on military leave;

2. On October 11, 2001, respondent mailed letters to parents and guardians of Trias's students to provide notice that petitioner was hired to be the long-term substitute teacher for Trias's classes;

3. On October 12, 2001, respondent prepared payroll documents authorizing petitioner's hire until June 30, 2002, specifically for the purpose of temporarily replacing Trias;

4. On October 15, 2001, respondent hired petitioner as a long-term substitute teacher:

5. On April 15, 2002, respondent via resolution granted Trias paid military leave from September 2, 2002, to June 30, 2003;

6. On May 20, 2002, petitioner signed a "Leave Replacement Employment Contract" with respondent for a full-time English teaching position from September 2, 2002, to June 30, 2003. The contract specifically indicated that petitioner was being hired to replace Trais;

7. In May 2002 petitioner received a provisional certificate of eligibility to teach English;

8. On July 22, 2002, respondent via resolution granted Wessel-Dwyer, another English teacher, family leave for the 2002-2003 school year;

9. On July 22, 2002, respondent via resolution appointed Lampf as a one-year long-term substitute teacher to replace Wessel-Dwyer for the 2002-2003 school year;

10. On October 21, 2002, Trias returned from military duty, which was almost an entire year earlier than anticipated;

11. Petitioner continued to teach Trias's class through June 30, 2003, the entire 2002-2003 school year. Petitioner's "Leave Replacement Employment Contract", which specifically assigned her to replace Trais during his military leave was not rewritten upon Trias's return; nor did respondent inform or provide petitioner with information that she would be a leave replacement teacher for anyone other than Mr. Trias;

12. As of October 21, 2002, when Trias returned from military duty and resumed teaching English there was no longer a leave-replacement position available in the English department. Lampf was given a sixty-day notice of termination and Trias completed Lampf's class teaching assignment in the Wessel-Dwyer's English class through June 2003;

13. As of October 21, 2002, petitioner's "Leave Replacement Employment Contract" was no longer operative because Trias had returned to work or was no longer on leave; causing petitioner to teach the remainder of the 2002-2003 school year in the capacity of a full-time teacher;

14. Wastie, another English teacher, retired effective September 1, 2003, and respondent hired petitioner in the capacity of a full-time English teacher to fill the vacancy;

15. On June 2, 2003, petitioner signed an employment contract with respondent to work as a full-time English teacher for the school year September 1, 2003, to June 30, 2004;

16. Petitioner was hired by respondent as a full-time English teacher for the 2004-2005 school year;

17. Petitioner was hired by respondent as a full-time English teacher for the 2005-2006 school year;

18. On April 7, 2006, petitioner received notice from respondent that her contract for the 2006-2007 school year would not be renewed;

19. On April 12, 2006, petitioner received the information she had requested from respondent regarding the reason for non-renewal. Respondent's letter stated that petitioner had attendance issues during the past year, had a confrontational attitude with staff and administrators, and exhibited emotional outbursts which caused negativity in the English department;

20. Respondent informed petitioner of her right to request a public discussion regarding her contract at the April 17, 2006, board meeting; petitioner attended the meeting;

21. On April 24, 2006, petitioner received respondent's letter, which reaffirmed the decision not to renew her contract. Petitioner requested a meeting before

the members of the board of education and she was granted an appearance on May 15, 2006. On May 16, 2006, respondent advised petitioner in writing that the decision not to renew her contract had not been changed.

MOTION FOR SUMMARY DECISION

DISCUSSION CONCLUSION AND DISMISSAL OF CROSS-PETITION

When considering a Motion for Summary Decision, this tribunal must determine whether the pleadings, admissions, certifications and affidavits demonstrate that no genuine issue of material fact exists. Motions for Summary Decision are the administrative counterpart to Summary Judgment and should be granted if the pleadings, discovery and certifications "show there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5; Contini v. Bd. of Educ., 286 N.J. Super. 106, 121 (App. Div. 1995). In Brill v. Guardian Life Insurance Company of America, 142 N.J. 520, 541 (1995) the New Jersey Supreme Court encouraged trial courts to grant summary judgment whenever the proper circumstances present themselves. When the evidence is so one-sided that one party must prevail, courts should not hesitate to grant summary judgment. Brill, supra, 142 N.J. at 540; R. 4:46-2; Boyle v. Bd. of Educ. of the City of Bayonne, EDU 11549-96, Initial Decision (October 27, 1997), http://lawlibrary.rutgers.edu/oal/search.html.

An adverse party's mere reliance on argument in a brief and the bare allegations of the complaint, without more is insufficient to create a genuine issue of fact. In re LaRusso, 97 N.J.A.R.2d (EDU) 506 (citations omitted); Camuso v. City of Newark, CSV 3667-98, Initial Decision (October 26, 1999), http://lawlibrary.rutgers.edu/oal/search.html; Baran v. Clouse Trucking, 225 N.J. Super. 230, 234 (App. Div. 1988), certif. denied, 113 N.J. 353 (1988). Relevant to the inquiry regarding a Motion for Summary Decision is whether the competent evidential materials, which have been presented, when viewed in the light of the most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issues in favor of the non-moving party. Brill, supra, 142 N.J. at 540. In order for the non-movant to prevail, a responding affidavit must

be offered setting forth specific facts, which indicate that there is a genuine issue of a material fact that can only be determined in an evidentiary proceeding. 37 New Jersey Practice, Administrative Law and Practices, 194 at 202, (Lefelt) (1988). This did not occur in this case. Respondent does not offer disputed facts or supporting documentation showing contradictory findings of issues raised in the petition. Accordingly, since there is no evidence contesting any of the facts, I adopt them as the factual predicate in this matter. Petitioner and respondent concur that a Summary Decision in the instant matter would address the Tenure Act and whether the terms of the act were implemented. Based on the foregoing **FACTS** and the applicable law I **CONCLUDE** that no genuine dispute of material facts exists. I also **CONCLUDE** that a determination on whether the terms of the Tenure Act were properly applied in the instant case is ripe for Summary Decision.

I further **CONCLUDE** that respondent's cross-petition must be dismissed since no claim has been established on which relief could be granted. Such dismissal entitles petitioner to prevail on a Motion for Summary Decision on the Petition. Barshatky v. Bd. of Educ. of Freehold Reg'l High School Dist., Monmouth County, 95 N.J.A.R.2d (EDU) 71, 72, aff'd, 95 N.J.A.R. 2d (EDU) 74 (Commissioner of Education October 26, 1994); Spivak v. Westwood Reg'l High School Dist., 97 N.J.A.R. 2d (EDU) 270, 271, aff'd, 97 N.J.A.R.2d (EDU) 273 (Commissioner of Education December 27, 1996).

CONCLUSION

Counsel for petitioner and counsel for respondent by way of cross motions have requested the undersigned to render a Summary Decision; and the undersigned having reviewed and adopted the undisputed facts, listened to oral arguments and reviewed all documents filed, has determined that petitioner has established that the terms of the Tenure Act N.J.S.A. 18A: 28-5 was not implemented in this matter; and N.J.S.A. 18A:16-1.1, does not prevent petitioner from accruing tenure credits commencing October 21, 2002:

> [A] board of education may designate some person to act in place of any . . . employee during the absence . . . of any such employee . . . [H]owever, no such person so acting

> shall acquire tenure in the office of employment in which he acts pursuant to this section when so acting.

On October 21, 2002, Trais returned to employment and petitioner ceased acting in his place.

Therefore I **CONCLUDE**, that petitioner, Sophia Giacomazzi, acquired tenure status, in accord with N.J.S.A. 18A: 28-5 by virtue of the fact that she was continuously employed in a full-time English teaching track position with respondent Board of Education of South Orange-Maplewood School District from October 21, 2002, through June 30, 2006.

I further **CONCLUDE** that the terms of the Tenure Act, N.J.S.A. 18A:28-5, were not followed by respondent Board of Education of South Orange-Maplewood School District and thereby caused a violation of petitioner Giacomazzi's tenure rights.

ORDER

Based on the foregoing I hereby **ORDER**, that:

Petitioner's cross motion for Summary Decision is **GRANTED** for the reason's set forth hereon. Summary Decision is entered in favor of petitioner, Sophia Giacomazzi;

Respondent's cross motion for Summary Decision is **DENIED** for the reason's set forth hereon;

Respondent is to reinstate petitioner to her tenured position;

Respondent is to reimburse petitioner (after mitigation) for lost salary and benefits.

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

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

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

March 14, 2008
DATE

Sandra Ann Robinson
SANDRA ANN ROBINSON, ALJ

Date Received at Agency: 3-17-08

Mailed to Parties:

MAR 18 2008
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lr

APPENDIX

EXHIBITS IN EVIDENCE

A Transmittal sheet for recommending candidate dated October 11, 2001

B Parent letter regarding petitioner's long-term substitute teacher position dated October 11, 2001

C Payroll information for petitioner dated October 12, 2001

D Employment contract for petitioner's leave replacement position dated May 20, 2002

E Provisional Certificate from the State of New Jersey effective May 2002

F Resolution granting leave-of-absence to Trias dated April 15, 2002

G Resolution granting Wessel-Dwyer leave-of-absence dated July 22, 2002

H Resolution appointment of Lampf as a substitute teacher for the 2002-2003 school year

I Memo, resolution and notes dated October 9, 21, and 22, 2002, respectively, regarding Mr. Trias's transition from military service to full-time teaching

J Employment contract appointing petitioner as a full-time English teacher from September 1, 2003, to June 30, 2004

K Respondent's non-renewal letter to petitioner dated April 7, 2006

L Respondent's letter to petitioner - "Closed Session Meeting" dated April 7, 2006

M Respondent's letter to petitioner - "Reasons for Non-Renewal" dated April 12, 2006

N Respondent's letter to petitioner - "Notice to Appear before the Board of Education" dated April 24, 2006

O Respondent's letter to petitioner - "Outcome of the May 15, 2006, Board of Education Meeting" dated May 16, 2006

267-08

OAL DKT. NO. EDU 5426-08
AGENCY DKT. NO. 113-4/08

V.J.P. AND F.R.P., ON BEHALF OF MINOR CHILD, A.D.P.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 6/16/08

Date of Mailing: 6/16/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 05426-08
AGENCY DKT. NO. 113-4/08

V.J.P. and F.R.P. o/b/o minor child, A.D.P.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,

Respondent.

F.R.P., pro se

Stephen J. Christiano, Esq., for petitioner (Christiano and Christiano, attorneys)

Record Closed: May 5, 2008 Decided: May 20, 2008

BEFORE **J. HOWARD SOLOMON,** ALJ:

This matter was transmitted to the Office of Administrative Law on April 29, 2008, for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

A hearing was scheduled for May 5, 2008. The parties appeared and agreed to settle this matter. In addition, F.R.P., after being duly sworn, gave the following uncontroverted testimony:

1. Petitioner, F.R.P., the grandmother of A.D.P. a minor student, and V.J.P., the uncle of A.D.P., have joint custody of A.D.P.

2. Since March 6, 2007, A.D.P. had been a resident of West Orange, residing with V.J.P., and had been enrolled in the public school system of West Orange.

3. V.J.P. is the co-owner with his spouse of the house located in West Orange where A.D.P. had been residing.

4. During the early part of the 2007-2008 school year, V.J.P. vacated his residence in West Orange due to marital issues with his spouse.

5. At that time, A.D.P. moved in with his grandmother, F.R.P., in Hillside, New Jersey.

6. Since moving in with his grandmother, A.D.P. has continued to attend a public school in West Orange.

7. On or about April 15, 2008, the respondent removed A.D.P. from its public school since he was no longer a resident of West Orange. On or about April 23, 2008, he was reinstated pending the outcome of this appeal.

8. According to F.R.P., V.J.P. continues to contribute to the support of the residence which he jointly owns with his spouse and intends to re-establish residency in West Orange for himself and A.D.P. once the marital issues have been resolved.

The attached Stipulation of Settlement indicates the terms of settlement which I have reviewed and I **FIND:**

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

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

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

[1] Petitioner, V.J.P., did not appear at the hearing. However, petitioner, F.R.P., represented that V.J.P. is bound by the Settlement Agreement. Attached is a signed acknowledgment to that effect.

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

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

5-20-08
DATE

J. HOWARD SOLOMON, ALJ

Receipt Acknowledged:

5-22-08
DEPARTMENT OF EDUCATION

DATE

Mailed to Parties

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAY 22 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

pb

State Of New Jersey
Office of Administrative Law
OAL Docket No. EDU 05426-08
AGENCY# 113-4/08

V.T.P. and F.R.P. o/b/o A.D.P.,

Petitioners,

vs.

Stipulation Of Settlement

Board Of Education of the Township of West Orange,

Respondent.

The parties hereby stipulate as follows:

1. The petition of appeal is withdrawn.

2. Respondent waives tuition reimbursement.

3. A.D.P. shall be permitted to attend school in respondent's district until the end of the 2007-2008 school year.

4. Unless the petitioners return to respondent's district and establish residency therein after June 2008, A.D.P. will no longer be permitted to attend school in respondent's district. Petitioners will be required to re-register A.D.P. in the

event of their return to West Orange..

5. This settlement resolves all issues raised in this litigation and the parties release each other from all liability.

Florence R. Parker

Florence R. Parker, Petitioner

Stephen T. Christiano

Stephen T. Christiano,
Attorney for Respondent

EXTRACT FROM THE MINUTES OF A MEETING
OF THE WEST ORANGE PUBLIC SCHOOLS
BOARD OF EDUCATION, WEST ORANGE, ESSEX COUNTY, NJ
AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the West Orange School District, West Orange, in the County of Essex, New Jersey, convened in Regular/Work session on May 12, 2008 at 8:00 P.M., at Washington Elementary School, 289 Main Street, West Orange, NJ.

The following members of the Board of Education were present:
Mrs. Casalino, Mrs. Tague, Mr. Petigrow, Mrs. Brill, Mrs. Lab

The following motion was offered by Mrs. Brill, and seconded by Mrs. Lab, and adopted by the Board of Education by the following roll call vote:

Stipulation of Settlement: V.J.P. and F.R.P. o/b/o A.D.P. v. Board of Education of the Township of West Orange

ROLL CALL: Ayes: Mrs. Casalino, Mrs. Tague, Mr. Petigrow, Mrs. Brill, Mrs. Lab

Abstain: None

CERTIFICATE

I, Mark A. Kenney, Secretary of the Board of Education, of the West Orange Public Schools, West Orange, in the County of Essex, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of said district duly called and held on May 12, 2008, has been compared by me with the original minutes as officially recorded in my office in the minute book of said West Orange Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 16th day of May 2008.

Mark A. Kenney
Business Administrator/Board Secretary

To: Judge J. Howard Solomon and West Orange School Board of Education

Re: Authorization to bind me to Settlement Agreement entered into May 5, 2008.

I Vernon J. Parker give authorization to my mother, Florence R. Parker to bind me to the agreement entered into with the West Orange, NJ Board of Education allowing ADP, my nephew and her grandson to return to Pleasantdale Elementary School and the agreement she entered into at the May 5, 2008 administrative hearing.

5-5-08

Vernon J. Parker Dated

State Of New Jersey
Office of Administrative Law
OAL Docket No. EDU 05426-08
AGENCY# 113-4/08

V.T.P. and F.R.P. o/b/o A.D.P.,

Petitioners,

vs.

Board Of Education of the Township of West Orange,

Respondent.

Stipulation Of Settlement

The parties hereby stipulate as follows:

1. The petition of appeal is withdrawn.

2. Respondent waives tuition reimbursement.

3. A.D.P. shall be permitted to attend school in respondent's district until the end of the 2007-2008 school year.

4. Unless the petitioners return to respondent's district and establish residency therein after June 2008, A.D.P. will no longer be permitted to attend school in respondent's district. Petitioners will be required to re-register A.D.P. in the

event of their return to West Orange.

5. This settlement resolves all issues raised in this litigation and the parties release each other from all liability.

Florence R Parker

Florence R. Parker, Petitioner

Stephen T. Christiano

Stephen T. Christiano,
Attorney for Respondent

EXTRACT FROM THE MINUTES OF A MEETING
OF THE WEST ORANGE PUBLIC SCHOOLS
BOARD OF EDUCATION, WEST ORANGE, ESSEX COUNTY, NJ
AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the West Orange School District, West Orange, in the County of Essex, New Jersey, convened in Regular/Work session on May 12, 2008 at 8:00 P.M., at Washington Elementary School, 289 Main Street, West Orange, NJ.

The following members of the Board of Education were present:
Mrs. Casalino, Mrs. Tague, Mr. Petigrow, Mrs. Brill, Mrs. Lab

The following motion was offered by Mrs. Brill, and seconded by Mrs. Lab, and adopted by the Board of Education by the following roll call vote:

Stipulation of Settlement: V.J.P. and F.R.P. o/b/o A.D.P. v. Board of Education of the Township of West Orange

ROLL CALL: Ayes: Mrs. Casalino, Mrs. Tague, Mr. Petigrow, Mrs. Brill, Mrs. Lab

Abstain: None

CERTIFICATE

I, Mark A. Kenney, Secretary of the Board of Education, of the West Orange Public Schools, West Orange, in the County of Essex, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of said district duly called and held on May 12, 2008, has been compared by me with the original minutes as officially recorded in my office in the minute book of said West Orange Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 16th day of May 2008.

Mark A. Kenney
Business Administrator/Board Secretary

To: Judge J. Howard Solomon and West Orange School Board of Education

Re: Authorization to bind me to Settlement Agreement entered into May 5, 2008.

I Vernon J. Parker give authorization to my mother, Florence R. Parker to bind me to the agreement entered into with the West Orange, NJ Board of Education allowing ADP, my nephew and her grandson to return to Pleasantdale Elementary School and the agreement she entered into at the May 5, 2008 administrative hearing.

5-5-08

Vernon J. Parker Dated

269-08

OAL DKT. NO EDU 1023-08
AGENCY DKT. NO. 380-12/07

IN THE MATTER OF THE TENURE	:	
HEARING OF RAFAEL BRITO,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK,	:	DECISION
ESSEX COUNTY.	:	

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

Upon such review, the Commissioner concurs with the Administrative Law Judge that the proposed settlement is consistent with established standards governing settlement of tenure matters. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846.

Accordingly, the settlement is hereby approved* and the tenure matter dismissed, subject to compliance with the terms of the settlement. A copy of this decision shall be forwarded to the State Board of Examiners.

IT IS SO ORDERED.

Lucille E. Davy
COMMISSIONER OF EDUCATION

Date of Decision: 6/16/08
Date of Mailing: 6/16/08

*It is noted that term #6 of the parties' agreement contemplates approval by the State Board of Education. The Commissioner of Education, not the State Board is charged with reviewing and approving settlement agreements.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO.EDU 1023-08

Agency Docket No. 380-12/07

IN THE MATTER OF THE TENURE HEARING OF RAFAEL BRITO, STATE - OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,

---

Perry Lattibourdere, Esq. and **Derlys Gutierrez**, Esq. appearing on behalf of petitioner (Office of General Counsel, Newark Public Schools)

Dennis A. Cipriano, Esq., appearing on behalf of respondent

Record Closed: May 23, 2008 Decided: May 23, 2008

BEFORE: **CARIDAD F. RIGO**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on January 3, 2008 for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. Hearings were scheduled and conducted on March 5 & 11, 2008. During the March 11, 2008 hearing the parties reached a tentative settlement subject to Board approval.

On May 23, 2008 the undersigned received the fully executed settlement which is attached hereto.

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

Having reviewed the contents of the attached Stipulation of Settlement, I **FIND**:

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

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

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

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

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

May 23, 2008
DATE

CARIDAD F. RIGO, ALJ

Date Received at Agency: 5-28-08

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAY 28 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

ljb

DENNIS A. CIPRIANO, ESQ.
200 Executive Drive
West Orange, NJ 07052
(973) 736-0400
Attorney for Respondent

RECEIVED
LAW
2008 MAY 23 A 9:10

In the Matter of the Tenure Hearing of Rafael Brito, State Operated School District of the City of Newark, Essex Count

OFFICE OF ADMINISTRATIVE LAW
ADMINISTRATIVE ACTION

OAL Docket No.: EDU 1023 - 08
AGENCY DOCKET NO. 380-12/07

SETTLEMENT AGREEMENT

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

1. **Resignation.** Rafael Brito (hereinafter called Brito) resigns his position as teacher employed by the, State – operated School District of the City of Newark ("the District").

2. **Effective date**. Said resignation was tendered on March 6, 2008 and is effective June 30, 2008.

3. **Compensation.** Mr. Brito shall receive his normal rate of pay effective March 10, 2008 through June 30, 2008. Mr. Brito is entitled to leave of 36 days which shall be included in the compensation provided herein and health benefits through June 30, 2008.

4. **Appeal Dismissal.** The pending appeal filed by Mr. Brito is dismissed with prejudice.

5. **Waiver.** Mr. Brito waives any and all claims against the District arising out of the tenure charges asserted in this action, including any awards of back pay, counsel fees or other monetary relief, except the compensation provided for hereinabove.

6. **Approval.** This agreement is subject to the approval of the State District Superintendent of the State – operated School District of the City of Newark and shall become affective only if approved by the **STATE BOARD OF EDUCATION.**

7. **Allegations.** During the 2006-2007 school year certain allegations of inappropriate comments towards students by Brito arose during the course of Brito's instruction of students. Mr. Brito was suspended with pay pursuant to said allegations on or about May 18, 2007 pending further investigation.

8. **DYFS Investigation.** Said allegations were reported to the Division of Youth and Family Services (DYFS) on or about May 28, 2007 and an investigation was conducted.

9. **DYFS Exoneration.** After its investigation, DYFS submitted its confidential report to the District that the alleged abuse was not substantiated in accordance with *NJSA* 9:6-8.21.

10. **Charges.** The District Superintendent recommended that tenure charges against Brito were justifiable and warranted. Brito has consistently denied any inappropriate acts toward any students and has consistently denied engaging in any conduct unbecoming a teacher.

11. **District Response to Inquiries.** The District shall respond to any and all inquiries concerning its employment of Mr. Brito by stating the date his employment began (9-03) and the date his resignation became effective (6-30-08). The District shall not make any negative, derogatory or pejorative statement concerning Mr. Brito or make any statement concerning any disciplinary charge against him. The District shall promptly issue a letter to Mr. Brito stating that he was employed by the District from September 2003 to his resignation effective June 30, 2008 and that he resigned in good standing.

12. **Return of Personalty.** The District shall promptly return to Mr. Brito his personal property which was located in his class room 207 in Barringer Ninth Grade Success Academy, Newark, NJ, or provide a refund for the value thereof.

13. **Voluntary Agreement.** After negotiations in good faith, the parties reached an agreement on March 6, 2007 providing for a complete resolution of their dispute. The agreement has been authorized by the Superintendent in accordance with *NJSA* 18A:7A-39, as evidenced by her signature affixed hereto. Mr. Brito understands fully his rights pursuant to the Tenure Law, and he has agreed to the terms of the agreement voluntarily and of his own free will. The terms of the agreement will satisfy the reasonable objectives of the District and will avoid the necessity of expensive and time-consuming litigation. The settlement agreement satisfies the requirements of the decision of the State Board of Education in *Cardonick v. Brooklawn Bd. Of Ed.*, 1983 S.L.D. (St. Bd. April 6, 1983).

We agree to the terms
of the foregoing stipulation
of settlement.

Witness

Rafael Brito

State Operated School District for
the City of Newark

Witness

by
Marion A. Bolden
State District Superintendent

268-08

OAL DKT. NO. EDU 250-08
AGENCY DKT. NO. 374-12/07

C.L., ON BEHALF OF MINOR CHILD, W.K.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF UPPER PITTSGROVE, SALEM COUNTY,	:	
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 6/16/08

Date of Mailing: 6/16/08

* Although its action is reflected in neither the Initial Decision nor the Stipulation of Settlement, the Board of Education approved the referenced agreement by resolution adopted on April 23, 2008. See letter of May 13, 2008 from Board counsel, with copy of resolution attached.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 250-08
AGENCY DKT. NO. 374-12/07

C.L. o/b/o MINOR CHILD, W.K.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF UPPER PITTSGROVE, SALEM COUNTY,
Respondent.

C.L., petitioner, pro se

Gary D. Wodlinger, Esq., for respondent (Lipman, Antonelli, Batt, Dunlap, Wodlinger & Gilson, attorneys)

Record Closed: May 14, 2008 Decided: May 20, 2008

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

This matter was transmitted to the Office of Administrative Law on January 23, 2008, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

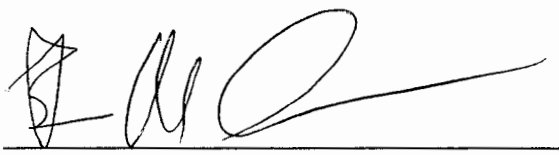
1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures and as placed on the record on April 22, 2008.

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

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

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

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



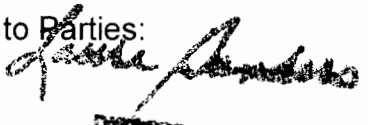
May 20, 2008
DATE

BRUCE M. GORMAN, ALJ

Date Received at Agency:

MAY 20 2008
DATE

Mailed to Parties:



OFFICE OF ADMINISTRATIVE LAW

/sd

C.L obo Minor child W.K.
vs.
Upper Pittsgrove Twp
BoE

Before Commissioner
Edward G.
Agency Docket
374-13/07

Stipulation of
Settlement

The parties agree to settle this disputed residency case as follows:

C.L will promptly (by end of week) enroll W.K in the Franklin Twp School district based on her current residency at 762 Swedesboro Rd, Monroeville NJ.

The school district waives any claim for back tuition.

This resolves the entire dispute in controversy

Chrystyl Long
Chrystyl Long on behalf of minor child W.K.

Robert J Bazzel
Robert Bazzel
Superintendent
Upper Pittsgrove BOE

#270-08E

OAL DKT. NO. EDU 4687-08
AGENCY DKT. NO. 170-6/08

JARED DeGROFF,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF WILDWOOD, CAPE MAY COUNTY,	:	DECISION ON APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this emergent matter – which included an audiotape of the hearing conducted at the Office of Administrative Law on June 16, 2008 – along with the recommended Order of the Office of Administrative Law (OAL) have been reviewed.

Upon such review, the Commissioner concurs with the Administrative Law Judge that petitioner has failed to satisfy the requirements necessary for the granting of emergent relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), most notably – he has failed to demonstrate a likelihood of prevailing on the merits of the underlying controversy or that the balance of interests and equities rests in his favor.

Accordingly, the recommended Order of the OAL denying petitioner's application is hereby adopted. This case shall proceed at the OAL for a hearing on its merits which, due to the circumstances of this matter, should – to the greatest extent possible – be conducted on an expedited basis.

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 6/16/08

Faxed to the Parties: 6/16/08

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
9 Quakerbridge Plaza
Mercerville, New Jersey 08625
(609) 588-6531

John R. Tassini
Administrative Law Assignment Judge

VIA FAX TRANSMISSION

June 16, 2008

Lucille Davy, Commissioner
Department of Education
100 Riverview Plaza, 4th Floor
P.O. Box 500
Trenton, NJ 08625-0500 (via fax: 609-292-4333)
Attn: M. Kathleen Duncan, Director of Controversies & Disputes

RE: J. D. v. BOARD OF EDUCATION OF THE CITY OF WILDWOOD, CAPE MAY COUNTY
OAL DKT. NO. EDU 4687-08; AGENCY DKT. 170-6/08

Dear Commissioner Davy:

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

Sincerely,

JRT

John R. Tassini
Administrative Law Judge

JRT:mph

cc: Jason D. Dalton, Esq. (via fax: 215-785-3401)
Andrew Cafiero, Esq. (via fax: 609-729-3441)

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
MOTION FOR
EMERGENT RELIEF
OAL DKT. NO. EDU 4687-08
AGENCY DKT. NO. 170-6/08

J.D.,

Petitioner,

v.

CITY OF WILDWOOD
BOARD OF EDUCATION,

Respondent.

Jason D. Dalton, Esq., for petitioners (Ronald V. McGuckin & Associates, attorneys)

Drew Cafiero, Esq., for respondent City of Wildwood Board of Education (Cafiero & Balliette, attorneys)

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

STATEMENT OF THE CASE

Petitioner J.D., a senior in the high school operated by the City of Wildwood Board of Education (BOE), engaged in a food fight in the school's cafeteria and the school's staff observed that his behavior included a sudden outburst and euphoria. Pursuant to the BOE's policies and guidelines, for engaging in the food fight school officials suspended the petitioner

for four days. Further, school officials, notified the petitioner that, pursuant to the BOE's policies and guidelines, since it appeared the he was under the influence of a controlled dangerous substance (CDS), he should submit a sample to be analyzed for the presence of a CDS metabolite. The petitioner's sample was positive and school officials then notified the petitioner that he would be suspended for ten additional days. The BOE afforded the petitioner a hearing on the matter and determined that he was properly suspended. The petitioner's class is scheduled to graduate this evening, so the suspension prevents him from participating in the ceremony, although he may pick up his diploma in the days following the ceremony. The petitioner appeals from the BOE's determination and he moves for emergent relief: an order vacating the order of suspension, so that he can participate in the graduation ceremony. The BOE opposes the motion, submitting that there was good cause for the suspension and that the petitioner has not satisfied his burden for vacating its action.

PROCEDURAL HISTORY

On June 13, 2008, petitioner's petition, motion for emergent relief, and exhibits were filed with the Department of Education and the Department transmitted the contested case to the Office of Administrative Law (OAL) where it was filed and scheduled for a hearing. N.J.S.A. 18A:6-9, N.J.S.A. 52:14B-2(b). On June 13, 2008, I heard the motion in the OAL, Trenton.

FINDINGS OF FACT

During relevant times, the BOE had in place policies and guidelines for the orderly and effective operation of its school system. The policies and guidelines included prohibition of misconduct that endangered the health and safety of staff and students and provided for suspension of those who engaged in such misconduct. By way of the faculty handbook and the student handbook, the BOE notified its staff and students of its policies and guidelines and that discipline would be imposed for misconduct.

By way of the student handbook, the BOE declared the misuse of drugs and alcohol to be a serious problem with enormous impact upon the welfare of the school community and the BOE declared its intent to prevent drug abuse. Consistent with this declaration and with law, by way

of the student handbook, the BOE notified its staff and students that, when a student appears to be under the influence of a CDS or alcohol, its staff shall report the matter and the student shall be examined to determine whether he or she is under the influence. See N.J.S.A. 18A:40A-12. Further, by way of the student handbook, the BOE notified its students, that for a first incident of being under the influence (a.) the student would serve a ten-day external suspension, (b.) a parental conference shall be required for the student's re-entry to school, and (c.) the student shall be required to attend counseling sessions. R-1.

During the 2007-08 school year, the petitioner, born June 8, 1990, was a senior in the BOE's high school and he has satisfied requirements for graduation ceremonies for which are scheduled for June 16, 2008. The petitioner's mother is a teacher in the BOE's school system.

On June 5, 2008, the petitioner and several other students engaged in a food fight in the BOE's high school cafeteria. School administrators alleged that the food fight caused major problems relative to student safety and cleanliness of the food service area. More particularly, many students were struck by food, trays, and other objects and clothing was soiled and, in some instances, damaged. P-1. The school system's staff characterized the petitioner's behavior as including a "sudden outburst" and "euphoria (high spirits)," indicative of ingestion of a CDS or alcohol. During the food fight, the petitioner's clothing was soiled and, thereafter, he left school without permission. P-1, P-2.

By letter, dated June 6, 2008, the school administration notified the petitioner's mother that, for the food fight, he was suspended from June 9 to 12, 2008; that, given his above-described behavior, he must submit a sample for drug screening; that he may pick up his diploma after June 17, 2008; and that he could appeal from these determinations. P-1. The petitioner submitted the sample and it was positive for the presence of a CDS (marijuana) metabolite. By letter dated June 10, 2008, the school administration notified the petitioner's mother that, under the above-described policy and guidelines, he was suspended for ten days, that he should begin counseling, and that he could appeal from these determinations. The ten-day suspension for the ingestion of CDS will prevent the petitioner from participating in the ceremony. The petitioner's grandfather, who was an educator, has traveled from out-of-state to attend the graduation ceremony.

CONCLUSIONS OF LAW

New Jersey's Constitution states that the Legislature shall provide for a system of public schools for the instruction of all children in the State between the ages of 5 and 18 years and, consistent with this requirement, the Legislature authorizes local boards of education to operate school districts. N.J. Const. Art. VIII, § 4, ¶ 1; N.J.S.A. 18A:11-1.

Public entities and public officials are presumed to have acted lawfully and in good faith and, consistent with this principle, it is well established that when a local board of education acts within its discretionary powers, its act will not be upset unless the claimant shows it to be patently arbitrary, without rational basis or induced by improper motives. Kopera v. West Orange Bd. of Educ., 60 N.J. Super. 288, 292-92 (App. Div. 1960) (citations omitted.)

To succeed in a motion for a temporary restraint and/or interlocutory injunction and/or emergent relief, the movant must show (1) that the parties' rights and duties are clear and well settled; (2) that, when the case is fully heard, it (the moving party) will probably prevail; (3) that, if the relief is not granted, it (the moving party) will suffer immediate and irreparable harm and, e.g., that money damages would not adequately compensate the moving party; and (4) that, balancing the equities, granting the relief moved for will not unduly harm or prejudice the party opposing the motion. See, e.g., N.J.A.C. 1:1-12.6; R. 4:52-1; Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982).

The BOE's above-described policies and guidelines are consistent with its statutory duties to provide a safe and effective school environment. The petitioner does not deny that, in direct violation of the BOE's policies and guidelines, he ingested CDS and that he engaged in the food fight in school. However, he seeks to prevent consideration of the evidence of his ingestion of CDS.

The motion to suppress evidence, available in criminal proceedings, results from judge-made rulings intended to prevent abuse by law enforcement officials from in derogation of Fourth Amendment rights against unreasonable search and seizure. The exclusionary rule does

not apply to administrative or disciplinary proceedings. Kelly v. Sterr, 62 N.J. 105, 107 (holding constitutional safeguards guaranteed an accused in a criminal proceeding did not apply to state trooper's departmental hearing to determine if trooper failed to properly carry out his assigned duties), cert. denied, 414 U.S. 822, S. Ct. 122, 38 L. Ed. 2d 55 ; Speights, supra, 157 N.J. Super. at 22 (holding exclusionary rule did not apply to civil disciplinary hearing involving removal of police officer from employment).

The petitioner makes a technical argument to thereby avoid suspension for his misconduct. Because the matter here concerns a civil administrative proceeding, the petitioner has not shown clear legal support for his argument. Further, he has not shown that the school officials and the BOE acted unreasonably or in bad faith. To the contrary, the BOE and its staff appear to have acted consistent with the interest of the public and the petitioner, who should learn that there will be repercussions for misconduct, including his ingestion of CDS. In the small world of the school system, granting the petitioner's motion would easily become known, contrary to the intent of the BOE's well-founded policy and guidelines.

Consistent with the above-described facts and law, the petitioner's motion must be denied.

ORDER

Consistent with the above, I **DENY** the motion for emergent relief.

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

June 16, 2008

DATE

JOHN R. TASSINI, ALJ

mph

EXHIBITS

For Petitioners:

P-1 Letter from principal, June 6, 2008

P-2 Teacher Referral for Intervention (Screening) on Possible Substance Abuse, June 6, 2008

P-3 Letter from principal, June 10, 2008

For Respondent:

R-1 Portions of Faculty Handbook and Student Handbook

276-08

D.B. on behalf of minor children, S.B. and S.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PORT REPUBLIC, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a petition of appeal challenging the authority of the respondent Board to require her to file a certification of residency on a monthly basis in order to have her two children retain continuing eligibility to attend Port Republic schools free of charge. Petitioner claimed that this requirement constituted harassment under *N.J.S.A.* 18A:38-1; the Board answered that such requirement was imposed because petitioner's residency was based on a month-to-month lease. Petitioner failed to appear at hearing.

The ALJ found that: petitioner removed her children from continued enrollment in Port Republic schools in February 2008, and enrolled them in Brigantine Public Schools; the school records of S.B. and S.B. were forwarded to Brigantine by respondent Board in February 2008; by inference, petitioner and her children are no longer residents of Port Republic; and respondent Board does not seek tuition payments or any other relief, but does seek a determination that the petition filed by petitioner be dismissed with prejudice. The ALJ concluded that petitioner has abandoned her appeal, and determined that the petition be dismissed with prejudice.

The Commissioner concurred with the ALJ that petitioner has failed to prosecute her appeal, and adopted the Initial Decision as the final decision in this matter.

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

June 19, 2008

276-08

OAL DKT. NO.EDU 326-08
AGENCY DKT. NO. 388-12/07

D.B. on behalf of minor children, S.B. and S.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PORT REPUBLIC, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.

As the Initial Decision explains, petitioner challenged as harassment respondent's requirement that she file a monthly certification of residency as a condition to the provision of a free public education to petitioner's two children. Respondent answered that the requirement was necessitated by the fact that petitioner resided in Port Republic by way of a month-to-month lease.

A hearing at the OAL was scheduled for May 1, 2008, but the petitioner failed to appear. The Commissioner notes that in the file is a copy of a notice dated March 19, 2008, which was sent to both parties, advising that the hearing would take place on May 1, 2008. The address to which petitioner's copy was sent is the address that petitioner designated on her petition.

Pursuant to *N.J.A.C.* 1:1-14.4(a), the Administrative Law Judge (ALJ) waited for at least one day to give petitioner the opportunity to offer an explanation for her nonappearance.

There being no explanation filed, the ALJ rendered his recommended decision on May 6, 2008, dismissing the petition for petitioner's failure to appear at the hearing and prosecute her appeal, and directing that the matter be returned to the Commissioner.

On page 2 of the Initial Decision, the ALJ indicates that the "file" of this case shows that petitioner removed her children from respondent's school district on or about February 26, 2008, and that respondent forwarded the children's school records to the Brigantine School District. If true, this would appear to render moot the relief requested in the petition, *i.e.,* the children's school attendance in Port Republic, and the invalidation of respondent's directive that she provide residency certification every month.

In any event, because petitioner failed to prosecute her appeal, the Commissioner adopts the ALJ's determination that the petition should be dismissed.

IT IS SO ORDERED. [1]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 6/19/08

Date of Mailing: 6/19/08

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

277-08E

277-08

-OAL DKT. NO. EDU 7232-08
AGENCY DKT. NO. 146-5/08

THOMAS LICCIARDI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT OLIVE, MORRIS COUNTY,	:	DECISION ON APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this emergent matter – which included an audiotape of the hearing conducted at the Office of Administrative Law on June 10, 2008 – along with the recommended Order of the Office of Administrative Law (OAL) have been reviewed.

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) that petitioner has failed to satisfy the requirements necessary for the granting of emergent relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) and *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application is adopted for the reasons succinctly expressed therein. This matter shall proceed to plenary hearing at the OAL – scheduled by the ALJ for September 9, 2008 – on petitioner's remaining issues.

IT IS SO ORDERED.*

Lucille E Day

COMMISSIONER OF EDUCATION

Date of Decision: 6/18/08

Faxed & Mailed to the Parties: 6/19/08

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER- EMERGENCY RELIEF
OAL DKT. NO. EDU 07232-08
AGENCY DKT. NO. 146-5/08

THOMAS LICCIARDI,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT OLIVE, MORRIS COUNTY,
Respondent.

Thomas Licciardi, pro se for petitioner

Marc H. Zitomer, Esq., for respondent (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

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

STATEMENT OF THE CASE

Petitioner seeks an Order for Emergency Relief directing respondent the Board of Education of the Township of Mount Olive, Morris County (Board) to allow him to be included in any formal final exam review process and to be included in his high school graduation exercises.

In his underlying petition, petitioner requests the following:

Immediate return to class to participate in a final exam review for classes for which he remains responsible;

Inclusion in graduation ceremonies on June 19, 2008;

Review of change made to his schedule for self-contained and resource room placement;

Review of due process afforded to him in disciplinary proceedings pursued by the Board against him;

Review of the Board's zero tolerance policy and its application by the Board;

Review of emotional pain and suffering resulting from application of zero tolerance specifically as to prohibition of interaction with the general school population;

Review of decision to be excluded from continuing all electives;

Review of his inability to continue in such electives that may negatively affect his preparedness as an incoming university freshman; and

Review of legal bill to him of $1,196.00.

PROCEDURAL HISTORY

On June 3, 2008, petitioner filed a petition with the Commissioner seeking emergency relief. The Director of the Bureau of Controversies and Disputes of the New Jersey Department of Education transmitted the matter on June 5, 2008, to the Office of Administrative Law (OAL), pursuant to N.J.S.A. 52:14B-1 to –15 and N.J.S.A. 52:14F-1 to –13, for determination as a contested case. I heard the application for emergency relief on June 10, 2008.

DISCUSSION

For a request for interim relief or stay, N.J.A.C. 6A:3-1.6 requires as follows:

(b) A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982):

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

These four standards are in the conjunctive, and petitioner must satisfy all requirements in order to be entitled to the requested relief.

The genesis of this matter is a March 11, 2008, incident where certain acts of vandalism and trespass were committed against property owned by the Board. Petitioner, a high school senior, and other students attempted to build a cement wall in front of the gate of the Mount Olive Bus Transportation Garage in an effort to delay or cancel school for the following day. Petitioner was suspended, and the Board made a determination that petitioner would be allowed to return to his high school on a modified schedule receiving instruction in an alternate classroom. He was also barred from participating in any extracurricular activities including graduation ceremonies and from regular classroom final exam review sessions. Petitioner has admitted to his participation in the March 11, 2008 incident.

The District has represented that petitioner has been placed back in his regularly scheduled classes for final examination review as of June 9, 2008, and therefore contends that this part of the application for emergency relief is moot. I agree. Also, petitioner has acknowledged that he has been permitted to resume all of his regular classes. The courts and the Commissioner ordinarily will refuse to review questions which become academic prior to the issuance of a decision out of reluctance to render a legal decision in the abstract and a desire to conserve judicial or administrative

resources. In re Conroy, 190 N.J. Super. 453, 458 (App. Div. 1983); Carolyn Henry v. Board of Ed. of the City of Wildwood, 1975 S.L.D. 1, 3.

The remaining issue is petitioner's entitlement to participate in his high school graduation ceremonies. Petitioner meets the threshold standard of irreparable harm since the opportunity to participate cannot be regained once lost and dismissal of an emergency application on this criterion alone would effectively insulate a school district's actions in matters of this type from any meaningful review. See, M.R. o/b/o J.R. v. Bd. of Educ. of Kearny, OAL DKT. No. EDU 7015-08, Comm'r's Decision, May 30, 2008. The inquiry then should be to the severity of the harm rather than whether it is irreparable. The weighing of the interests of petitioner and the Board tip in favor of the Board. Whereas participation in graduation ceremonies is only a privilege rather than a right, the Board has the right to deny such a privilege as a consequence of activity warranting discipline.

Petitioner does not have a likelihood of success on the merits, and the law is settled in favor of the position the Board has taken. Graduation exercises are similar to other extracurricular activities. It has been consistently held that the privilege to participate in an extracurricular activity can be revoked for infractions of school rules or policies. One's status as a high school student does not afford him a legal entitlement to participate in extra curricular activities such as graduation ceremonies. D.S. o/b/o D.C. v. Bd. of Educ. of the Township of Parsippany Troy Hills, 96 N.J.A.R. 2d (EDU) 697. A Board's policy concerning participation in senior events may not be upset unless it can be demonstrated to be patently arbitrary, capricious or unreasonable. Kopera v. West Orange, Bd. of Educ., 60 N.J.Super. 288, 294 (App. Div. 1960); L.B. and K.B. o/b/o W.M.B. v Bd. of Educ. of the Woodbury School District, 96 N.J.A.R. 2d (EDU) 695 (1996); T.M. v. Mercer County Junior and Senior High School, EDS 4317-02, Final Decision, (June 21, 2002) <http://lawlibrary.rutgers.edu/oal/search.html>.; J.M. v. Cherry Hill Township Bd. of Educ., EDS 4333-04, Final Decision (June 8, 2004) < http://lawlibrary.rutgers.edu/oal/search.html.> There has been no showing that the Board's action here was arbitrary, capricious or unreasonable. This is so even upon consideration of the fact that petitioner's activity leading to his discipline was limited to

March 11, 2008, whereas several other students receiving the same discipline also committed some additional improper acts on a subsequent day. The Board considered the conduct of each participant in certain of the activity individually, and such consideration included a review of prior disciplinary records.

I am mindful of the personal significance of a graduation ceremony in terms of its acknowledgment of academic achievement and the opportunity for family members to express their pride. However, as a matter of law, the deprivation of participation in graduation ceremonies does not provide the requisite harm warranting the extraordinary relief requested. Martin A. Domacasse v. Board of Education of the North Warren Regional School District, Warren County, decided by the State Board of Education April 17, 1996.

After careful consideration of all of the arguments, I **CONCLUDE** that petitioner has not met all of the requirements for emergency relief and that his request for such relief must be denied.

ORDER

It is hereby **ORDERED** that petitioner's application for emergency relief be **DENIED** and that the Board act consistently with its above representations; and,

It is further hereby **ORDERED** that the remaining issues in this matter proceed to a plenary hearing on September 9, 2008.

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

June 11, 2008
DATE

JESSE H. STRAUSS, ALJ

280-08EL

280-08

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

JON S. CORZINE
Governor

LUCILLE E. DAVY
Commissioner

June 20, 2008

Thomas O. Johnston, Esq.
Porzio, Bromberg & Newman
100 Southgate Parkway
Morristown, NJ 07962-1997

Cynthia Raymond Rimol, DAG
NJ Department of Law & Public Safety
Division of Law
Richard J. Hughes Justice Complex
P.O. Box 112
Trenton, NJ 08625-0112

Dear Counsel:

I have reviewed petitioner's motion for stay of my June 12, 2008 denial of emergent relief in the matter entitled *Kentwood Academy v. Lucille Davy, Commissioner, New Jersey State Department of Education*, Agency Dkt. No. 154-5/08, OAL Dkt. No. EDU 7165-08, Commissioner's Decision No. 264-08E, together with the Department of Education's opposing papers. Having done so, I have determined to deny petitioner's motion, which seeks to "reinstate" the emergent relief recommended by the Administrative Law Judge (ALJ) while petitioner's appeal is pending.[1]

Petitioner asserts that my June 12, 2008 decision is "remarkably dismissive of the impact on 29 emotionally and behaviorally disabled children who are receiving appropriate education programs at Kentwood," since it is "beyond dispute" that if Kentwood's approval is revoked on July 1, 2008 as scheduled, the school will cease to exist. Petitioner further asserts that my decision is based on erroneous factual and legal conclusions, since: 1) at no time did petitioner waive – through settlement or otherwise – its rights to challenge respondents' "persistent unreasonable actions over the past several years;" 2) respondents' interpretation as to calculation of the average daily enrollment required for Kentwood to retain its approval is patently unreasonable; and 3) the ALJ's findings in favor of petitioner should have been accorded deference, since he presided over the settlement at issue in this matter.

[1] The ALJ had recommended that: 1) the Department be enjoined from revoking Kentwood's approval status; 2) during the pendency of petitioner's appeal on the merits, Kentwood continue to be considered an approved private school for students with disabilities; and 3) surrounding districts be notified that Kentwood is approved to accept student enrollment for the 2008-09 school year.

Thomas O. Johnston, Esq.
Cynthia Raymond Rimol, DAG
June 20, 2008

On review, I note that petitioner's assertions as to the meaning, scope and finality of the settlement agreement and the impact of a July 1, 2008 revocation of Kentwood's approval substantially reiterate arguments already raised – and fully considered by me in reviewing the ALJ's decision – in conjunction with the emergent proceeding underlying my decision of June 12, 2008. Considering them again here – particularly in light of the Department's compelling arguments in opposition – I find nothing to dissuade me from my earlier stance that, for the reasons set forth in the decision under review, petitioner has demonstrated neither a likelihood of success on the merits of its appeal nor a balance of equities in its favor, as it must in order to qualify for stay of a Commissioner decision pursuant to *N.J.A.C.* 6A:3-1.15(a).

Accordingly, petitioner's request for stay of my June 12, 2008 Decision on Application for Emergent Relief is DENIED, and such decision shall remain in full force and effect unless stayed or reversed on appeal to the State Board of Education.[2]

Sincerely,

Lucille E. Davy
Commissioner

c: Kathleen C. Serafino, Interim County Superintendent
Barry N. Frank, ALJ
OAL Clerk – North
State Law Library
OAL Library

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

281-08

#281-08E

OAL DKT. NO. EDU 5787-08
AGENCY DKT. NO. 176-6/08

SAMANTHA WALSH, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE MONMOUTH REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION ON APPLICATION FOR EMERGENT RELIEF

The record of this matter – including the audiotape of proceedings – and the recommended Order of the Office of Administrative Law (OAL) have been reviewed by the Assistant Commissioner to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-34.

Upon such review, the Assistant Commissioner concurs with the Administrative Law Judge that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia,* 90 *N.J.* 126 (1982) and *N.J.A.C.* 6A:3-1.6.

While the Assistant Commissioner, unlike the ALJ, does finds that petitioner has met the threshold standard of irreparable harm notwithstanding that attendance at graduation ceremonies is a privilege rather than a right – since the opportunity to graduate with one's class cannot be regained once lost and dismissal of emergent applications on this criterion alone effectively insulates a school district's actions in matters of this type from any meaningful review[1] – the fact remains that applicants seeking

[1] In so holding, the Assistant Commissioner is fully cognizant of the well-established principle that a prohibition from attending events of this type does not, in and of itself, rise to the necessary level of irreparable harm so as to warrant extraordinary remedy. However, harm is "irreparable" when there can be no adequate after-the-fact remedy in law or in equity, and monetary damages cannot adequately redress the intangibles of a lost experience after the event is over. In past cases denying similar applications for emergent relief, the irreparable nature of the harm and the degree or severity of the harm have frequently been addressed together; they are, however, two separate factors, and it is on the basis of the *severity* of the harm – which pertains to the weighing of interests – and not its irreparable nature that applications of this kind typically fail. *Martin A. Domacasse v. Board of Education of the North Warren Regional School District, Warren County*, decided by the State Board April 17, 1996; *L.J. on behalf of minor child, S.J., and David Wickham v. Board of Education of the Township of Manchester, Ocean County*, decided by the Commissioner May 2, 2003. See *D.M.S., on behalf of minor child, E.B., and Gregory Heck v. Board of Education of the Pinelands Regional School District, Ocean County, et al.*, decided by the Commissioner May 9, 2008.

extraordinary remedy must also demonstrate a likelihood of success on the merits of the underlying appeal and show that the balance of interests and equities under the circumstances rests in their favor. Here, for the reasons fully set forth by the ALJ, the Assistant Commissioner cannot find that petitioner has met the necessary burden.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed therein, as modified with respect to irreparable harm as set forth above. Because the present decision fully disposes of all issues in dispute between the parties, no further proceedings are necessary, and this matter is, therefore, dismissed with the request that the Clerk of the OAL return the file to the agency pursuant to *N.J.A.C.* 1:1-3.3.

IT IS SO ORDERED.[2]

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: June 20, 2008
Date of Faxing: June 20, 2008

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

2008 JUN 20 P 1:3

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
9 Quakerbridge Plaza
Mercerville, New Jersey 08625
(609) 588-6542

Joseph F. Martone
Administrative Law Judge

June 20,2008

Lucille Davy
Commissioner
Department of Education
100 Riverview Plaza, 4th Floor
P.O. Box 500
Trenton, NJ 08625-0500 (via fax 609-292-4333)
Attn: M. Kathleen Duncan, Director of Controversies & Disputes

RE: S.W. v. BOARD OF EDUCATION OF THE MONMOUTH REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY
OAL DKT. NO. EDU 5787-08; AGENCY DKT. 176-6/08

Dear Commissioner Davy:

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

Very truly yours,

Joseph F. Martone
Administrative Law Judge

mph
c: Samantha Walsh (via e-mail L3590@comcast.net)
Martin M. Barger, Esq. (via e-mail bargerlaw@aol.com)
Clerk, OAL Scheduling

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
DENYING EMERGENT RELIEF TO GRADUATE ON JUNE 21, 2008
OAL DKT. NO. EDU 4787-08
AGENCY DKT. NO. 176-6/08

S.W.,

Petitioner,

v.

BOARD OF EDUCATION OF THE MONMOUTH REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

Respondent.

S.W., petitioner, pro se, assisted by her mother, L.B.

Martin M. Barger, Esq., for respondent (Reussile, Mausner, Carotenuto, Barger, & Steel, attorneys)

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The petitioner, S.W., an eighteen-year-old student attending the respondent high

school appeals from the determination of the Board of Education denying her attendance at graduation on June 21, 2008, because of her failure to comply with the attendance policy of the school district. The matter was transmitted to the Office of Administrative Law (OAL) on June 19, 2008, for an emergent hearing as a contested case. The matter was scheduled for June 20, 2008, for oral argument on the emergent relief application.

At the hearing on emergent relief, the school district called two witnesses. James W. Cleary, Superintendent of Schools, testified that the school district has an attendance policy No. 5110, originally adopted on September 5, 1978, and revised on October 8, 1985 (R-11). This policy requires attendance by students and delegates to the superintendent the authority to prepare regulations to implement this policy. Pursuant to this delegation, Superintendent Cleary testified that a policy has been adopted providing that a student with 16 or more absences may lose course credits in the courses from which the student was absent. In this case, S.W. lost course credit in English and Geometry (R-8), two courses that are part of the core curriculum and are required for graduation.

Superintendent Cleary testified to his own discussions (R-1) and that of others in the school district (R-2) with both S.W. and her mother, L.B., concerning the significant number of absences by S.W. and the possible impact of these absences. He pointed out that in prior years, S.W. lost credit in core curriculum classes which she had to make up in summer school. Because S.W. has 42 absences (R-14), 10 days of which were excused because of illness, the Board of Education on an appeal heard on June 17, 2008, denied a waiver of the attendance requirements (R-8). S.W.'s mother indicated to the Board that S.W.'s teachers advocated a waiver of the attendance policy. However, there is some question whether this was correct based on letters submitted in evidence from each of S.W.'s teachers (R-3 to R-7 and R-9 to R-10).

Patricia Domanich, the attendance officer for the school district, testified that in her individual classes, S.W. had at least 41 absences and, in one case, up to 74 absences (R-14). She identified the record of S.W.'s absences and confirmed that

S.W. was absent for a complete day on 42 occasions (R-14). She indicated that the student handbook and the regulations of the school district indicate that any absences in excess of 16 are unacceptable and a violation of attendance policy. The student handbook is given out every year and the absences she referred to are complete full-day absences.

S.W. testified that she was only informed on Monday, June 16, 2008, that she would not be graduating because of her absences. It was only because her mother happened to call the school on an unrelated matter that she learned of this and she questioned when she was going to be notified. Her mother immediately made an appointment with the attendance officer and then contacted S.W.'s teachers and asked if they would advocate for a wavier of the attendance policy, to which they responded yes. Because S.W. was working, her mother attended the school board meeting at which the Board denied the request.

S.W. inquired whether her absence from her homeroom would result in her being marked as being absent for the entire day even though she may have attended classes. In response, Ms. Domanich indicated that in that instance, which occurred on quite a few occasions, she had the authority to change the entry from an absence to a tardy. Therefore, the absences in S.W.'s record are only for absences from a full-day of classes.

S.W. felt that it was unfair that other students were given the option to attend an alternate school and that she was never given that option during the year. She also questioned what would have happened if her mother did not accidentally find out on Monday that she was not graduating.

As I stated during the hearing, every school district is obligated to establish a school calendar in which instruction is offered to students for a minimum of 180 days per year. Each school district is also obligated to establish its own attendance policy. In this case, the school district has adopted an attendance policy requiring students to attend classes and has delegated to the superintendent the authority to adopt

regulations to implement this policy. In this case, the respondent has adopted regulations requiring a student to attend classes all but 16 days during the school year, and has provided a procedure for waiver of this requirement for good cause.

In this case, S.W. was afforded the opportunity to appear before the Board of Education to seek a waiver from the requirements of the school district's attendance policy. However, according to the superintendent, when the Board members reviewed the excessive number of absences by S.W., it declined to grant such a waiver.

N.J.A.C. 1:1-12.6(a) and 6A:3-1.6(b) authorize emergency relief where immediate and irreparable harm will probably result, if there is a likelihood that the moving party will prevail, and if the relief is as limited in scope and as temporary as possible. These regulations embody the principles in Crowe v. DeGioia, 90 N.J. 126, 132 (1982).

There is a presumption of validity which attaches to actions taken by a board of education within its authority, and such actions are not to be overturned unless they are arbitrary, capricious or unreasonable. Thomas v. Morris Tp. Bd. of Ed., 89 N.J. Super. 327, 332 (App. Div. 1965), Aff'd. o.b., 46 N.J. 581 (1966). In this case the presumption of validity attaches to both the attendance policy of the school district as well as the action of the Board of Education in denying S.W.'s waiver application.

With respect to the requirement to show irreparable harm, I am certain that the impact on a student who is not able to graduate with his or her class is an embarrassment and can be devastating. However, in K.C. v. Board of Education of Parsippany Troy Hills, 96 N.J.A.R. 2d (EDU) 697, it was held that a petitioner's alleged injury from non-participation in graduation ceremonies did not constitute irreparable harm sufficient to warrant such an extraordinary remedy.

With respect to the requirement that there is a likelihood that the moving party will prevail on the merits, in this matter, the petitioner S.W. acknowledges that she was absent at least on 25 occasions. She explained that she was absent because of her

modeling work, a family vacation to Italy and her being ill. However, I cannot fault the board of education for denying a waiver to S.W. in view of the excessive number of absences. I **FIND** that, under the circumstances, the action of the Board of Education was not arbitrary, capricious or unreasonable.

I **FIND** that there is no justifiable basis or reason for overturning the presumably valid action taken by the school district and its Board of Education in enforcing its attendance policy. I **FIND** that while it may be embarrassing and even devastating to a student not to graduate, it does not amount to irreparable harm. I **FIND** that the petitioner has failed to establish any of the bases for the granting of emergent relief established by the above-cited regulations.

ORDER

Therefore, I **ORDER** that petitioner's application for emergent relief to be allowed to graduate on June 21, 2007, is hereby **DENIED.**

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

Joseph F. Martone

June 20, 2008
DATE

JOSEPH F. MARTONE, ALJ

mph

282-08R

282-08

OAL DKT. NO EDU 875-08
(EDU 2212-07 ON REMAND)
AGENCY DKT. NO. 69-3/07

IN THE MATTER OF THE TENURE	:	
HEARING OF GEORGE C. LANGLEY,	:	
SCHOOL DISTRICT OF THE CITY OF	:	COMMISSIONER OF EDUCATION
BRIDGETON, CUMBERLAND COUNTY.	:	DECISION
	:	

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

Upon such review, the Commissioner concurs with the Administrative Law Judge that the proposed settlement is consistent with established standards governing settlement of tenure matters. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846.

Accordingly, the settlement is hereby approved and the tenure matter dismissed, subject to compliance with the terms of the settlement. A copy of this decision shall be forwarded to the State Board of Examiners.

IT IS SO ORDERED.

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 6/24/08
Date of Mailing: 6/24/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 875-08
(On Remand of
OAL DKT. NO. EDU 2212-07)
AGENCY DKT. NO. 69-3/07

IN THE MATTER OF THE TENURE HEARING OF GEORGE C. LANGLEY, SCHOOL DISTRICT OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY.

A. Paul Kienzle, Esq., for petitioner

Ned P. Rogovoy, Esq., for respondent

Record Closed: May 27, 2008 Decided: May 29, 2008

BEFORE **EDGAR R. HOLMES,** ALJ, T/A:

This matter was transmitted to the Office of Administrative Law on February 28, 2008, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

May 29, 2008
DATE

EDGAR R. HOLMES, ALJ, T/A

Date Received at Agency:

JUN 3 2008
DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/sd

CASAROW, KIENZLE & RACZENBEK
COUNSELLORS AT LAW
32 North Pearl Street
P.O. Box 337
Bridgeton, New Jersey 08302

John A. Casarow, Sr. (1897-1989)
John A. Casarow, Jr.
A. Paul Kienzle, Jr.
David F. Raczenbek

Telephone No.: (856) 455-0566
Telefax No.: (856) 455-6593

May 22, 2008

Honorable Edgar Holmes, ALJ
Office of Administrative Law
1601 Atlantic Avenue, Sixth Floor
Atlantic City, NJ 08401

RE: Bridgeton Board of Education – George C. Langley
OAL Docket No.: EDUTH 02212-2007S

Dear Judge Holmes:

Regarding the above-captioned matter, you will find enclosed herewith the following:

1. A copy of the settlement agreement between the Respondent, George C. Langley, and the Board of Education of the City of Bridgeton dated May 6, 2008.

2. A copy of the resolution of the Board of Education of the City of Bridgeton dated May 6, 2008, approving the settlement agreement.

Please note that attached to the settlement agreement are the documents that were filed in this matter, the resignation of the Respondent and the affidavit of the Respondent.

It is requested that Your Honor review these documents for compliance with the necessary resolution of this matter and enter an Order directing the settlement as agreed to between the parties.

If there is any further that is necessary and needed, please do not hesitate to contact me or Mr. Rogovoy at once as we will do what we can to accommodate this.

Thank you for your attention to the above.

Very truly yours,
CASAROW, KIENZLE & RACZENBEK

A. PAUL KIENZLE, JR.

APK/dg
Enclosures
cc: Ned P. Rogovoy, Esquire
H. Victor Gilson, Ed. Ph.D
Nicole M. Schoener, School Business Administrator
and School Board Secretary

SETTLEMENT AGREEMENT,
APPROVED LEAVE OF ABSENCE AND RESIGNATION

This Settlement Agreement, Approved Leave of Absence and Resignation (the "Agreement"), is entered into this 6th day of May, 2008, by and between GEORGE C. LANGLEY ("Mr. Langley") and the BRIDGETON BOARD OF EDUCATION, CUMBERLAND COUNTY (the "Board") (collectively, the "Parties"). For purposes of this Agreement, the term the "Board" shall mean and include the Bridgeton Board of Education, a body public. The term "Mr. Langley" shall mean and include George C. Langley and any and all of his heirs, executors, administrators, successors, predecessors, assigns, agents, representatives and privies. This Agreement constitutes the complete and final settlement of any and all disputes arising from or relating to Mr. Langley's employment by the Board.

WITNESSETH:

WHEREAS, the Board prepared and filed tenure charges ("Tenure Charges") based on charges of conduct unbecoming a teacher, insubordination, inefficiency, incapacity and failure to discharge responsibilities, and excessive absenteeism against Mr. Langley pursuant to N.J.S.A. 18A:6-10 et seq. and said charges were certified on March 8, 2007 and are pending under Agency Docket No. 69-3/07 and OAL Docket No. EDUTH 02212-2007S which can be more specifically delineated in **Appendix A** which is a copy of the charges and the answer to those charges; and

WHEREAS, the Parties desire to enter into this Agreement to fully and finally settle and resolve any and all claims, complaints, charges and actions of any kind whatsoever, whether known or unknown, which the Board may have against Mr. Langley; and

WHEREAS, the Board acknowledges and agrees that this Agreement shall cause the Board to voluntarily dismiss, waive and withdraw any and all administrative actions of any kind against Mr. Langley and the Board has agreed to request that the Commissioner of Education approve the Board's voluntary dismissal of the tenure charges with prejudice;

NOW, THEREFORE, in consideration of the promises and mutual covenants contained in this Agreement, the Parties hereby agree as follows:

1. (A) Mr. Langley agrees that upon signing this Agreement and by signing his Resignation which is attached hereto as **Appendix B**, he is irrevocably resigning his employment with the Board effective June 30, 2008.

(B) As a result of the tenure charges being certified on March 8, 2007 and contested as represented in the prior introduction, Mr. Langley's pay was stopped for 120 days, but began again on September 1, 2007. All parties, to avoid the litigation of the contested tenure matter before an administrative law judge and specifically, the Board, in exchange for Mr. Langley's resignation pursuant to paragraph 1(A) above, agrees to place Mr. Langley on paid leave of absence until June 30, 2008.

2. (A) In addition, the Board shall pay to Mr. Langley a lump sum payment in the amount of TWELVE THOUSAND ($12,000.00) DOLLARS on June 30, 2008 for his release of any and all claims, complaints, charges and actions of any kind and/or nature whatsoever, whether known or unknown, that he may have regarding the Board including entitlement to future employment. The only contingency to this payment is the prior approval by the Commissioner of Education of this settlement.

(B) Mr. Langley, for the consideration given by the Board as set forth above, which he acknowledges is adequate and satisfactory to him, hereby commits as follows:

(1) Mr. Langley irrevocably and unconditionally remises, releases, waives and forever discharges the Board from any and all manner of liabilities, actions, causes of action, contracts, agreements, promises, claims and demands of any kind or nature whatsoever, in law or equity, whether known or unknown, which Mr. Langley has ever had or now has against the Board in connection with his employment with the Board, the resignation of his employment, compensation and/or benefits with the Board and the charges. Mr. Langley further understands and agrees that this Agreement shall act as a complete bar to any claim, demand or action of any kind whatsoever which could be or could have been brought by him and which seeks personal, equitable or monetary relief for him against the Board, including but not limited to: any claims of wrongful discharge; breach of express or implied contract; fraud; discrimination; retaliation; wages; benefits; other compensation; misrepresentation; defamation; liability in negligence or tort; and any claims of any kind which may be brought in any court of law or equity or an administrative agency; claims for arbitration in any forum; the U.S. Constitution, as amended; the Constitution of the State of New Jersey; Title VII of the U.S. Civil Rights Act of 1964, as amended; the U.S. Age Discrimination in Employment Act of 1967; the U.S. Americans with Disabilities Act; the U.S. Age Discrimination in Employment Act; the U.S. Employment Retirement Income Security Act; the U.S. Fair Labor Standards Act; the United States Family and Medical Leave Act; the New Jersey Family Leave Act; the New Jersey Law Against Discrimination; the New Jersey

Conscientious Employee Protection Act; the New Jersey Department of Personnel; and any other federal, state or local law, regulation or ordinance relating to employment; related torts; and employment, discrimination; employee benefits; collective bargaining agreement; and the termination of employment; and any other claim arising from or relating to Mr. Langley's employment. Mr. Langley understands that he is not releasing any claims he may have to enforce the provisions of this Agreement. This release covers both claims that Mr. Langley knows about and those he may not know about, except for claims (I) that may arise after the date Mr. Langley executes this Agreement; (ii) for a breach of this Agreement; or (iii) with respect to any benefits in which Mr. Langley has a vested interest under the terms and conditions of any of the Board's employee benefit plans. Mr. Langley further agrees not to file a lawsuit or administrative claim or demand for arbitration to assert any of the claims he has given up, released or waived. Any substantial or material breach of this Agreement shall entitle the non-breaching party to an injunction or any action at law or equity to remedy the breach and an award of reasonable attorneys' fees, other professional fees, costs and expenses incurred to remedy and defend against said breach.

3. The Board agrees to request that the Commissioner of Education approve the Board's voluntary dismissal of the tenure charges, Agency Docket No. 69-3/07, OAL Docket No. EDUTH 02212-2007S, with prejudice in light of Mr. Langley's resignation and the lump sum consideration paid and the paid and unpaid leave of absence granted to him by the Board. In executing this Agreement, Mr. Langley understands the ultimate decision with regard to the resolution of the tenure charges lies with the

Commissioner of Education and in the event that the New Jersey Commissioner of Education rejects the settlement between the Board and Mr. Langley, then this agreement is completely null and void and the tenure charges currently pending will continue to be processed. Attached as **Appendix C** is Mr. Langley's Affidavit showing that he has been counseled in every respect and knows that the Board of Examiners can act independently.

4. With respect to any inquiries directed to the Bridgeton School Board's Department of Human Resources regarding Mr. Langley's status, the Board shall have the responsibility to comport with the requirements of New Jersey's Open Public Records Act, *N.J.S.A. 47:1A-1 et seq.*

5. This Agreement is not and shall not in any way be deemed to constitute an admission or evidence of any wrongdoing or liability on the part of the Board or Mr. Langley. Rather, this Agreement constitutes the good faith settlement and release of disputed claims, and it is acknowledged and agreed by the Parties that this Agreement is being entered into by the Parties solely to avoid the burden, expense, delay and uncertainties of further litigation and to fully and finally resolve, settle and dismiss with prejudice, any and all claims of any kind whatsoever, whether known or unknown, which the Board or Mr. Langley has ever had or now has against each other arising out of or relating to his employment with the Board.

6. This Agreement may not be changed orally and no modification, amendment or waiver of any provision contained in this Agreement, or any future representation, promise or condition in connection with the subject matter of this Agreement shall be

binding upon any party hereto unless made in writing and signed by such party and subject to approval by the Board.

7. This Agreement contains the entire agreement and complete settlement between the Parties and supersedes any and all previous agreements of any kind whatsoever between them, whether written or oral. All prior and contemporaneous discussions and negotiations have been and are merged and integrated into, and are superseded by this Agreement. This is an integrated document.

8. In the event that any provision of this Agreement or the application thereof should be held to be void, voidable, unlawful or, for any reason, unenforceable, the remaining portion shall remain in full force and effect and to that end, the provisions of this Agreement are declared to be severable.

This Agreement is made and entered into, and shall be subject to, governed by and interpreted in accordance with the laws of the State of New Jersey and shall be fully enforceable in the courts of that state, without regard to principles of conflict of laws. The parties agree that any suit, action or other legal proceeding arising out of this Agreement shall be brought in the Superior Court for the State of New Jersey, County of Cumberland.

9. Mr. Langley agrees that he shall be responsible for his own attorney's fees and costs incurred in connection with any matter mentioned in this Agreement.

10. In executing this Agreement, Mr. Langley has had an opportunity to speak to his attorney and has relied upon the legal advice of his attorney as to the terms of this Agreement, which have been completely read by him and explained by his attorney,

and those terms are fully understood and voluntarily accepted.

11. This Agreement shall not be executed in counterparts and shall be enforceable only if executed by Mr. Langley and the Board.

12. This Agreement shall become effective immediately following the execution by Mr. Langley and the Board.

WHEREFORE, intending to be legally bound, the Parties have agreed to the aforesaid terms and indicate their agreement by signing below.

AGREED AND ACCEPTED:

George C. Langley Date: 4/30/08

Subscribed & sworn to before me
this 30th day of APRIL, 2008

Notary Public
Attorney at Law

I hereby acknowledge and affirm that I have full authority to act on behalf of and to bind the Board to the terms set forth in this Agreement.

Angelia L. Edwards, Board President Dated: 5/20/08

Witness:

, Business Administrator/
Board Secretary

APPENDIX A

Tenure Charges and Answer

STATEMENT OF EVIDENCE IN SUPPORT OF CHARGES

TO: The Board of Education of the City of Bridgeton
ATTN: Nicole M. Schoener, Business Administrator

RE: George Langley

I, H. Victor Gilson, Ed.D., of full age, being duly sworn according to law, upon my oath, depose and say:

1. I am the Superintendent of Schools for the Bridgeton Public Schools in the City of Bridgeton, County of Cumberland and State of New Jersey.

2. In that capacity, I hereby file charges of conduct unbecoming a teacher, unfit for service, insubordination, inefficiency, incapacity, absenteeism, and other just cause against George Langley, a tenured Teaching staff member currently employed by the Board of Education of the City of Bridgeton as set forth in the tenure charges.

3. I hereby certify that the evidence in support of the tenure charges filed by me consists of memoranda, observations, anecdotal records, letters, inter-departmental correspondence and other miscellaneous documents. The evidence in support of these charges is as specifically set forth below and will include all statements and testimony. Petitioner reserves the right to present additional evidence in support of these charges as the same may become available during the pendency of these proceedings.

P1:		Personnel Record Card of Mr. George C. Langley
P2:	(1 of 6)	Annual Performance Report, dated June 9, 2003.
P3		Memorandum to Mr. George Langley from Mr. Roy Dawson, Principal of West Avenue School, dated March 17, 2004, re: Testing Security.
P4	(1 of 6)	Classroom Observation Report, dated April 21, 2004.
P5	(1 of 6)	Annual Performance Report, dated May 15, 2004.

P-6		Memorandum to Mr. George Langley from Mr. Roy Dawson, Principal of West Avenue School, dated September 2, 2004, re: Opening Day Schedule.
P-7		Memorandum to Mr. George Langley from Mr. Roy Dawson, Principal of West Avenue School, dated November 15, 2004, re: student grades.
P-8		Memorandum to Mr. George Langley from Mr. Roy Dawson, Principal of West Avenue School, dated November 15, 2004, re: Grade book and unit test.
P-9		Memorandum to Mr. George Langley from Mr. Roy Dawson, Principal of West Avenue School, dated November 19, 2004, re: Student data.
P-10		Memorandum to Mr. George Langley from Mr. Roy Dawson, Principal of West Avenue School, dated November 30, 2004, re: leaving the building.
P-11		Memorandum to Mr. George Langley from Mr. Roy Dawson, Principal of West Avenue School, dated December 15, 2004, re: LL Teacher Consultation.
P-12	(1 of 6)	Annual Performance Report, dated May 12, 2005.
P-13		Memorandum to Mr. George Langley from Mr. Roy Dawson, Principal of West Avenue School, dated June 7, 2005, re: Call out procedure.
P-14		Memorandum to Mr. George Langley from Mr. Roy Dawson, Principal of West Avenue School, dated June 16, 2005, re: End of the year assessment.
P-15		Memorandum to Mr. George Langley from Mr. Roy Dawson, Principal of West Avenue School, dated June 16, 2005, re: Student Test.
P-16		Memorandum to Mr. George Langley from Mr. Roy Dawson, Principal of West Avenue School, dated June 24, 2005, re: George Langley pay increment.
P-17		Rice letter to Mr. George Langley from Mr. James A. Dunkins, Director of Human Resources, dated July 15, 2005.
P-18		Change in Name, Address or Telephone Number Form, with notations, dated August 9, 2005.
P-19		Memorandum to Mr. George Langley from Mr. Roy Dawson, Principal of West Avenue School, dated September 30, 2005, re: Withheld check.

P-20	(1 to 5)	Classroom Observation Report, dated November 17, 2005.
P-21		Memorandum to Mr. James Dunkins from Mr. Roy Dawson, Principal of West Avenue School, dated January 10, 2006, re: George Langley.
P-22		Letter to Mr. George Langley from Dr. H. Victor Gilson, Superintendent of Schools, dated January 17, 2006, re: physical and psychiatric evaluations.
P-23		Letter to Mr. George Langley from Dr. H. Victor Gilson, Superintendent of Schools, dated January 26, 2006, re: suspension.
P-24		Rice letter to Mr. George Langley from Mr. James A. Dunkins, Director of Human Resources, dated January 31, 2006, re: suspension.
P-25		Letter to Mr. George Langley from Mr. James A. Dunkins, Director of Human Resources, dated February 1, 2006, re: appointment for psychiatric evaluation.
P-26		Letter to Mr. George Langley from Mr. James A. Dunkins, Director of Human Resources, dated February 8, 2006, re: change of appointment for psychiatric evaluation.
P-27		Letter to Mr. George Langley from Mr. James A. Dunkins, Director of Human Resources, dated February 15, 2007, re: ratification of suspension.
P-28	(1 to 3)	Psychiatric Evaluation of Mr. George Langley by James L. Hewitt, M.D., dated March 14, 2006.
P-29	(1 to 4)	Letter to Mr. Joseph O'Neill from Mr. James A. Dunkins, Director of Human Resources, undated, re: Copy of Psychiatric Evaluation.
P-30		Incident Report of Ofc. Ronald Broomall, Educational Enforcement Officer, dated March 17, 2006.
P-31		Telephone messages for Mr. Dunkins, dated February 16, 2006 and February 21, 2006, re: Dr. appointments.
P-32		Report from Ms. Beth Thompson, Human Resources Confidential Secretary/ Office Manager, dated March 22, 2006.
P-33	(1 to 2)	Letter to Mr. George Langley from Dr. H. Victor Gilson, Superintendent of Schools, dated May 22, 2006, re: physical evaluation and tests.
P-34	(1 to 2)	Personnel Physical Examination by Dr. J. Gregory Bear, dated June 6, 2006.

P-35	(1 to 3)	Report from LabCorp, dated June 13, 2006.
P-36	(1 to 8)	Fax from Family Practice Associates, along with Physical, screening, and prescriptions, dated June 27, 2006.
P-36	(1 to 10)	Attendance Summaries for school years 2002-2003, 2003-2004, 2004-2005, 2005-2006.
P-38	(1 to 4)	Police report, dated February 23, 2003.
P-39		Letter from Ms. Leah Taylor, Grade 2 Teacher at West Avenue School, dated June 2, 2006.
P-40		Letter from Ms. Lisa Heisroth, Grade 4 Teacher at West Avenue School, dated June 2, 2006.

I certify the foregoing statements made by me are true to the best of my information and belief. I hereby certify that all of the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

9-14-07
Date

H. Victor Gilson
H. Victor Gilson, Ed. D.
Superintendent of Schools

Sworn before me this 14th day of September, 2007

Terri J Ott

TERRI J. OTT
NOTARY PUBLIC OF NEW JERSEY
Commission Expires 3/16/2010

NED P. ROGOVOY, ESQUIRE, L.L.C.
782 South Brewster Road, Unit A6
Vineland, NJ 08361
(856) 205-9701
Attorney for George Langley

IN THE MATTER OF THE TENURE CHARGES OF GEORGE LANGLEY, an employee of Bridgeton Public Schools, Cumberland County New Jersey	:	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY AGENCY DKT NO. ***ANSWER TO TENURE CHARGES***

I, George Langley, by way of Answer to the tenure charges, according to law, depose and say:

1. I am now 37 years old and I began to serve in the Bridgeton School System in 1992 and, therefore, served this system for almost 17 years.

2. I wish the Board to know that I graduated with a Bachelor of Arts in English Literature and Writing from LaSalle University after attending that institution for four continuous years obtaining my degree in 1991. After moving back to the area after my graduation and determining what I wished to do with my life, I realized my desire to pursue a career in teaching. To further my desires, I began to substitute as of February, 1992 in the Bridgeton Elementary School and did so intermittently until the end of that year. In the school years 1992-1993, 1994-1995, 1995-1996, 1996-1997, I served in the capacity of a long term substitute

in the elementary schools and through the alternate route, I obtained my elementary teaching certificate K-8 from the State of New Jersey in 1997 which I currently hold and treasure.

3. I began teaching as a full time teacher in the Bridgeton School System in the 1997-1998 school year wherein I was a 2nd grade teacher at the West Avenue School. I then taught 3rd grade in 1998-1999, 1999-2000, 2000-2001, 2001-2002, as well as the 2002-2003, 2003-2004, 2004-2005 school year when I was assigned 2nd grade again in the 2006 school year.

4. I do not believe that I ever received a bad evaluation, nor did I have any issues with the administration in the Bridgeton School System until on or about the end of 2005, when it seems as if I was the target of Mr. Dawson for whatever reason and at the end of that year, he recommended a withholding of my pay increment which had to do with some end of the year activities that I believe was just a disagreement of professional opinion. He even went so far as to withhold my checks for June 23rd and June 24th of 2005 because he said that my cumulative folders were incomplete and that my end of the year student assessment tests were incomplete and not recorded accurately to which facts I today dispute. I did at the end of 2005 what I did every year for the last 16 years and never had a problem and I knew when he began to unilaterally withhold my checks based upon some nebulous reason of incomplete folders, there was going to be trouble.

5. The following year after the 2004-2005 school year or the 2005-2006 school year, I was assigned to 2nd grade math team teaching role with Leah Taylor. I was evaluated on November 17, 2005 by Mrs. Kia Johnson-Phillips which is contained as Exhibit 20 of the tenure charges. You will see by reading that evaluation that there is absolutely nothing which would indicate any problem with my teaching.

6. The real issue was that on Tuesday, January 3, 2006, while Leah Taylor was teaching Language Arts and I was to teach Math at 11:00 a.m., I went to the copy room to copy some material that I needed for the 11:00 a.m. class and I slipped on a wet floor and landed on my back exacerbating a preexisting automobile accident injury. I remember specifically that it was a rainy day and where I went to copy the material, was in close proximity to the entrance doors of West Avenue School and people who had entered the building had evidently tracked in the wet environment onto the tile floor causing it to be slippery. I immediately went to the nurse who is Laurie Couch and she gave me an ice pack, I reported back to the classroom just prior to my time to teach at 11:00 a.m. and advised Leah Taylor that I could not teach my class because of the exacerbation of my back injury and I used the telephone and left for the day after reporting to the office in the person of Kia Phillips. I wish the Board to know that I treated with a workers compensation doctor prescribed by the workers compensation carrier of the Board

for a good period of time. His name was Dr. DiVerniero who is with Premier Orthopedics and he treated me with medications once a week for a period of time. I am currently treating with Dr. Pattucci and Dr. Soriano who are located at Chestnut Avenue in Vineland and I have had one epidural as of recent and I am scheduled for two more. With all that being said, the administration for some reason has taken my slip and fall and the spotting of water on my pants to be some indication that I was under the influence of some controlled substance. That is absolutely not true. In fact, the school set up an appointment with Dr. Hewitt, a Psychiatrist whose report is Exhibit 28 in the tenure charges and he does not find that there is any reason for the Bridgeton School System to be concerned with my psychiatric well being. Further, I took a blood test which was to determine whether I had any controlled substances in my system and result was negative.

7. There is nothing psychiatrically, and/or physically, and/or there is no controlled substance in my system which should prevent me from teaching, but I have been suspended from on or about January 3, 2006 and now tenure charges are being brought over a year later for reasons which I just do not understand.

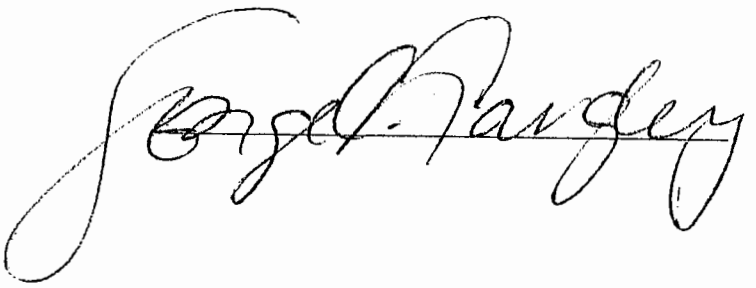
8. Fortunately, the NJEA has provided me with an attorney and I intend to contest these tenure charges before an Administrative Law Judge and believe that I will be exonerated from the allegations herein, and ask the Board to carefully

consider any vote to certify these charges against me since I believe that they are not on solid ground and are in fact baseless.

CERTIFICATION

I hereby certify that the foregoing statements made by me are true and correct to the best of my knowledge and belief. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated: 2-28-07



PROOF OF SERVICE

I, Ned P. Rogovoy, Esquire, hereby certify as follows:

On the 1st day of March, 2007, I served a sealed envelope containing a copy of the Answer to Tenure Charges of George Langley by regular mail to:

A. Paul Kienzle, Esquire
32 North Pearl Street
PO Box 337
Bridgeton, NJ 08302

Nicole M. Schoener, School Business Administrator
Bridgeton Public Schools
Bank Street Administration Building
PO Box 657
Bridgeton, NJ 08302

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: March 1, 2007

Ned P. Rogovoy, Esquire
Attorney for George Langley

APPENDIX B

Resignation of George C. Langley

To the Bridgeton Board of Education, Cumberland County:

I, George C. Langley, hereby resign my employment with the Bridgeton Board of Education, Cumberland County, effective June 30, 2008.

George C. Langley

Subscribed & sworn to before me
this 30th day of APRIL, 2008.

Attorney at Law

APPENDIX C

AFFIDAVIT OF GEORGE C. LANGLEY

IN THE MATTER OF THE TENURE HEARING OF GEORGE C. LANGLEY, SCHOOL DISTRICT OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY
AGENCY DOCKET NO. 69-3/07
OAL DOCKET NO. EDUTH 02212-2007S

AFFIDAVIT OF GEORGE C. LANGLEY

STATE OF NEW JERSEY)
:ss
COUNTY OF CUMBERLAND)

GEORGE C. LANGLEY, of full age, being duly sworn according to law upon his oath, deposes and says:

1. I have reviewed the Settlement Agreement and all of its ramifications, including the fact that the Board of Examiners will independently review the facts surrounding the tenure charges and have the right to bring an Order to Show Cause to suspend or revoke my license.

2. Additionally, I was advised that I could have continued with the trial and had the judge make a determination as to whether or not the Board of Education had, by a preponderance of evidence, proved "conduct unbecoming a teacher," insubordination," "inefficiency," "incapacity and failure to discharge responsibilities," and "excessive absenteeism" pursuant to the facts when applied to existing law.

3. I have entered into the Settlement Agreement freely and voluntarily and no one has forced or coerced me to resign, but I have done so at my own free will, knowing the perils and in some cases, benefits, that I will or could derive.

SWORN & SUBSCRIBED TO
Before me this 30th day of
April 2008.

Attorney at N.J.

GEORGE C. LANGLEY (L.S.)

RESOLUTION
OF
THE BOARD OF EDUCATION
OF THE CITY OF BRIDGETON

WHEREAS, the Board of Education has filed tenure charges against George C. Langley for conduct unbecoming a teacher, insubordination, inefficiency, incapacity and failure to discharge responsibilities, excessive absenteeism and other just cause; and

WHEREAS, on the first day scheduled for trial, all parties appeared and the Respondent testified regarding his understanding and acceptance of the resolution of the charges; and

WHEREAS, there are extensive documents, proofs and trial days possible for this matter to proceed; and

WHEREAS, the parties have conferred;

NOW THEREFORE, BE IT RESOLVED, as follows:

The Bridgeton Board of Education hereby determines that it is in its best interest and the best interests of the public to agree to the settlement agreement attached hereto which settlement agreement includes the resignation of George C. Langley from employment in the School District of the City of Bridgeton and which settlement agreement resolves the tenure charge;

BE IT FURTHER RESOLVED, that among the reasons the Board of Education determines that this is in the best interests of the public are as follows:

1. Attached hereto is the comprehensive settlement agreement prepared and executed by the parties which sets forth in particular the documentation as to the nature of the charges, an explanation of the circumstances justifying the settlement, evidence of the consent of both the charged and charging parties, evidence that the charged party entered into the agreement with full understanding of his rights and proof that the staff member has been advised of the Commissioner's duty to refer tenure charges resulting in the loss of position to the State Board of Examiners for possible action against the staff member's certificate.

2. The resignation of the charged party shall be in compliance with the New Jersey Open Public Records Act, NJSA 47:1A-et seq. wherein employment information of the charged party shall be made public including the individual's name, title, position, salary, payroll record, length of service, date of separation and reason therefor and the amount and type of any pension received.

3. It is anticipated that trial in this matter could consume eight to ten additional full days.

4. The anticipated trial would result in substantial financial expense to the Bridgeton Board of Education both with respect to attorney's fees and loss of staff time.

5. It is anticipated that the loss of work days for the Superintendent of Schools, the Principal of West Avenue School, the Assistant Principal of West Avenue School, the Human Resources Director, and Supervisors involved in this case as well as Teachers and witnesses would amount to over thirty (30) days in lost work time for school personnel.

6. The Board of Education, for the settlement not to take place, would be responsible to resume paying salary beyond the length of time for anticipated hearing and at substantial additional expense to the Board of Education.

7. Due to the complicated and involved nature of this tenure hearing, it is probable that the final resolution, if this matter were to go to trial, could extend beyond the time frame that the Board has agreed to pay Mr. Langley pursuant to the agreement between the parties. Due to the uncertainties of litigation, the Board of Education determines that it is in its best interest to approve the agreement that is set forth hereinafter which will bring finality to this matter and avoid possible continued litigation and expense.

8. It has been reported by the Principal of West Avenue School that members of the public feel "uncomfortable" with Respondent and their relationship with the Respondent both as parents and associates which resulted in having expressed concerns regarding Mr. Langley.

9. Staff members have described a lack of cooperation by Mr. Langley and they desire not to have to work with him.

10. Both the Board of Education and the Administrators feel that they could do better for the public and the students with the removal of Mr. Langley and the securing of another staff member.

11. Community members have expressed to the school principal their displeasure with the Respondent and requested their children be moved to a different classroom.

12. The Respondent's colleagues and fellow union members have concerns about the effectiveness and trustworthiness of Respondent's personal and professional practices and have expressed reservations concerning his unwillingness to work in a collegial manner.

BE IT FURTHER RESOLVED, that the President of the Board of Education and the School Business Administrator are hereby authorized to execute this agreement on behalf of the Bridgeton Board of Education.

The foregoing resolution was moved by Mr. Jack Surrency; and seconded by Mr. Willie Tukes.

ROLL CALL VOTE

NAME	AYES	NOES
Mrs. Marie Bernstein	X	
Mr. Ronald Bowman	X	
Mrs. Brenda Dellaquilla	X	
Mr. J. Curtis Edwards	X	
Ms. Angelia Edwards	X	
Mr. Brian Moore	X	

Ms. Thelma Scott	X
Mr. Jack Surrency	X
Mr. Willie Tukes	X

CERTIFICATION

I, Nicole M. Schoener, School Business Administrator of the Board of Education of the City of Bridgeton, herewith certify that the foregoing Resolution was approved by the Bridgeton Board of Education in a roll call vote as herein set forth in executive session, at the regular meeting of the Bridgeton Board of Education held on May 6, 2008.

Dated: May 7, 2008

NICOLE M. SCHOENER
SCHOOL BUSINESS ADMINISTRATOR

283-08

#283-08

IN THE MATTER OF THE TENURE	:	
HEARING OF ADAM MIERZWA,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF FRANKLIN, SOMERSET COUNTY.	:	
	:	

SYNOPSIS

The petitioning school district certified three tenure charges of unbecoming conduct and other just cause against respondent – a tenured technology education teacher – for alleged inappropriate behavior toward students and staff, in which he demonstrated poor judgment, an inability to control his temper and demeanor, and insubordination, and on one occasion, used excessive force against a student. The respondent acknowledged that the three incidents had occurred, but denied that his behavior constituted conduct unbecoming and asserted that his failure to control his emotions in response to exceptionally difficult circumstances did not constitute a pattern of conduct unbecoming a teacher.

The ALJ found that the Board has established by a preponderance of the credible evidence that respondent on two different occasions acted in a manner inappropriate for a teacher and inapposite to his function as a role model. Respondent failed to control his temper, displayed poor judgment, and allowed feelings of frustration and anger to overwhelm his professional demeanor in the aftermath of a student fight in February 2004; moreover, he used force against a student, although not excessively under the circumstances. Respondent displayed similarly inappropriate behavior during and following an incident of unruly student conduct in his classroom in May 2006. On the third occasion, the ALJ found respondent's behavior less than exemplary, but concluded that under the circumstances it did not rise to the level of unbecoming conduct. Based on the two charges proven, the ALJ concluded that respondent was incapable of controlling his temper and that his tenure must be revoked.

Upon careful and independent review of the record, the Commissioner found that – while concurring with the ALJ's findings as to the seriousness and unacceptability of respondent's conduct – the penalty of dismissal in this case is too severe in light of prior tenure matters wherein respondents demonstrated similar unprofessional behavior but did not lose their tenured employment. Accordingly, the Commissioner adopted the Initial Decision of the OAL with modification as to the penalty, holding that respondent shall not be dismissed from tenured employment, but shall forfeit the 120 days of salary already withheld from him and shall further be suspended without pay for four months beginning with the opening of the 2008-09 school year while he obtains training and assistance in anger management, conflict resolution and handling difficult and disruptive students – which must successfully completed as a condition of respondent's return to duty, or his tenured employment shall cease at the end of his suspension.

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

June 23, 2008

OAL DKT. NO. EDU 8220-07
AGENCY DKT. NO. 259-9/07

IN THE MATTER OF THE TENURE HEARING OF ADAM MIERZWA, SCHOOL DISTRICT OF THE TOWNSHIP OF FRANKLIN, SOMERSET COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed, as have exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by respondent and the Franklin Township Board of Education (Board), respectively, together with respondent's reply to the Board's exceptions.[1]

In his exceptions, respondent urges adoption of the Initial Decision, but asks that it be modified with respect to the recommended penalty of dismissal. Respondent contends that – although the Administrative Law Judge (ALJ) thoroughly analyzed the facts and circumstances underlying the tenure charges – he nonetheless imposed an "excessive and unwarranted" sanction that neither accurately reflects nor appropriately addresses the actual nature and gravity of respondent's conduct. (Respondent's Exceptions at 1-6)

According to respondent, the facts found by the ALJ constitute neither a pattern of unbecoming conduct nor individual instances of conduct sufficiently flagrant

[1] Although all three days of hearing appear to have been transcribed, the record forwarded to the Commissioner contained transcripts for the March 3, 2008 and March 5, 2008 hearings only.

to demonstrate unfitness to remain in a teaching position.[2] Respondent stresses that: 1) he did not strike, physically threaten or intimidate, curse at or personally insult or slur any student, teacher or administrator; 2) he engaged in none of the behaviors – such as physical or verbal abuse, harassment, harsh and persistent scolding and criticism, or cruel, premeditated or vicious actions – that have cost teachers their positions in prior tenure matters of this type; and 3) his conduct did not exhibit a pattern of gravity or frequency comparable even to those of teachers who did *not* lose their positions. (Respondent's Exceptions at 6-7 and 9, citing *In the Matter of the Tenure Hearing of Juan Cotto, State-Operated School District of the City of Newark, Essex County*, Commissioner's Decision No. 205-00, decided June 26, 2000, affirmed, State Board of Education Decision No. 40-00, decided November 1, 2000; *In the Matter of the Tenure Hearing of M. William Cowan*, 224 *N.J. Super.* 737 (App. Div. 1988); and *In the Matter of the Tenure Hearing of Barbara Emri, School District of the Township of Evesham, Burlington County,* Commissioner's Decision No. 371-02, decided October 21, 2002, affirmed with modification, State Board of Education Decision No. 49-02, decided December 3, 2003)

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[2] Respondent characterizes "the sum of [his] conduct at issue" as follows:

> On February 20, 2004, Respondent, then 56 years old, was punched, kicked, and knocked to the ground by a student when he removed her from a fight. When he brought her to the office, he was physically and emotionally compromised; he was lightheaded and breathing heavily, and upset at what he perceived to be a lack of support to deal with a very serious altercation. He yelled that more assistance was necessary, and then left the office instead of heeding an instruction from his Principal which he undisputedly may not have even heard.
>
> On May 4, 2006, Respondent berated students in his class for throwing things at him while he was facing the chalkboard; referring to their behavior as cowardly, and threatening not to pass them, or to contact the police. He then called security to remove one of the students, T.W., who had already tried to shove past Respondent to leave the classroom, and who subjected him to a litany of foul insults when he was removed. Respondent then went to the main office and emotionally expressed his anger and frustrations to his Principal and Vice Principal. Leaving the office, he angrily told T.W. that his obnoxious and assaultive actions might warrant police intervention. (Respondent's Exceptions at 8-9)

Moreover, respondent asserts, his actions on the dates in question were at least to some extent predicated on a lack of assistance from the school administration in dealing with difficult students, so that the district bears a degree of responsibility for creation of the conditions that led to his actions. (Respondent's Exceptions at 7-8 and 9, citing *In the Matter of the Tenure Hearing of George Zofchak, School District of the City of Trenton, Mercer County*, Commissioner's Decision No. 365-02, decided October 15, 2002, affirmed, State Board of Education Decision No. 47-02, decided June 4, 2003)

Respondent, therefore, urges that – although a sanction is warranted because he allowed his emotions and temper, on two occasions more than two years apart, "greater leeway than is appropriate for one charged with exhibiting a great degree of restraint and self-control" – his "displays of emotion" under the circumstances were neither so extreme as to demonstrate "an utter inability to control his temper" nor indicative of a temperament "so chronically fragile that he is unable to handle the rigors of the classroom on a daily basis." (Respondent's Exceptions at 9)

The Board, in turn, urges that the Initial Decision be adopted in all respects save its finding that respondent's use of force in pushing a student into a chair on February 20, 2004 was not "excessive." Pointing to the testimony of respondent's then-principal and the "statements" from witnesses and respondent serving as the basis for the administration's report to the superintendent on its investigation of the underlying incident (Exhibit P-3), the Board asks the Commissioner to find instead that respondent, in anger and frustration, pushed a student – who was no longer offering any physical resistance and had been given no prior direction to sit – into a chair with such

force that her backpack hit the back of the seat and bounced her back up, thereby employing a degree of force unnecessary and excessive under the circumstances, creating some risk of harm to the student, and setting an extremely poor example by reinforcing the very impulses toward irrationality and violence that caused the student to become involved in fighting in the first place. (Board's Exceptions at 1-5)

In reply, respondent counters that: 1) the testimony on which the Board bases its exceptions was fully taken into account by the ALJ, who properly contextualized it in making his findings of fact; and 2) the conclusions of Exhibit P-3 cannot be substituted for the findings resulting from a plenary hearing where testimony was duly weighed and witness credibility appropriately assessed. Respondent also contends that Exhibit P-3 does *not* include a "statement" from him as claimed by the Board, since the document in question was prepared by the Board's chief witness against him and he had no opportunity to review, correct or sign it. As to the Board's proposed findings of fact, the record shows – according to respondent – that: 1) he held onto the student in question as he was bringing her into the office and directing her to the chair so she could not continue assaulting him – as she had just done by punching, kicking and pushing him to the ground, and as he reasonably feared she might again based on her manifest combativeness – so that while he was, indeed, angry and frustrated, his handling of the student was motivated by the desire to avoid further injury; 2) while he undeniably used force to compel the student to sit, there is no basis for characterizing the degree of such force as "great;" 3) he did, in fact, instruct the student to sit as he was directing her into the chair, as found by the ALJ; and 4) any claim that the student – who had just engaged in a violent altercation with a classmate and assaulted

respondent to the point where he required medical attention – was put at "risk of harm" by respondent's placing her into a cushioned chair is "not only objectionable hyperbole, but also dilutes the gravity of that phrase in instances where its application is warranted." (Respondent's Reply at 1-6, quotation at 6)

Upon careful review and consideration, the Commissioner determines to adopt the Initial Decision with modification as set forth below.

Initially, the Commissioner finds the ALJ's fact-finding, analysis and conclusions as to the truth of the Board's allegations and the characterization of respondent's behavior as unbecoming conduct – including the finding that the force used by respondent in compelling student K.H. to sit was "not excessive" – to be fully supported by the record and entirely consistent with applicable law. In regard to the ALJ's finding of "not excessive," as challenged by the Board, the Commissioner notes that the testimony and evidence proffered on exception were, in fact, fully and carefully considered in the Initial Decision, and that the import of the ALJ's assessment – which is by no means an exoneration of respondent – is clear from the corollary finding that respondent pushed K.H. down forcefully enough to get her to sit, but did not throw her down or jam her into the seat so as to place her in danger. (Initial Decision at 20-21)

However, while the Commissioner concurs with the ALJ as to the nature of respondent's conduct, she finds less clear the question of whether dismissal is the appropriate penalty for it.

On the one hand, the ALJ is entirely correct – for all of the reasons well expressed in the Initial Decision (at 29-30) – that respondent's behavior cannot be tolerated and that nothing in his Lesson Observation records and Annual Performance

Reports (Exhibits P-24a through P-24q and R-15 through R-18) serves to mitigate any penalty that would otherwise be imposed against him. Furthermore, as noted by the Board in its Post Hearing Brief (at 26-28), the record is replete with indications that respondent does not comprehend the gravity of – or accept responsibility for – his behavior, instead contending that he does not have an anger management problem and attributing his difficulties entirely to the failings of others – specifically, students and district administrators.[3]

On the other hand, though – while respondent's actions certainly may not be dismissed as lightly, or viewed as sympathetically, as his recitation of "the sum of his conduct" would suggest[4] – respondent is correct that, in prior tenure matters, conduct of the type in which he was found to have engaged has generally resulted in a penalty less severe than dismissal. *In the Matter of Emri, supra,* citing *In the Matter of the Tenure Hearing of Charles Motley, State-operated School District of the City of Newark, Essex County*, Commissioner's Decision No. 252-99, decided August 4, 1999; *In the Matter of the Tenure Hearing of Henry Allegretti, School District of the City of Trenton*, Commissioner's Decision No. 96-00, decided March 22, 2000; and *In the Matter of the*

[3] For example, although he did attend "a couple of counseling sessions" at the suggestion of his attorney (Transcript of March 5, 2008 hearing at 213), respondent dismissed suggestions in 2004 – by both the Division of Youth and Family Services and the district – that he undergo counseling to assist him in dealing with this anger, noting that he already practiced Tai Chi and Qi Gong and that it was K.H. who needed anger management. (Initial Decision at 9; Exhibits P-3 and P-21) On July 23, 2005 – nearly a year prior to the incident of May 4, 2006 – he represented to the district, in seeking restoration of the increment withheld from him as a result of the February 20, 2004 incident, that he had developed sufficient coping strategies so that his behavior would not be repeated. (Exhibit P-22) As late as the March 5, 2008 hearing in this matter, he stated that the problem was not with his level of anger control, but with the behavior of his students. (Transcript at 213)

[4] See Note 2 above. With respect to the February 20, 2004 incident, respondent does not even mention his physical handling of K.H. or pushing her into the chair. With respect to the events of May 4, 2006, respondent ignores the ALJ's findings that respondent publicly stated he *would* file charges against T.W. and that he cast aspersions on his students (not merely on their behavior) and responded to all of them, guilty or not, in an "emotional, agitated and verbally threatening manner" (Initial Decision at 27); moreover, nothing in respondent's description captures the ALJ's specific (and graphic) finding as to respondent's persistent yelling, screaming and venting in his interactions with administrators. (*Id.* at 26-27)

Tenure Hearing of George Mamunes, Pascack Valley Regional School District, Commissioner's Decision No. 208-00, decided June 26, 2000. See also *In the Matter of the Tenure Hearing of Adelphia Poston, School District of the City of Orange Township, Essex County,* Commissioner's Decision No. 362-06, decided October 19, 2006, appeal dismissed, State Board of Education Decision No. 44-06, decided April 4, 2007. Moreover, although the Board withheld respondent's increment after the incident with K.H. and suggested that he obtain counseling (Exhibits P-3 and P-8), there is no indication on the record that the Board compelled him to take specific actions to address his unacceptable behaviors, or that strategies for dealing with disruptive students or administrative conflict were included in his Individual Professional Improvement Plans.

The appropriate balance in this matter, then, would appear to be struck by a penalty that 1) suffices to impress upon respondent the seriousness and unacceptability of his misconduct, yet affords him a reasonable opportunity to address his behavior without losing his tenured employment, and 2) removes him from the school environment while his behavior is being addressed, but in a manner that takes into consideration the need to minimize disruption to his students' education. The Commissioner, therefore, directs that respondent shall forfeit the 120 days' salary already withheld from him pursuant to *N.J.S.A.* 18A:6-14, and that he shall further be suspended without pay for an additional period of four months commencing with the beginning of the 2008-09 school year, during which time the Board shall arrange for – and the respondent shall successfully complete as a condition of his return to duty – a program designed to provide training in anger management, conflict resolution and handling difficult and disruptive students. *In the Matter of Emri, supra,* State Board Decision at 6-8.

Should respondent not successfully complete the program as directed, his tenured employment shall cease at the end of the four-month suspension period.

Accordingly, the Initial Decision of the OAL, as modified herein with respect to penalty, is adopted as the final decision in this matter. Respondent shall not be dismissed from tenured employment at this time, but shall forfeit the 120 days of salary already withheld from him and be further suspended without pay for four months while he obtains training and assistance as set forth above; provided, however, that his tenured employment shall cease at the end of the suspension period if he fails to successfully complete the requisite program. [5]

IT IS SO ORDERED.[6]

COMMISSIONER OF EDUCATION

Date of Decision: June 23, 2008

Date of Mailing: June 24, 2008

[5] Nothing herein is intended to foreclose the Board from referring respondent to an Employee Assistance Program or directing that he be examined pursuant to *N.J.S.A.* 18A:16-2, if, in the Board's judgment, he shows evidence of deviation from normal mental or physical health. Similarly, should respondent complete training as ordered and return to duty, nothing herein precludes the Board from taking action as it deems fit in response to any subsequent instances of inappropriate behavior.

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

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 08220-07

AGENCY DKT. NO. 259-9/07

IN THE MATTEROF THE TENURE HEARING OF ADAM MIERZWA, FRANKLIN TOWNSHIP BOARD OF EDUCATION, SOMERSET COUNTY.

David W. Carroll, Esq., for petitioner Franklin Township Board of Education (Parker McCay, attorneys; **David W. Carroll**, Esq., and **James F. Schwerin**, Esq., on the brief)

Arnold M. Mellk, Esq., for respondent Adam Mierzwa (Wills O'Neill & Mellk, attorneys; **Arnold M. Mellk**, Esq., and **Edward A. Cridge**, Esq., on the brief)

Record Closed: March 31, 2008 Decided: May 6, 2008

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

The Franklin Township Board of Education (Board) filed tenure charges with the Commissioner of Education (Commissioner), alleging that Adam Mierzwa, a tenured teacher employed by the Board, had engaged in unbecoming conduct that warranted sanctions against his tenure, including possible removal. N.J.S.A. 18A:6-10. Mr. Mierzwa filed an answer and the contested case was transferred to the Office of Administrative Law for hearing. Hearings were held on March 3, 4 and 5, 2008. Briefs were filed and the record closed on March 31, 2008.

The charges against Mr. Mierzwa allege, in summary, that his conduct in connection with three separate events was unbecoming, insubordinate, demonstrated poor judgment and demonstrated a lack of control of his temper and manner. The three incidents occurred on February 20, 2004, February 21 and 23, 2006, and May 4, 2006. Each will be examined as to the testimony and documentary evidence presented at the hearing.

FEBRUARY 20, 2004

The first incident of alleged misconduct purportedly occurred at the end of the school day on February 20, 2004, when a fight broke out among students at the bus pickup area in front of the school. In regard to the events of this day, the Board asserts that besides acting in an unbecoming manner, an insubordinate manner and demonstrating poor judgment and an inability to control his temper, Mierzwa endangered the safety and welfare of a student.

There is no dispute that the fight occurred, or that Mr. Mierzwa was outside and that he brought a female student, K.H., who had been one of those fighting, into the main office after the fight. Dr. Johanna Ruberto, now an assistant superintendent in the Rockaway Township School District, but in February 2004 the principal of Smith Intermediate School in Franklin Township, testified that she became aware of the altercation outside the front of the school from information provided over a walkie-talkie. The main office is located to the right of a large central location (foyer) which fronts on the doors leading to the bus loading area in the front of the school. She became aware of a commotion and went to the front of the office in the hallway. She was told, and also observed, that appropriate personnel were present to deal with the commotion. Police were notified as well. She then was inside the office when Mr. Mierzwa entered. He was holding a female student by her upper left arm. When the door to the office opened, Mierzwa was yelling something at Ruberto, something about what had to be done outside. He then pushed the student into a chair and when her back pack pushed her forward, he again pushed her back. As he was yelling, Ruberto told Mierzwa to calm down and also told Robert John Turri, now retired but then a teacher in the district and a teachers' association representative, to tell Mierzwa to calm down. Twice, she

asked Mierzwa to come into a small office, but he was agitated and raised his voice. She was not sure whether he heard her direct him to the small office. She perceived no indication of any response to her directive. Turri did "nothing." Mierzwa did not go into the little office, but he instead left the central office altogether.

Ms. Ruberto recalled that when Mierzwa and K.H. entered the office, K. was talking, but she did not observe the student "kicking." Ruberto was "shocked" when she saw Mierzwa push K. in to the chair.

Mierzwa returned to the Central Office five or ten minutes later. Ruberto told him to come into her office and not to "start this again." Instead, he again left the Central office.

Ruberto requested that the staff present in the office, including Turri, write down their observations. However, Turri and another staff member, Ms. Minis, who had assisted K.H. after she was pushed, each claimed that they saw nothing.

Given the physical force which she had witnessed, Ruberto informed both the police and the Division of Youth and Family Services (DYFS) Institutional Response Unit of Mierzwa's conduct toward K.H. DYFS's investigation interrupted the school's own investigation of the event. DYFS issued a report in April 2004. When she had an opportunity to speak to Mierzwa, he told her that he had been dissatisfied as to the manner in which the school was being operated and that staff were not trained to break up fights. While she agreed that a serious fight had occurred at the bus loading area and the police had to be called to deal with it, Ruberto could not excuse Mierzwa's conduct. His emotional actions could have ignited further situations and did not convey the message that he was in control of himself and of the situation. In a situation such as this, it is vital that one person keep control while others are not in control of themselves. One must be able to view the situation "intellectually" and try to change the situation. She acknowledged that she had a motto, "We don't react, we respond," that was made frequently to teachers at the school. She viewed the situation as a "very serious matter." The school has 1,100 students and a large staff. It depends on structure and procedures to function properly. Mierzwa's "emotional" response and his

failure to be responsive to her "on all levels" were unacceptable. His use of physical force to solve a problem, his failure to follow the directives of his principal, his lack of consideration of the surroundings and his effect upon it, and the fact that he fled the situation twice in an agitated state all constituted breaches of acceptable conduct. However, she considered his defiance as "secondary" to his use of force and his emotional conduct.

After the incident, K.H. was sent to the nurse due to the force used against her. She was also disciplined for her conduct. A conference was held with her parents, but Ruberto could not recall if the student was suspended.

While the witness denied that she suggested that Mierzwa obtain counseling due to his conduct, she acknowledged that an effort was made in July 2004, when a report of the investigation of the incident was issued, to "implement his ability" to get a physical and/or mental examination.

Colyer James, a security officer with the Franklin Township Board of Education, testified that in February 2004, he became aware that two girls were fighting at the front of the school. When he arrived at the front area, the fight was already over. He escorted one of the girls to the main office and then went outside to dismiss the buses. He then returned inside and heard a commotion coming from the main office. The door to that office was open and he heard Mr. Mierzwa, but he does not recall what happened except that he was asked to escort him from the office back to his classroom and he did so.

Margaret E. Brown, an accounts clerk at the Middle School, was behind the counter in the main office on February 20. She testified that a statement she wrote on February 24, 2004, was a truthful recollection of what she observed. She wrote there that she was running something off on the copy machine when she heard loud voices coming from the main office. She saw Ruberto in the office and Mierzwa leaving the office. Ruberto asked him to go to her office at least three times, but he did not respond and left the main office. A number of teachers and three students were present. About five minutes later, Mierzwa returned. She was again in the copy room.

Mierzwa was "yelling." He was "shouting at Dr. Ruberto." She tried again to get him to come into her office but he left, yelling as he exited the main office. She did not hear the words he was saying. She wrote the statement at Ruberto's request, but did not discuss it with anyone before she did so. The copy room was about fifteen feet from the counter and the door to the copy room was open. She heard a number of loud voices at first and could not tell whose voices they were. Later, she heard Mierzwa's voice. Both he and Ruberto were speaking loudly.

Diane Horace, a teacher of basic skills employed at Franklin Middle School for eleven years, testified about the February 20, 2004, incident as a witness called by the respondent. She described the hallway in which her classroom is located and which leads to the large foyer area, that itself opens to the concrete outside the front of the building where the buses pick up students at the time of dismissal. She described her observation of the commotion outside that day, with perhaps one hundred students screaming and hollering and some standing on benches. She heard that a child was hitting a teacher. Horace testified that she saw Mierzwa outside during the altercation. He was trying to apprehend a female student who was swinging her arms "out of control" and resisting his efforts to part her from another person. "She was whaling at him, kicking." She saw this student's arms and legs come into contact with Mierzwa. Horace then went back inside to the main office to summon assistance. Horace ran to the main office to get assistance. She saw Steve Brochstein, a teacher, and told him that she thought he "should go outside." She said that she did not think she had seen security out there. He seemed "flummoxed." Dr. Ruberto came in and seconds later Mierzwa entered with a student, within two to three minutes of her own arrival in the office. Ruberto was "a little concerned why Horace was asking him (Brochstein) to go outside." While she could not recall Ruberto's exact words, her "tone" was that "you don't have the right to tell him (Brochstein) to do that." It sounded like she felt that "someone was trying to get over on her and she was not going to allow that." Ruberto was also taken aback by Mierzwa's not listening to her. Horace later met with Ruberto who told her that she thought the Horace was "emotional" and had no right to tell, or to summon, a fellow teacher to do something. However, she was not disciplined.

The witness recalled that when Mierzwa entered the office with the student, the student was making angry comments and Mierzwa was out of breath and red faced. Mierzwa was dishelved. He had a hand on K.'s back and led her to the chair, which was located right next to the door into the main office. He told the student to sit and she did so abruptly, landing as if she were trying to get attention. The student sat "as if she did not want to sit." Horace observed no more contact with Mierzwa.

Horace testified that Ruberto did not know what was happening and Mierzwa was "angry," "emotional," saying that "you better get out there, it's really big." He also said that he could not believe that no one came outside. Ruberto told him "to come back into my office or here." Both Mierzwa and Horace left the office.

Horace was referred to an e-mail she wrote to Ruberto on February 20, 2004, at 3:21 pm, about 50 minutes after dismissal, about "February 20th incidents," in which she discusses in detail an incident involving two boys in the 200 hallway, one of whom eventually "faced off" with Mr. Turri and was then escorted to the main office. She then discusses heading back to her room and hearing someone in the lobby saying there was a "huge fight outside." She mentions coming into the office and telling Brochstein that "we needed him outside." Mierzwa came into the office with K.H. "a few minutes later." She did not recall if Turri was in the office when Mierzwa entered.

Robert John Turri testified that on February 20, 2004, he was around the corner from the main entrance hall (foyer) when he heard a commotion from near the office. Some students were brought in to the office for discipline and to see the principal. Mierzwa was there, and Ruberto was behind the counter. K.H. seemed "kind of defiant and not readily willing to do what Mierzwa wanted," which was to sit in a chair. He saw her sit, which she did not want to do. Mierzwa had her by the arm of her coat and "guided" her by the arm of the coat into the chair. He saw no subsequent physical contact and "not a significant amount of force" was involved in getting K. to sit. Mierzwa told Ruberto that more help was needed at dismissal time. She responded with something he could not recall. Mierzwa was upset and breathing heavily. Ruberto spoke "more like a principal," "as someone with authority." He recalled that Mierzwa

was "upset, agitated" and that he "initiated the conversation." He had no recollection of what Ruberto said or of anything she asked.

Gary Hall, the Director of Personnel Services for the district since January 2001, testified that following the incident an investigation was initiated. While it proceeded, Mierzwa was suspended with pay effective February 23, 2004. As a part of the investigative process, Mierzwa was offered an opportunity to explain himself. A report was presented to the Superintendent on June 7th by a committee consisting of Ruberto, Hall and Debra Sheard, Director of Social Studies, Technology Education and Work Readiness. The report recommended that Mierzwa's conduct be considered as unbecoming and other just cause and a reprimand be issued along with a withholding of his 2004-05 salary increment. The Superintendent and the Board agreed with this recommendation. A grievance was filed but was not pursued to completion.

Mr. Mierzwa has been employed with the Board since January 2000, as an industrial arts teacher. He previously taught for many years in New York City. In February 2004 he was fifty-six years old. On that day, Mierzwa was on bus duty at the end of the day when a fight erupted between two female students as a large number of other students gathered around them. There were typically 100-200 students in the general vicinity at that time. The combatants were punching, kicking, screaming and eventually ended up on the ground. This all occurred about thirty feet from the main doors of the school. Seeing the convergence of two groups of students and the clash between the two females, Mierzwa saw that something had to be done. He looked at Ed Clark, another teacher located close to his location, and they moved in, Clark grabbing one of the women and Mierzwa grabbing K.H. and picking her up. She started to swing her arms and punch at him and he attempted to protect his face with his hands and arms, taking blows on these areas. She punched him, perhaps five or six times, and he grabbed her upper arms by the shoulders and she started to kick him in the right leg and his shins. He tried to move her away from the center of the fight and took a couple of steps toward the sidewalk and the busses. She stuck her leg out to try to trip him, as another person also tried to do the same. Mierzwa fell toward the busses and landed against a bus as the crowd surged and he and K.H. fell, with him falling "kind of on top of her." His knee hit the curb and he was halfway under the bus. He lifted K. up,

picked her up, spun her around and led her to the main doors and then to the main office about sixty to seventy feet away. When he got to the door of the office, he directed K. to sit, but she was still resisting and he had to keep her under control. She was trying to shrug him off and fighting to escape his grasp. She was saying things that he cannot recall. The door to the office opened inward. He was exhausted and his heart was pounding loudly and his ears were ringing. He suffers from hypertension and felt weak and dizzy. He held on to K. and directed her to a chair right inside the doorway and yelled at her once or twice to sit down and she eventually did. He then moved away from her. As a result of the incident he had a bruised knee and back and his hands hurt. He was also scared that he would have a heart attack. Later in the day he went to Somerset Medical Center for treatment of multiple contusions and a sprained lumbar region.

There were only a few people in the office at this time. No one did anything or approached him. He told them "we need help out there; it's getting dangerous out there." At this point, Ruberto shouted, "This is all being documented, Mr. Mierzwa." Later, she told him, "You don't do that to my children in my school," to which he replied, "If it's your school, you should take better care of it."

Mierzwa was not sure that he heard any direction to him from Ruberto to come in to the conference room, as he has a partial but fairly extensive hearing loss in his right ear dating back to the 1970's. He did not hear her say anything to Mr. Turri about getting him to cooperate. All he recalls hearing was his heart pounding, and he was worried about his blood pressure. He left the office and met Colyer James in the hallway, who went with him to the classroom about fifteen to twenty feet from the office where they talked and he calmed down. Someone then asked him to return to the office to try to explain what had occurred. All he recalls hearing was Ruberto saying in a loud voice, "This is all being documented," which he did not understand, although he imagined it had something to do with how he handled K.H. He testified that he did not use "great force" towards K. and, although he was angry, had been assaulted and traumatized; he did not make loud statements and was not defiant. When he returned to the office he was not yelling and did not shout at Ruberto.

He later was suspended and lost his increment for 2004-05, although he eventually sent a letter requesting that it be restored. He recalls that he received it several months later, but on cross-examination he was shown a letter he wrote in February 2006 to the NJEA that indicated that he had not received the increment and he has not heard anything since about it. He denied that he had done anything inappropriate. He acknowledged that it was suggested to him that he obtain some anger management counseling, but he was already practicing Tre Gong, a "traditional Oriental" practice which assists with control of both his emotional and physical state. Nevertheless he did attend three or four sessions in Scotch Plains at the suggestion of his then attorney, but he does not think that he has an anger management problem.

FEBRUARY 21 AND 23, 2006

Once again, the Board contends that the events of these two days demonstrate that Mierzwa demonstrated poor judgment, inappropriate behavior and inability to control his temper. Additionally, his actions supposedly ignored the welfare of students who observed his emotional outburst and showed a "complete disregard for the sincere efforts of his supervisor to address the very complaint he had brought to her attention."

Phyllis Bruno, has been employed as the Director of Social Studies and Work Readiness for the Board since August 2005, During her first few months on the job she tried to be at the Middle School on a daily basis to see that all teachers had what they needed. She supervised forty-seven teachers, including business teachers in grades nine through twelve and technical education in family and consumer sciences. She has known Mierzwa for five to six years as a teacher at the Middle School. During the 2006-07 school year he would come to the monthly department meetings. On February 17, 2006, a Friday afternoon, she received an e-mail from him in response to an e-mail she had sent to him. She was looking for a CD burner and asked if he had seen it. He replied that it was in one of two small rooms off of his classroom and that one had photochemical residue in it and he had not gone into that room because it was dangerous. She responded, but he first called Dr. Bundy, the high school principal, and asked him to look into the residue.

The Monday following receipt of Mierzwa's e-mail was a school holiday, but on Tuesday, Bruno went directly to the middle school and to Mierzwa's room. He was in the hallway and she approached him. She asked what he was talking about. He responded that if something was not done about the residue within one month that he would take action. She went to view the room and he became irate. She wanted to understand exactly what the problem was, but he was very agitated and loud. Students were passing in the hallway at this time. Mierzwa said, "You wouldn't work here, I won't work here." She said that she was trying to understand, but he seemed as if he would not calm down and she felt physically uncomfortable and had concerns for the children moving around them. The whole episode escalated within two minutes. She went to the principal's office and was told that Buildings and Grounds personnel were coming to check out the situation. As a result of what had occurred in the hallway, Bruno notified Mierzwa that she wanted to have a meeting with him and an association representative. She felt that his conduct in the hallway was inappropriate in front of children and an inappropriate way to respond to her own response to his expressed concern.

The meeting was held on February 23, 2006, in Bruno's office at the Board's offices. Mary Repetto was the association representative who attended. As soon as they sat down, Mierzwa began to speak about his concerns and the dangers that he felt were posed by the residue. Bruno wanted to state her concerns about his behavior, but he insisted that she let him finish. She and Repetto each had to tell Mierzwa to give Bruno a chance to speak. Bruno testified that she actually empathized with Mierzwa because her own husband had had a health issue due to renovations at the school at which he worked. Eventually, Bruno did have an opportunity to speak and explained her concerns, but he responded that he was upset about the working conditions, which he characterized as "unsafe, unhealthy" and he added, "I shouldn't have to work like that." He was very agitated. He also mentioned that he wanted to use the other sub room as an office. Bruno prepared a set of "Minutes" of the meeting as soon as it ended.

On cross-examination, Ms. Bruno was shown Mierzwa's e-mail sent to her at 1:27 pm on February 17, 2006. In that e-mail, Mierzwa writes about the former darkroom

> which at this point is heavily contaminated with photographic chemical residue. The room was never cleaned up. This is a violation of OSHA regulations as the chemical residues are toxic and after extended exposure can create health and safety hazzards. (sic). . . This situation needs to be remedied asap. If no action is taken by FTBOE within a month from today I will be forced to notify OSHA of this condition which presents an occupational safety hazard. . . .

Bruno admitted that she "took umbrage" at his assumption that she knew about the issue and despite that knowledge she had done nothing about it. She had been at the school "nearly every day" since September and he had not mentioned it to her. At 2:30 pm on February 17, 2006, she e-mailed a response to Mierzwa.

> This is the **first** time that you have ever mentioned this concern to me. I am perplexed by the urgent tone of this correspondence, since I have stopped by to see you EVERY week since school opened in September to check on your needs in terms of . . . room condition. I would agree that if room 500A presents a health condition, it should be rectified in short order. However, as your director and someone who has been in contact with you on a weekly, and on some occasions, daily basis, I take umbrage with the threatening tone of this letter if I do not meet a deadline of your making.
>
> If you have spoken to your colleagues in the department you should be aware that every concern regarding safety and/or health issues . . . have raised to me, have been addressed and rectified within a matter of days.
>
> . . . .
>
> I feel I must caution you to refrain from using threatening language in a correspondence to me, as it usually does not produce the anticipated response.

Nancy L. Repetto, an 8th grade journalism and creative writing teacher employed at Franklin Middle School, testified that she attended the meeting with Bruno and Mierzwa on February 23, 2006. Bruno had requested the meeting to talk about what had occurred in the 500 hallway when she met there with Mierzwa. At this meeting on the 23rd, Bruno acknowledged that she interrupted Mierzwa while he was speaking to another teacher and he said that she did interrupt. The meeting lasted for about forty to forty-five minutes, during which time Mierzwa was "completely calm," as was Bruno.

Neither raised their voice. Repetto could not recall whether there was any discussion about the conditions in Mierzwa's working area and she only recalls conversation about the incident in the hallway.

The witness sent an e-mail to Bruno at 10:06 am on February 24, 2006. She wrote in part to thank Bruno for the "professionalism, courtesy, and calmness that you displayed . . . with Mr. Minerzwa.(sic) Thank you for understanding that email perceptions can be misinterpreted. . . . Thank you for keeping this incident "in house." . . . Thank you for understanding that people's frustrations about the lack of assistance at our school and administrative forgetfulness can cause people to react rather than act. . . . " In her testimony, Repetto explained that her reference to "calmness" had to do with the fact that the subject of conditions in the school was something that the administration might become "ruffled and riled" about. She also referred to "keeping the incident in house" because sometimes administration will place a letter about an incident in a teacher's personnel file, but here Bruno said that nothing else would happen after the meeting. In her "minutes" of the meeting, Bruno commented that she told Mierzwa and Repetto "that as long as there are no future incidents like those discussed, I did not plan on bringing attention to this beyond my office."

On cross-examination, the witness again insisted that Mierzwa was "completely calm." He did not interrupt or raise his voice, although there was one point when Bruno said something and he disagreed and interrupted and Repetto told him to let Bruno finish. Repetto also explained that she did not recall any conversation by Bruno at the February 23 meeting about an e-mail, only about what happened in the hallway.

Adrienne C. Alexander, a keyboard music teacher at the middle school, was the teacher with whom Mierzwa was speaking on February 21 when Bruno approached Mierzwa in the hallway. This occurred between periods when students were passing from one class to another and the teachers were outside their classrooms in the hallway to monitor that movement. She was near room 501 and he was near room 500. It was normal for the two to speak "generally" across the hallway with students passing in between them. Bruno came into the hallway. Alexander cannot recall Bruno's demeanor when she first entered the hallway. Alexander testified that since Bruno was

Mierzwa's supervisor (but not Alexander's), she would have stopped her own conversation with him at Bruno's approach. She recalls that the conversation was heated; Bruno raised her voice but Alexander did not hear Mierzwa do so. When the tardy bell rang, Alexander went into her classroom, but Bruno and Mierzwa continued to speak in the hallway. She heard loud conversation but could not tell what they were discussing. She had only been in the hallway for about four minutes and Bruno had only been there for perhaps two, and Alexander had not remained long enough to know whether Mierzwa was agitated. After she entered the classroom and closed the door, she did continue to hear Bruno's voice, but Bruno had a higher voice than Mierzwa. Later on, Mierzwa commented about the demeanor of his supervisor, but Alexander does not recall who initiated that conversation.

Mr. Mierzwa testified that in September 2005, he was directed by the school's then principal, Mr. Bundy, to make use, for storage, of a former darkroom which had been located in one of the two side rooms in the main shop area where he worked. Mierzwa noticed that this side room had a lot of photochemical residue on the walls and the cement floor. It smelled of "stop bath," or acetic acid, a chemical used in photo development which he described as toxic. This alarmed him and he and another teacher tried to clean out the room, which he had been directed to use for storage. He mentioned the situation to Mrs. Bruno, told her he had been directed to use the room and that this was unacceptable. She said there was nothing that she could do about it and that he should discuss this issue with Dr. Bundy, who was at that time the school's principal.

On February 17, 2006, Mierzwa wrote the e-mail to Bruno because at that point nothing had been done about the room. He had mentioned the condition of the room to a visiting state auditor in September 2005. There had been other OSHA issues in the building and he thought the condition would be remedied after this conversation. However, nothing occurred as a result of his mention of the room's condition to the auditor, so he eventually wrote to Bruno. He received her e-mail at 2:30 pm. A few days later she approached him in the hallway, which was at most ten feet wide. He was chatting with Alexander when Bruno "walked right up to him," saying "What is the meaning of this e-mail?" She added that she considered it a threat. She was "very

unpleasant, angry, irritated, loud and nasty." Her voice and manner were not at all polite. He told her that he had mentioned the issue to her previously. He tried to explain to her that the e-mail was not meant as a threat to her directly. He does not recall what else was said. He heard the bell, turned and walked into his classroom. He denied that he ever threatened her, but he was "taken aback" by her comments.

The respondent testified that despite Bruno's comments about Mr. Bundy, he had never gone to Bundy about the problem, as he believed that Bruno should have brought it to Bundy's attention. Thus, he did not tell Bundy about the dangers posed by chemical residue in the room.

He received a letter directing him to attend a meeting with a representative. At that meeting he apologized to Bruno if she felt threatened by what he said or wrote. The tone of the meting was generally "conversational," yet intense, although no one was out of control. He was quite agitated and spoke in a firm, loud, clear voice so as to be understood. However, he did not lose his temper.

Mierzwa testified that after the meeting in the hallway he decided to contact OSHA and did so, relating the condition in the former dark room. He asked if he had to fill out a form and was told that the OSHA inspector would contact the superintendent of buildings and grounds. The following day, Mierzwa met with that superintendent, showed him the dark room and it was both cleaned and painted.

May 4, 2006

The district contends that Mr. Mierzwa's conduct on this date included unbecoming actions both in his classroom and in the main office and an inability to control his temper. His conduct purportedly undermined his authority and that of administrators, and disrupted the functioning of both his class and the office.

The incident of May 4, 2006, started when Mr. Mierzwa was teaching a class and a student(s) threw some object(s) at him while his back was turned. There is no dispute as to this occurring, as Mierzwa's statements and testimony to this effect is

corroborated by several statements obtained from students present in the class at the time of the event. Jermaine Blount, now an assistant principal at a middle school in East Windsor, was then employed as an assistant principal in Franklin Township. On May 4, 2006, he heard a commotion in the main office; screaming and yelling in the reception area. He saw Mierzwa, who was agitated and screaming. He nodded to Mierzwa as if to say I am hearing what you are saying. Usually if a teacher is upset this type of gesture will calm them, but Mierzwa was "still pretty agitated." He told Mierzwa, Let's come back to the conference room." They did and Mierzwa continued to scream. Blount told him, "Mr. Mierzwa, you're yelling at me." Mierzwa continued to be "very, very agitated" and continued to yell for two minutes. Blount felt that the situation was very volatile. At this point Dr. Diane M. Lotz, the interim principal of the school, came into the room. She tried to talk to Mierzwa and asked him to come into her office or to another area to speak, which he did.

Blount recalled that Mierzwa was saying that some students in his class did not want to be there and were being disruptive. Someone threw something at him. Blount told him that this would not be tolerated and the students(s) would be held accountable. He was trying to calm Mierzwa down, but to no avail.

After Mierzwa had left with Dr. Lotz, Blount went about trying to determine who the offending student(s) was. He spoke to Colyer James, who advised that he had escorted T.W. from the classroom. He wanted to obtain this student's account of what had occurred. As he was entering the office, Mierzwa was exiting from the area and saw T.W. Mierzwa pointed at T.W. and said that he would call the police and file charges. At this point, Mierzwa appeared to still be agitated, but less so than before. Blount was concerned both about the fact that this comment was made in a public area and about confidentiality issues. Mierzwa was acting in a confrontational manner. Blount was concerned that he might have to step in between the two, but nothing happened.

Blount requested that a guidance counselor obtain statements from students who had been in Mierzwa's room when the incident allegedly involving the throwing of something occurred. The students were instructed not to talk to each other and that the

statements would be confidential. They were asked if they knew why they were in the guidance office and were then asked for a verbal recitation of what they knew and then asked to write it down. Blount interviewed T.W. and L.W. and was present when they wrote their statements. Blount later read all of the statements, which confirmed that some students had misbehaved and someone did throw something, conduct which he labeled as "inexcusable." In reviewing the statements, Blount tried to find commonality in what was said. Some reported that when the item was thrown, Mierzwa turned around and said, "Who threw this? Don't be a coward, throw it to my face." Blount saw this response as "confrontational," and the response treated the action of one student as if it were the action of all the students in the class. It was also reported that he told the students that he was going to fail all of them, which got the class more agitated. He referred to them as "chicken heads," and spoke about contacting the police and filing harassment charges, again referring to the class as a whole in a manner that Blount believed was not an "effective statement to make." He also told students that if they did not want to be in his class they should get out. This was another inappropriate statement, especially since these students may not have alternative choices available to them.

Blount acknowledged that T.W. had called Mierzwa a "fucking nigger." He was suspended from school for this comment and a discussion was held with his parents. However, his conduct did not excuse Mierzwa's. His comments to the entire class caused undue stress and anxiety and were not professional.

Dr. Lotz has been an administrator with the Franklin Township schools since January 2001, after teaching since 1973. In 2005-06 she served as an interim principal at the Franklin Middle School. During the late afternoon of May 4, 2006, she heard a loud voice several rooms away from her office in the school. When it did not stop she went to investigate and observed Mr. Blount and Mr. Mierzwa in the conference room on opposite sides of the table. Each would sit and then stand and sit again. She entered and stood at the head of the table. Mierzwa did most of the talking. He was "glassy eyed" "very red faced" and "very upset," speaking very rapidly and was clearly very agitated. Blount was quiet. She started to intervene, saying that she heard that Mierzwa was upset. He had been talking about his class. She told him that what he

said was "important." She tried to calm him, telling him that she would listen to him, but could not hear him if he was yelling. He was still upset and loud and mentioned students who were "out of control." Hoping to calm him down, she offered to get him a glass of water and he followed her into the kitchen, drank the water and calmed down. She told him that it was totally up to him whether he wanted to call the police. He appeared to become more relaxed. She asked him if he wanted to stay in the office, but he said that he would be fine and he left to go back to his classroom. He was later suspended by the Superintendent following normal procedures.

The witness acknowledged that she had first met Mierzwa in March when she took over as the interim principal. At a faculty meeting he had made a statement comparing the behavior of students in the school to the place where he had previously taught, in the New York City Public Schools. She agreed that his comments at the time concerned her. She agreed with his suspension because of her concern about the agitated state she had observed him in, his inability to maintain control, the language and comments he made to the students in his class, his inability to refrain from discussing his feelings with them and his loud, screaming conduct. She had no assurance that such conduct would not be repeated. She agreed that her thoughts did include consideration of what he had said at the faculty meeting.

Gary Hall testified that following this incident, Mierzwa was again suspended with pay, pending an investigation. Dr. Lotz and Ms. Bruno were involved in this investigation and Mierzwa was given an opportunity to respond. A report was issued to the Superintendent on July 13, 2006. It related that in addition to the incident of May 4 that was the initial subject of the inquiry, Ms. Bruno had revealed to the committee information about Mierzwa's conduct on February 21 and 23, 2006. The committee concluded that Mierzwa's "inability or unwillingness to control his temper world be cause for concern if it was an isolated incident. This is not, however, an isolated incident." They referred to the 2004 incident and the February 2006 events and concluded that he had "a recurring temper-control problem." He had "a mindset that focuses on a lack of administrative support and/or proper protocols as the primary reasons for the situations triggering his temper flare-ups." He failed to consider his own behaviors as factors in these situations. "The recurrence of this victim mentality and lack of ownership for the

circumstances that affect him, his students, and his colleague that compounds our concern." The members expressed their belief that Mierzwa "is not well-suited to continue teaching the students of Franklin." They recommended a continued suspension and the institution of tenure charges. The Superintendent and the Board agreed with that conclusion and these charges followed.

Mr. Mierzwa explained that he had a manual drafting class of 7th graders. There were twenty-four work stations and room for twenty-four students, but there were at least twenty-seven students in the class and other students were sent by Guidance during the first few days of the marking period. Between forty and fifty percent of the students were "hostile" and "resentful." The class was supposed to be an elective, but several did not want to be there and made their feelings clear to him "in no uncertain terms." He had provided the students with a three to four page course outline and list of expectations and a page about safety concerns. This constituted an "unofficial contract" with the students. He also provided information on the grading policy, showing that thirty percent of the grade was for behavioral and safety issues. Each student and their parent or guardian had to sign a paragraph about this, but only a few brought back a signed document.

On May 4, many of the students refused to work and paid no attention to his instructions regarding a sketching exercise. Some objects were thrown at him as he worked at the blackboard and some hit him, including rolled up paper and pen caps. He turned and faced the students and asked who was throwing things and said that it was a "chicken thing to do." He also told them that if he identified who had thrown things that he could file harassment charges and that the course required work and cooperation and if everyone did not do it then he could not give them a passing grade. However, he did not threaten to fail anyone if no one confessed. The respondent denied that he had "gone off" or "gone crazy." Eventually, he pushed the button for security and Colyer James and another person arrived. This other security officer commented, "Oh, the dumping ground." T.W. was in the class and seemed to be the focus of the disruptive activity. He used a cell phone in class and would not put it away. He called Mierzwa a "fucking nigger." He also ran up behind Mierzwa and tried to push his way into the hallway after the security button was pushed. James was by that time

already in the hallway and took T.W. to the office. The rest of the class was "up in arms." As this was the end of class time, he dismissed the class. He was upset and decided that he had had enough and had to talk to someone in the administration. Eighth period was a free/prep period, so he went to the main office. He complained to Mr. Blount, saying that he really had to speak to someone, really had a lot of problems, was being abused and harassed by students and could not tolerate it any more. He was "loud," "firm," but was not screaming. Blount asked him to come into the side room. He did and kept talking. He described the conditions in his class to Blount, telling him of the treatment to which he was being subjected and that he did not want to be used as a baby sitter and was "there to teach." He was a "little angry," and Blount told him to calm down. Dr. Lotz entered the room. He denied ever making any personal comments, threats or uttering any curses. When Lotz came in and saw his red face and he made mention of his hypertension she said that she also had hypertension and got him some water. He calmed down, she asked if he was okay and he went back to work. When he saw T.W. in the hallway, he spoke to him in a "stern, authoritative voice," saying "What you're doing is harassment and if you keep doing it I'm going to take it up with the police." He then left the area.

Mierzwa recalled the faculty meeting referred to by Dr. Lotz. It was a special meeting to address student behavior issues with a representative of the County Superintendent. At the meeting, Mierzwa said that he had concerns regarding student behavior and thought that he could give some reasons for it, such as students who were in his "elective" shop class and did not want to be there.

DISCUSSION AND ANALYSIS

FEBRUARY 20, 2004

FINDINGS OF FACT

I **FIND** that there is no dispute that a fight occurred outside of the school entrance in the bus departure area at dismissal time on the afternoon of February 20, 2004. Mr. Mierzwa was on bus duty at the time and K.H. was a participant in the fight. There is no evidence to dispute Mierzwa's story that he was involved directly in breaking up the fight and I have no reason to doubt that he received some minor

injuries as he did so. The medical record supports this. I **FIND** that Mierzwa then escorted K.H. to the main office, using physical means to do so. It is quite reasonable to assume that this combatant student did not want to go to the office and that she was resistant to being taken there. Thus, I **FIND** that Mierzwa did have his hand(s) on her person as he moved her towards the door of the main office and opened it. He then did three things. One, he told K.H. to sit and, two, he made sure that she did so. The third is that he voiced his upset to those in the office. How he accomplished items two and three are at the crux of the charges.

It must first be noted that I observed that Mr. Mierzwa had a serious sounding voice that is rather deep. Thus, if he spoke loudly, I suspect it would make some forceful impression on the hearer(s). When he entered the office, with the student in tow who had just been punching, kicking and fighting with him, who had caused him to fall to the ground with some degree of force, he was, not all that surprisingly, quite angry, frustrated, annoyed, physically spent, experiencing discomfort and concern at his heart rate and generally disgusted with what he perceived to be failings on the part of the administration and his fellow staff members to both protect and assist him. Given this volatile mix of emotions and circumstances, it is most reasonable to conclude that if K.H. did not immediately sit down as directed, that Mierzwa would have utilized some degree of physical effort to sit her down, despite her desire not to sit. And if, as he says, she was still struggling, albeit not nearly to the degree she had outside, this would be even more likely to motivate him to physically achieve what he wanted her to do, that is, for her to sit. Mierzwa would have it that he merely guided her to the seat; however, I am convinced that he did so with some emphasis and therefore with some real force. I therefore do not credit Ms. Horace's version of this portion of the events, that is, that K.H. sat herself down, albeit with some "emphasis" (my word). Indeed, Mr. Turri's recollection is more accurate, in that he too recalled that Mierzwa guided the student into the chair by the arm of her coat. But I hasten to add that while I find that physical force was used, I do not infer that Mierzwa did more than to push her down forcefully enough to get her to sit, and that he did not throw her down or jam her down into the seat. Thus, given the circumstances, I am persuaded that he did not use excessive force. Yet, as he may well have appeared to push her into the chair, it is not surprising that Ruberto, who may not have understood precisely what the chain of events was up

to the point that this happened, saw a situation that to her seemed excessive and of such nature as to require reference to DYFS. DYFS did not find any reason to act against Mierzwa.

Despite Mr. Mierzwa's testimony, I **FIND** it unreasonable to conclude that at the time of this event with K.H., Ms. Ruberto said that, "This is all being documented". At that point in the incident, Mierzwa's appearance in the office with K.H., and his attempt to get her to sit in the chair, was occurring so unexpectedly and quickly that it is not likely that Ruberto's first verbal comments in response to what she was seeing would have been anything about documenting anything. This statement may well have been spoken later on, after subsequent events in the office and his later return to the office. These events included his lack of response to the direction given three times by Ruberto that he come into the small office to talk about his concerns, which despite Ruberto's acknowledgement now that she could not be sure that he heard her, must have seemed at the time to be insolent, insubordinate and defiant. I **FIND** that she did make these repeated statements, as confirmed by Margaret Brown and to an extent by Diane Horace. Mierzwa denied hearing them, citing his hearing loss. But I am persuaded that given his emotions and the circumstances, he was himself speaking very loudly and forcefully, to the point of yelling, because he was so angry, so physically keyed up, so emotionally involved in the physical and mental strain caused by his involvement in the fight and the struggle with K.H., that he simply could not hear her over his own voice, and possibly added to this may have been both his lowered hearing ability and his being so caught up in what was happening to him both physically and emotionally (his anger at what he saw as a lack of care, support, training etc.) that even to the extent he may have heard what Ruberto said, he simply ignored it. I am convinced that this was not done directly as a means of rebellion or disdain for Ruberto, but more in response to his perceptions of the circumstances. Thus, I would be leery of calling this defiant conduct. Nevertheless, I would certainly agree that he did not follow the directions he was given and left the office without any response to his superior's instructions. He was certainly loud, he screamed and he was emotional. And while there is dispute over whether Mierzwa's conduct was or was not actionable as misconduct, nevertheless Ms. Horace agreed that he did not respond to or comply with Ruberto's directions and left the office.

Clearly, the scene that Dr. Ruberto observed disturbed her. It might have seemed that the highly emotional, volatile, confrontational fight and disturbance that was occurring outside had been transferred into the calm setting of the main office. Clearly, and not surprisingly for someone in her position, Ruberto is someone who demanded order, procedure, and a calm approach to dealing with problems. Her response to what was occurring, from her reaction to Horace's summons to Brochstein to her reaction to the commotion caused by the emotional, loud and angry Mierzwa, is reflective of her sense that emotional, loud outbursts and disturbance of any kind has no place in the school, especially in the main office.

CONCLUSIONS OF LAW

It is perhaps understandable that Mr. Mierzwa was upset about the incident outside of the school. But once he entered the main office, with K.H. in tow, it was not appropriate for him to display his frustrations with loud screaming and emotional outbursts. Not only was this not a proper means of dealing with those in the office, but in addition, it was hardly the appropriate manner to show to K.H., whose own lack of control and violent action was exactly the kind of conduct that a teacher was supposed to discourage. A teacher is a role model, and Mr. Mierzwa's conduct was hardly that of the role model for K.H. I **CONCLUDE** that he engaged in conduct that was inappropriate. He failed to control his temper, he displayed poor judgment. However, given the circumstances involving K.H. and the finding that he did not use excessive force towards her, I **CONCLUDE** that he did not endanger her safety and welfare.

FEBRUARY 21 AND 23, 2006

FINDINGS OF FACT

I **FIND** that on February 17, 2006, in response to an e-mail Phyllis Bruno had sent him, Mierzwa e-mailed her about the condition of a storeroom located off of his classroom in which he claimed dangerous chemical residue was located. His e-mail contained reference to possible violations of OSHA regulations and told her that if proper action was not taken to eliminate the danger, he would "be forced to notify

OSHA" of an occupational safety hazard. It is Bruno's position that in all the time from September 2005 through February 16, 2006, Mierzwa had never mentioned this concern to her. Interestingly, her response to receipt of this e-mail was, in her words, to "take umbrage" to his claim that she knew of the problem. Her responsive e-mail of February 17 expressed her "umbrage" and referred to the "threatening" tone of the letter. Needless to say, the groundwork for an uncomfortable situation had been established by these e-mails. But one must ask whether Bruno's response was in itself so proper. If there was a dangerous condition, it had to be eliminated. If it was not eliminated, then it was certainly a proper matter for OSHA. If Mierzwa sounded "threatening," so what, for if the problem did exist, even if he had not previously mentioned it to her, its elimination should have been the goal. And there was at that time no suggestion that Mierzwa had already bypassed the school's administration and actually taken his complaints to OSHA. At any rate, on February 21, when Bruno approached Mierzwa in the hall, I **FIND** that Ms. Alexander, with whom Mierzwa was casually conversing as students passed by during the change of classes, gave way, so to speak, to Bruno, Mierzwa's supervisor. Clearly, from the reaction that Bruno had to Mierzwa's e-mail "threat," Bruno was not happy with Mierzwa and did not like what he had said or how he had said it. I am persuaded that when she approached and began to talk to him, Bruno was not quiet about it, but instead spoke loudly, as confirmed by the credible testimony of Alexander on this point. Alexander said she left the scene too soon to determine whether Mierzwa was agitated, but it is certainly logical to conclude that he too was upset with Bruno, who had denied that he had told her previously of the condition. He felt that danger lurked in the closet, so to speak, and given Bruno's reaction and how she approached him, I am persuaded that he too was agitated and spoke loudly. This may well have made Bruno uncomfortable, but I cannot totally blame this on Mierzwa alone since I am convinced that she herself came on strongly toward him. As for any students in the area, there is no evidence at all whether any students saw or heard the exchange, and while it is certainly possible that some did, it is entirely speculative whether they did so or paid the least bit of attention to it. Also, while Mierzwa and Bruno both were upset and loud, there is no reason to conclude that any children were endangered by this verbal exchange.

The meeting of February 23 has been described quite differently by the attendees. According to both her testimony and her "Minutes" of the meeting, Bruno characterizes Mierzwa as continually interrupting her, or at least not letting her speak, raising his voice, practically yelling and being agitated, all of this occurring through most of the forty-five minute meeting. Ms. Repetto, the union representative present with Mierzwa, testified that he was "completely calm," interrupting only once. Her recall of the specific details of the discussion at this meeting seems to have been a bit limited. As for Mierzwa, he testified that the tone of the meeting was mostly conversational, no one was loud or "really yelling or out of control." But he acknowledged that the issue was a serious one and he was "quite agitated at that meeting," which seems hardly a description of someone who was likely to be quite as calm and "conversational in tone" as he claimed. He acknowledged that he spoke in a "firm loud clear voice," but denied losing his temper. Finally, Ms. Repetto's e-mail of February 24 is interesting, but its precise meaning, or its implications, if any, as to the nature and tone of the meeting on the 23rd are not that clear. She denied that its reference to thanking Bruno for her "calmness" meant anything in regard to the allegation that Mierzwa's behavior at the meeting was inappropriate.

I am convinced that there was some raising of voices at this meeting, that not everyone spoke in a purely "conversational" manner, that Mierzwa did interrupt or did monopolize the conversation at times, as would be reflective of his admittedly agitated state, that this conduct did not occur for the entire forty-five minutes of the meeting, and that Mierzwa was not, at least for the most part, yelling, but did speak in a serious, deep and to some degree forceful tone. I **FIND** that Bruno was, even prior to the meeting, upset and disturbed by Mierzwa, that she was already feeling very negative towards him, that she did not like that he may have been less than entirely complacent and quiet at the meeting, and that her "minutes," while not to be taken as untruthful, nevertheless play up to some degree the level of Mierzwa's agitation at the meeting.

CONCLUSIONS OF LAW

Not every event in which a teacher expresses himself in a firm, loud and forceful manner rises to the level of inappropriate conduct on that teacher's part. Here, I

CONCLUDE that while the events in the hallway were not of the sort to be encouraged, both Ms. Bruno and Mr. Mierzwa were in part responsible for any overly loud, agitated or disturbing levels of speech. Contrary to the implications of the Charge as stated in the Statement of Tenure Charges, which suggest that the hallway confrontation was solely due to Mierzwa's misconduct, I have determined that Bruno's conduct played a part as well. With due regard to the high standards that teachers must meet, I cannot identify anything about the actions of Mr. Mierzwa either in the hallway or in the meeting that rise to the level of conduct that is so inappropriate as to render him liable for tenure sanctions for what he did. This is not to say he was perfectly correct in tone or level of voice, or in the degree of politeness one would hope to see, but tenure charges are weighty matters that demand that the proofs that conduct was at a level which is sanctionable be clear, even under the preponderance standard that applies to the factual determinations underlying the legal charge. There is no credible evidence here that Mierzwa acted in an untoward manner, lost his temper, demonstrated poor judgment or that he disregarded the welfare of students. As for the alleged "complete disregard for the sincere efforts of his supervisor to address" his complaint, I am afraid that while no doubt Bruno wanted to address it, her own tone and manner in confronting Mierzwa, in taking umbrage and making it so plain that she did, undermines the implication that Mierzwa acted improperly to a wholly innocent supervisor.

As for the meeting on the 23rd, again, there was some raising of voices and some agitation. This meeting was supposed to address what had occurred in regards to the e-mail and the meeting in the hallway. Perhaps given what had already passed between the two, it was inevitable that this would not be an entirely calm and cool discussion. Mierzwa had what he perceived as a very legitimate complaint about working conditions, and he perceived that Bruno was more upset that he had raised the issue and mentioned OSHA than that there might be some danger in the building. This may have contributed to his tone and demeanor. But once again, while this may not have been the calmest of meetings, the conduct at this private meeting of these two employees did not reach a level that involved misconduct, insubordination, or other grounds for a viable tenure charge.

I **CONCLUDE** that the second tenure charge is not proven by a preponderance of the credible evidence.

MAY 4, 2006

FINDINGS OF FACT

There is no question that something untoward occurred in Mr. Mierzwa's classroom and that students, probably more than one in number, were disruptive and engaged in completely inappropriate conduct, throwing something or some things at Mierzwa as he attempted to teach a lesson. His testimony to this effect was credible and supported by statements from students which, while hearsay, serve to buttress his position that some of the students were out of order. No doubt this type of conduct, this exhibition of disrespect for not only Mierzwa, the teacher, but for other students who might actually have been trying to learn something from his lesson, disturbed and frustrated Mierzwa. It bolstered his belief that at least some of the students in his classroom did not want to be there, did not care to learn from him and were there only because they had to be, not because they wanted to be in his drafting class. Mierzwa then proceeded to have one of the students removed from the class and he himself proceeded to the main office. I am persuaded that when he went there he was agitated, upset, frustrated, angry, fed up and in a disagreeable mood. Mr. Blount's recollection of hearing a commotion and then observing Mierzwa screaming and yelling is commensurate with the circumstances that occurred in the classroom and the mental state that I am convinced Mierzwa was in at the time he went to the office. Blount's attempt to calm him was not successful; he continued to let loose his anger and frustration, venting openly to those in the office. Blount did get him to enter the conference room, but here Mierzwa continued to yell, scream and vent. Ultimately, after a few minutes of this, Dr. Lotz was able to get him to calm down. Then, after Mierzwa was exiting the office and saw T.W., one of the offending students, the teacher let loose with comments about the student's conduct and about what he would do about it. This occurred in a public area.

Based upon the facts as described by Mierzwa and in the students' statements, I am convinced that when Mierzwa became aware of the improper things that students were doing, including the throwing of items at him or in his direction, he did make comments to the students as a whole, describing at least those then unidentified "throwers" (my word), as "cowards" and threatening serious consequences such as police contact and failing grades. Everything about Mierzwa's response to the incident as displayed in the office and his general description in testimony, as well as the general run of information in the students' hearsay statements, supports the conclusion that Mierzwa did respond to the incident in this particular manner. Mierzwa's own testimony about the nature of the class and those in it supports the conclusion that when faced with the conduct that occurred, he responded to his students, all of them, guilty of misconduct or not, in an emotional, agitated and verbally threatening manner. And while it is true that Mierzwa's voice can sound "stern and authoritative" (as he described it in reference to his comments to T.W. in the hallway), I am convinced that he was also angry and agitated when he made his remarks to the student.

CONCLUSIONS OF LAW

Mr. Mierzwa was presented with an admittedly challenging and upsetting circumstance. No teacher should ever have to deal with students who throw things at him, but it is also true that reality teaches that any teacher may at times face disruptive students, students who are not happy having to be in their class and who show their disinterest and disrespect by acting out. A teacher must perforce be able to control his temper, weigh his words and actions with extreme care and, to the extent possible, tamp down volatile, unruly situations and restore order to the classroom. If this is not possible, then security may need to be summoned to deal with the situation, but a teacher must not become a focal point of the disruption, must not add to it, must not ramp up the tumult by his actions, must not let his frustration and his private feeling overcome his professional demeanor so that he does not add to the problem. In the circumstances of May 4, 2006, I am constrained to **CONCLUDE** that Mr. Mierzwa did just what he should not have done. His overall conduct that day, both in an out of the classroom, was not professional, was not helpful and was, indeed, contrary to the standard of conduct expected of a teacher.

STANDARDS

Tenured teachers may not be dismissed or reduced in compensation except for "unbecoming conduct, or other just cause." N.J.A.C. 18A:6-10. The Board of Education bears the burden of persuasion in the prosecution of tenure charges certified to the Commissioner, and must establish the grounds for action against the employee's tenure status by a preponderance of the credible evidence. Matter of Polk, 90 N.J. 550 (1982). Unfitness to remain as a teacher may be demonstrated by a single incident if it is sufficiently flagrant, although in less serious matters progressive disciplinary measures may be more appropriate. In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967). "Unbecoming conduct" is broadly defined as "any conduct which adversely affects the morale or efficiency of the [governmental unit] or which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services. Karins v. City of Atlantic City, 152 N.J. 532 (1998), at 554. (internal quotation and citations omitted). In the Matter of Anthony Nicosia, A-5285-04T5 (App. Div. May 17, 2007). The conduct need not be "predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye." In re Emmons, 63 N.J. Super. 136,140 (App. Div. 1960). And because a teacher is both a role model and is entrusted with the care and education of minors, the public is entitled to expect that they will fulfill their roles with a high degree of responsibility.

In Saunders v. New Jersey Dep't of Educ., 91 N.J.A.R.2d (EDU) 12, 14, Administrative Law Judge Mumtaz Bari-Brown wrote:

> The educator imparts on her students not only academic knowledge, but also the development of social and moral values that are expected from parents, law enforcement officials, and the general public. Thus, teachers must be held to a higher standard of conduct than others who do not in their profession have direct contact with molding habits and nurturing young minds. Suffice it to say, children mimic what they see and they learn by example. Clearly, teachers play a direct role in influencing the opinions of their pupils and, indeed, teachers are role models. Teachers often impart the goals set by their students and the direction they take in achieving those goals.

CONCLUSION AND ORDER

The Board of Education has established by a preponderance of the credible evidence that on two different occasions Mr. Mierzwa acted in a manner that is not appropriate for a school teacher and not commensurate with a teacher's function as a role model. On February 20, 2004, he failed to control his temper, created a disturbance, exercised poor judgment and allowed his feelings of frustration and anger to overwhelm his professional demeanor. The same sort of response occurred on May 4, 2006, over two years later. Each time the respondent failed to uphold the standards of the teaching profession and each time his conduct had the potential for showing students that the proper way to respond to disturbing and provocative behavior is to display temper, to raise the level of turmoil, to act as those who have themselves acted improperly have done. This is most assuredly not the teacher's role; not the instructor's task. While no one should minimize the difficulties and provocations that Mr. Mierzwa and other teachers unfortunately face in the schools, and by no means should the sanctioning of a teacher for improper conduct in any way be viewed as condoning the actions of misbehaving students, it is still the case that a teacher must comport himself properly despite the slings and arrows of daily life in the schools. Mr. Mierzwa apparently is unable to harness his temper and control his emotions sufficiently to handle the pressures that he inevitably must face when dealing with students, and the record suggests that he is not fully aware of this as a problem that he needed to deal with. It is not required of a school district that it continue to employ a teacher who fails to serve as the role model that a teacher must be, nor to employ a teacher whose temper is so uncontrolled that he cannot act in a proper and controlled fashion when faced with the strains of modern day school life. His continued employment does not serve the interests of his school, his colleagues, his district and most importantly, his students. I have examined Mr. Mierzwa's Lesson Observation records and Teacher Annual Performance Reports, which were offered by him in regard to any assessment of the sanction to be imposed if it were determined that the Board had proven the existence of tenure violations. On the whole, I see nothing in them to suggest that he was either an outstanding or a less than satisfactory teacher. Given the seriousness of his departures from the conduct appropriate for an educator, I do not find that this

evaluative material mitigates the need for the most serious sanction. Therefore, I **CONCLUDE** that Mr. Mierzwa's tenure must be revoked. It is so **ORDERED**.

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

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

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

May 6, 2008
DATE

JEFF S. MASIN, ALJ

Date Received at Agency:

May 6, 2008

Mailed to Parties:

MAY - 8 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

JOINT EXHIBITS:

J-1 Drawing of foyer

J-2 Drawing of hallway

FOR THE PETITIONER:

P-1 2/20/04 letter from William Westfield to Adam Mierzwa

P-2 2/20/04 letter from Johanna S. Ruberto to Adam Mierzwa

P-3 6/7/04 Confidential Memorandum to William Westfield from Ruberto, Sheard and Hall

P-4 2/22/04 handwritten statement by A.N.

P-5 2/24/04 handwritten statement by Peggy Brown

P-6 Undated statement from Colyer James re 2/20/04 incident

P-7 2/20/04 memo re incident in main office

P-8 7/30/04 letter from Gary Hall to Adam Mierzwa

P-9 E-mail exchange between Adam Mierzwa and Phyllis Bruno, 2/16/06 to 2/17/06

P-10 2/21/06 letter from Phyllis Bruno to Adam Mierzwa

P-11 Minutes of 2/23/06 meeting between Mierzwa, Bruno & Nancy Repetto

P-12 5/4/06 letter from William Westfield to Adam Mierzwa

P-13 5/10/06 letter from Phyllis Bruno to Adam Mierzwa

P-14 5/15/06 handwritten letter from Adam Mierzwa to Phyllis Bruno

P-15 7/13/06 Confidential Memorandum to William Westfield from Lotz, Bruno & Hall

P-16 Student statement of L.W. dated 5/5/06

P-16c Student statement of N.J.

P-16d Student statement of D.R. dated 5/5/06

P-16b Student statement of L.H. dated 5/5/06

P-16e Student statement of J.A.

P-16f Student statement of S.T.

P-16g	Student statement of J.T. dated 5/5/06
P-16h	Student statement of L.W. dated 5/5/06
P-16i	Student statement of J.B. dated 5/5/06
P-16j	Student statement of H.E. dated 5/5/06
P-16k	Student statement of M-C.S. dated 5/5/06
P-16l	Student statement of J.W. dated 5/5/06
P-16m	Student statement of R.T. dated 5/5/06
P-16n	Student statement of R.W.
P-16a	Student statement of M.T.
P-16p	Student statement of L.W. dated 5/5/06
P-16o	Student statement of M.G. dated 5/5/06
P-17	5/4/06 handwritten statement by Colyer James
P-18	Two E-mail messages, including one dated 2/24/06 from Nancy Repetto to Phyllis Bruno
P-19	2/20/04 e-mail from Diane Horace to Johanna Ruberto
P-20	Resume of Adam Mierzwa
P-21	Copy of 6/7/04 memorandum to William Westfield with Mierzwa handwritten notes/comments
P-22	7/23/05 letter from Adam Mierzwa to Gary Hall
P-23	2/21/06 letter from Adam Mierzwa to NJEA (Attn: Henry Klein)
P-24a	Lesson Observation 12/2/04 (3 pages)
P-24b	Lesson Observation 12/3/03 (4 pages)
P-24c	Lesson Observation 2/12/03 (4 pages)
P-24d	Lesson Observation 12/3/02 (4 pages)
P-24e	Lesson Observation 11/4/02 (3 pages)
P-24f	Lesson Observation 1/28/02 (3 pages)
P-24g	Lesson Observation 1/3/02 (2 pages)
P-24h	Lesson Observation 10/25/01 (3 pages)
P-24i	Lesson Observation 3/16/01 (6 pages)
P-24j	Lesson Observation 12/20/00 (9 pages)

P-24k Lesson Observation 10/17/00 (4 pages)

P-24l Lesson Observation 3/28/00 (3 pages)

P-24m Lesson Observation 3/21/00 (3 pages)

P-24n Annual Performance Report (May 2003)

P-24o Annual Performance Report (April 2002)

P-24p Annual Performance Report (April 2001)

P-24q Annual Performance Report (April 2000)

FOR THE RESPONDENT:

R-1 See Exhibit P-9

R-2 See Exhibit P-11

R-3 See Exhibit P17

R-4 7/10/06 e-mail from Bruno to Gary Hall

R-5 Not in evidence

R-6 See Exhibit P-19

R-7 & 8 Not in evidence

R-9 Statement of Diane Horace

R-10 to R-14 Not in evidence

R-15 2005-2006 Teacher Performance Report of Mierzwa

R-16 11/29/05 Lesson Observation Report

R-17 2004-2005 Teacher Performance Report of Mierzwa

R-18 12/2/04 Lesson Observation Report

R-19 Not in evidence

R-20 Documents from Mierzwa's Feb. 2004 hospital visit

R-21 5/1/06 e-mail from Adam Mierzwa to Joseph Diver

284-08

OAL DKT. NO. EDU 4458-08
AGENCY DKT. NO. 118-4/08

REGINA LUGO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF CRIMINAL HISTORY REVIEW, AND EMILY FISHER CHARTER SCHOOL FOR ADVANCED STUDIES, MERCER COUNTY,	:	DECISION ON MOTION FOR EMERGENT RELIEF
RESPONDENTS.	:	

This matter comes before the Commissioner by way of an order from the Office of Administrative Law (OAL) denying petitioner's emergent application for reinstatement to the position that she has held for ten years in the Emily Fisher Charter School for Advanced Studies (the Charter School). As the OAL order sets forth, petitioner has served as a business manager for the Charter School since January 1998, but was disqualified based upon a 1973 conviction for possession of marijuana. Respondent Charter School also moved for a stay of the directive from respondent Department of Education, Office of Criminal History Review (OCHR), removing petitioner from her school employment. The OAL Order implicitly, if not expressly, denies that motion. The Commissioner has reviewed the record, the Order Denying Emergent Relief and the audiotape of the June 3, 2008 hearing in the OAL.[1]

[1] The audiotape provided to the Commissioner contained prolonged periods of severe distortion, particularly after the first half.

In his order, the Administrative Law Judge (ALJ) applied the standards set forth in *N.J.A.C.* 6A:3-1.6(b) – adopted from *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) – to the facts of the present case and found that:

1. Petitioner had not shown that the harm she would suffer without a stay of the disqualification directive would be irreparable; and
2. Petitioner had not demonstrated that she would likely prevail on the merits of her case.

Thus, the ALJ concluded that petitioner was not eligible for injunctive relief pending the final disposition of the merits of this case.

In finding that petitioner had failed to show irreparable harm, the ALJ pointed out that if she were to ultimately prevail on the merits of her case, she could be reinstated to her job and buy back her pension time. Similarly, the ALJ found that the respondent Charter School, which moved for a stay of petitioner's disqualification, might be inconvenienced by losing petitioner's experienced services, but that it could hire a replacement.

The Commissioner concurs with the ALJ that petitioner did not show irreparable harm and consequently did not qualify for emergent relief.[2] The Commissioner also concludes that – notwithstanding the significant inconvenience of hiring a new bookkeeper at the end of a fiscal year and prior to an audit – respondent Charter School did not demonstrate irreparable harm. That portion of the ALJ's order is consequently adopted.

Having so ruled, the Commissioner determines that it is not necessary - for purposes of the decision on petitioner's emergent relief application - to address the ALJ's other

[2] With respect to petitioner's concerns regarding her pension membership, the Commissioner notes that membership in the Public Employees' Retirement System ceases pursuant to *N.J.S.A.* 43:15A-7e only after the discontinuance of service for more than two consecutive years; if petitioner were to prevail on the merits herein, it would be unlikely that her account would be closed so that she would have to buy back her pension time.

conclusion that petitioner is not likely to succeed on the merits. She thus expresses no opinion at this time concerning his conclusions in that regard.

With respect to the plenary hearing to be held at the OAL, the Commissioner notes that delays and irregularities appear to have occurred regarding the resolution of petitioner's status over the last ten years. It is consequently requested that the OAL hearing on the merits of this case be scheduled on an expedited basis.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 6/26/08

Date of Mailing: 6/26/08

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
EMERGENT RELIEF
OAL DKT. NO. EDU 4458-08
AGENCY DKT. NO. 118-4/08

REGINA LUGO,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF CRIMINAL HISTORY REVIEW, AND EMILY FISHER CHARTER SCHOOL FOR ADVANCED STUDIES, MERCER COUNTY,

Respondents.

Regina Lugo, petitioner, pro se

Jennifer L. Campbell, Deputy Attorney General, for respondent Department of Education (Anne Milgram, Attorney General of New Jersey, Attorney)

Gregory E. Tomczak, Esq., for respondent Emily Fisher Charter School for Advanced Studies (Genova, Burns & Vernoia, attorneys)

BEFORE **JOSEPH F. FIDLER**, ALJ:

Petitioner Regina Lugo has been employed as business manager by the Emily Fisher Charter School for Advanced Studies ("EFCS"). She seeks a stay of the determination of the Department of Education's Office of Criminal History Review that she is disqualified from school employment pursuant to N.J.S.A. 18A:6-7.1, based upon

the results of a criminal history background check conducted in 1998. The background check revealed that petitioner was convicted in a New York court in 1973 for possession of marijuana, a controlled dangerous substance. Respondent EFCS has also moved for a stay of the Department's determination that petitioner is disqualified from school employment.

Oral argument on the emergent relief applications was heard on June 3, 2008. N.J.A.C. 6A:3-1.6(b) provides that for emergent relief to be granted, the applicant must satisfy the following standards under Crowe v. DeGioia, 90 N.J. 126 (1982):

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

For purposes of this proceeding, the following facts are undisputed. Petitioner Lugo was hired by EFCS as its business manager in January 1998. On or about June 18, 1998, petitioner completed and mailed to the Department of Education's Office of Criminal History Review an Applicant Authorization and Certification form for the purpose of a criminal history background check as required by law. Petitioner circled two job categories on the authorization: administrator/supervisor and substitute teacher. The certification noted petitioner's understanding that her continued employment would be subject to approval by the Department based upon the results of the criminal history review.

Petitioner's request for the criminal background check was recorded by the Department in July 1998. When the background check was conducted, it revealed petitioner's 1973 New York conviction for possession of a controlled dangerous

substance. She was fined $100. for this offense by a New York municipal court. As a result of the criminal background check, the Department recorded petitioner as being permanently disqualified from school employment as of September 4, 1998. Petitioner did not learn of this determination, however, until she inquired of the Department in December 1999 to ascertain the status of criminal background checks for herself and other EFCS employees. She was told that the results had been sent to the Trenton School District because of the code used on the forms.

Petitioner immediately informed EFCS of her disqualification, and on January 17, 2000, EFCS's Board passed a resolution providing that petitioner would continue in her role as bookkeeper but would not have regular contact with the students. On or about September 1, 2000, EFCS's new administration building became petitioner's workplace. No students are present in the administration building. According to certifications filed on behalf of petitioner and EFCS in this matter, petitioner was informed by the Department in January 2002 that she was not allowed to show that she had been rehabilitated and that her disqualification from employment was final. A gap in the chronology until May 2005 is unexplained, but in that month EFCS placed petitioner in the position of outside consultant. She continued to perform the same duties she did as EFCS's business manager.

On June 30, 2005, EFCS's Executive Director, G. Dallas Dixon, wrote to the Department seeking an opinion regarding whether petitioner should be subject to a second record check upon re-employment because as business manager her position would not involve regular contact with students. He also suggested that petitioner should be allowed to show rehabilitation because her record check authorization was submitted before the statute was amended to eliminate that provision. On July 20, 2005, Carl H. Carabelli of the Criminal History Review Unit responded that petitioner's request for a background check was entered into the database on July 13, 1998, after the amendment to the statute became effective on June 30, 1998. He confirmed that petitioner was disqualified from school employment as of September 4, 1998, based upon a conviction identified as a disqualifier in the statute. Mr. Carabelli advised, "Your administration in consultation with your school attorney will need to determine whether

the position of 'business manager' measure[s] up to secretary or clerical positions mentioned in the statute."

By letter dated November 1, 2005, Mr. Dixon informed the Department that the Board's attorney had definitively recommended petitioner's employment as business manager, by virtue of her title and lack of regular contact with students. He enclosed the legal opinion and the Board's resolution. Mr. Dixon asked that any objection to this course of action be made known within twenty-one days. There was no timely response, but nearly two years later, on November 15, 2007, petitioner received a written notice of disqualification from the Department. She was afforded ten days to challenge the accuracy of the determination and was advised that failure to respond in a timely fashion or to successfully challenge the determination would result in her employer being notified to terminate her employment. Petitioner responded on November 26, 2007, enclosing the previously referenced legal opinion and the Board's resolution.

On April 21, 2008, the Department reiterated its position to EFCS that petitioner is disqualified from employment and that she must be removed immediately. On April 22, 2008, Executive Director Dixon informed petitioner of her termination from EFCS, effective that day. On April 28, 2008, the Board of Trustees of EFCS passed a resolution rescinding petitioner's termination and directed Mr. Dixon to reinstate her without loss of pay, benefits, or service. Counsel for EFCS now states that petitioner was re-terminated on May 27, 2008. Petitioner's Amended Petition of Appeal and Motion for Emergent Relief were filed with the Commissioner of Education on May 28, 2008. EFCS's Motion for a Stay was filed on June 3, 2008.

Petitioner contends that she will suffer irreparable harm if her disqualification is not stayed because she will not be able to continue her enrollment in the New Jersey Public Employees' Retirement System. She states in her moving papers that she will be vested in the pension system as of June 30, 2008, but will lose that interest in the system in addition to losing a job that she has held for ten years. Petitioner also contends that the legal right underlying her claim is settled and that she has made a

preliminary showing of a reasonable probability of ultimate success on the merits. She argues that the statute does not require a background check for her position of business manager. Further, she asserts that because she submitted her application for a criminal history check twelve days before the Act was amended to eliminate the opportunity to show rehabilitation, it is not permissible to apply the amended Act retroactively to her. Petitioner also contends that her disqualification should be barred by principles of equity, noting in particular that she has been allowed to continue her employment and pension system contributions with the Department's knowledge for ten years. It is petitioner's position that she will suffer greater harm than the Department if the requested relief is not granted.

EFCS argues that petitioner has peculiar knowledge of its accounting system and with an end of the fiscal year audit approaching, it will suffer irreparable harm if it is deprived of petitioner's significant skills and services. The charter school also contends that petitioner has a likelihood of prevailing on the merits because her disqualification is contrary to well settled law. This argument is based in part upon the contention that a background check is not required for petitioner's position of business manager; it is not among the positions expressly identified as subject to the requirement and it is not a position that involves any pupil contact. Further, EFCS asserts that the June 30, 1998, amendment to the Act does not apply to petitioner because she submitted her application for a criminal history background check twelve days before the Act was amended. EFCS also contends that petitioner's disqualification should be barred by equitable principles, noting that she had been contributing to the pension system during ten years of employment while the Department failed to have her terminated. According to EFCS, it will suffer greater harm than the Department if petitioner is disqualified from employment pending the outcome of her petition because it will lose an employee who has performed work of superior quality who has advanced the mission of the school. It will incur significant costs to have someone replace petitioner for the fiscal year audit.

The Department opposes the applications for emergent relief. It is the Department's contention that neither movant has shown harm that can properly be

characterized as irreparable. While harm is generally considered irreparable if it cannot be redressed adequately by monetary damages, financial loss is generally insufficient to meet this requirement because it may be redressed by monetary damages.

The Department further contends that a stay should be denied because the movants have failed to demonstrate a likelihood of success on the merits. It is undisputed that petitioner was convicted of possession of a controlled dangerous substance, which is a disqualifying offense under N.J.S.A. 18A:6-7.1. Amendment of the statute eliminated the opportunity to show rehabilitation from such an offense as to background checks performed on or after June 30, 1998. Petitioner submitted her request for a background check just before that date and the check was performed after. Thus, the statutory amendment has not been applied retroactively. Further, the Department contends that the statutory phrase, "regular contact with pupils," should be interpreted broadly to include petitioner's administrative position in order to ensure the maximum degree of protection for children.

I agree that the movants have not demonstrated irreparable harm. EFCS has the option of hiring a replacement to perform petitioner's duties. This may involve expense and inconvenience, but it does not constitute irreparable harm. Petitioner contends that in addition to losing her employment, she will fall just short of vesting her pension. However, she will receive the return of her pension contributions. If she ultimately prevails on the merits, she could be rehired, and could purchase back her service time upon reenrollment in the pension system. Thus, the harm petitioner faces is not without adequate remedy.

I also agree with the Department's contention that petitioner has failed to demonstrate a likelihood of success on the merits. N.J.S.A. 18A:6-7.1 provides in pertinent part:

> A facility, center, school or school system under the supervision of the Department of Education and board of education which cares for, or is involved in the education of children under the age of 18 shall not employ for pay or contract for the paid services of any teaching staff member

> or substitute teacher, teacher aide, child study team member, school physician, school nurse, custodian, school maintenance worker, cafeteria worker, school law enforcement officer, school secretary or clerical worker or any other person serving in a position which involves regular contact with pupils unless the employer has first determined consistent with the requirements and standards of this act, that no criminal history record information exists on file . . . which would disqualify that individual from being employed or utilized in such capacity or position. . . .
>
> An individual . . . shall be permanently disqualified from employment or service under this act if the individual's criminal history record check reveals a record of conviction for any crime of the first or second degree; or
>
> . . .
>
> b. An offense involving the manufacture, transportation, sale, possession, distribution or habitual use of a "controlled dangerous substance" as defined in the "Comprehensive Drug Reform Act of 1987," N.J.S. 2C:35-1 et al. or "drug paraphernalia" as defined pursuant to N.J.S. 2C:36-1 et seq.
>
> . . .
>
> d. For the purposes of this section, a conviction exists if the individual has at any time been convicted under the laws of this State or under any similar statutes of the United States or any other state for a substantially equivalent crime or other offense.
>
> . . .
>
> g. This section shall first apply to criminal history record checks conducted on or after the effective date of P.L. 1998, c. 31 (C.18A:6-7.1c et al.). . . .

Petitioner's criminal history record check was conducted after the effective date of the amendment eliminating the opportunity to show rehabilitation from a disqualifying conviction. Thus, the amendment has not been applied retroactively to petitioner. Further, the Commissioner of Education has very recently determined that the phrase "regular contact with pupils" must be interpreted broadly to ensure the maximum degree of protection for children. Chavis v. New Jersey Department of Education, Office of Criminal History Review, OAL Dkt. No. EDU 8547-07, Agency Dkt. No. 248-9/07, Final Agency Decision dated May 30, 2008. Much as petitioner had contended here, Chavis contended that her administrative position, which was not among the expressly named positions in the statute, did not involve regular contact with pupils and that her office was located in a separate administrative building. The Commissioner determined that

there was no basis for concluding that the criminal history disqualification act did not apply, emphasizing that "the Legislature plainly intended its prohibition against school employment by persons convicted of a disqualifying offense to apply to any person whose position or credentialing provides potential access to the district's schools, and hence, regular opportunity for contact with students." Id. at 1-2.

Based upon the foregoing discussion, I **CONCLUDE** that neither movant has demonstrated that irreparable harm will be suffered if the requested relief is not granted. I further **CONCLUDE** that petitioner and EFCS have failed to demonstrate a likelihood of success on the merits of petitioner's underlying claim. As the movants must show that these standards have been met in order to demonstrate entitlement to the emergent relief that they seek, their motions for interim relief or a stay are **DENIED**. Petitioner's amended petition of appeal to challenge her disqualification may proceed to plenary resolution.

I so **ORDER**.

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

June 5, 2008
DATE

Joseph F. Fidler
JOSEPH F. FIDLER, ALJ

285-08

AGENCY DKT. NO. 78-3/08

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
D.K. on behalf of minor children K.T. and K.A.T.,	:	DECISION
RESPONDENT.	:	

For Petitioner, Destribats, Campbell, DeSantis, Magee & Staub

K. T., *Pro Se*

This matter was opened before the Commissioner of Education on March 17, 2008, by way of a verified petition against respondent, the parent of two students who formerly attended school in petitioner's district. Petitioner alleged that both students had been ineligible to attend school in its district for the entire 2006-2007 school year and for part of the 2007-2008 school year. More specifically, K.T. was alleged to have attended petitioner's schools without eligibility during the 2006-2007 school year and from September 5, 2007 to January 10, 2008. K.A.T. was alleged to have attended without eligibility during the 2006-2007 school year and from September 5, 2007 to February 27, 2008. Petitioner demanded tuition reimbursement for those periods of time.

By notice dated March 18, 2008, the Bureau of Controversies and Disputes (the Bureau) directed respondent, via regular mail, to file an answer to the petition. On April 24, 2008, the Bureau directed respondent for a second time, via both certified and regular mail, to file an answer to the petition. The notice sent by certified mail was returned with signature, and the notice sent by regular mail was not returned.

The first communication from the Bureau clearly provided respondent with notice that, pursuant to *N.J.A.C.* 6A:3-1.5, an individual against whom a petition is filed shall have 20 days from receipt of the petition to file an answer. The second notice advised that if respondent did not file an answer within ten days of her receipt of same, each count of the petition would be deemed to have been admitted and the Commissioner might decide the matter on a summary basis. The Bureau has received neither an answer to the petition from the respondent nor from any attorney purporting to represent respondent.

Petitioner's Director of Secondary Education has certified that $29,303.08 is the amount of tuition due for the amount of time that respondent's children improperly attended school in petitioner's district.

The Commissioner concludes that the allegations – which respondent has chosen not to deny – may be deemed admitted, pursuant to *N.J.A.C.* 6A:3-1.5(e), and are sufficient to justify an order that respondent pay the tuition.

IT IS THEREFORE ORDERED that summary decision shall be granted to the petitioner, and that respondent shall pay tuition in the amount of $29,303.08 for the period of time in which her children were ineligible for a free education in the Hamilton School District.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 6/25/08

Date of Mailing: 6/26/08

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

286-08

286-08

OAL DKT. NO. EDU 2979-08
AGENCY DKT. NO. 121-4/08

S.T. on behalf of minor child J.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSBOROUGH, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. The Initial Decision recites that the settlement reached by the parties resolves both petitioner's application for emergent relief and the underlying petition.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/26/08

Date of Mailing: 6/26/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2979-08

AGENCY DKT. NO. 121-4/08

S.T. O/B/O OF MINOR CHILD J.T.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSBOROUGH, SOMERSET COUNTY,

Respondent.

Daniel J. Baurkot, Esq., for petitioner (Princzewski & Baurkot, attorneys)

Brent R. Pohlman, Esq., for respondent (Fogarty and Hara, attorneys)

Record Closed: May 7, 2008 Decided: May 8, 2008

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

This matter involves the petitioner's request for emergency relief regarding his daughter's suspension from school. The matter was scheduled for oral argument on May 7, 2008, before me. The parties engaged in settlement discussions with me and resolved the emergent relief request, as well as the necessity for a plenary hearing in this matter.

I have reviewed the record and the terms of settlement (J-1) and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures. Additionally, respondent's counsel advised, on the record, he is authorized to enter into this agreement on behalf of the board of education.

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

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

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

May 8, 2008

DATE

ANA C. VISCOMI, ALJ

Date Received at Agency:

MAY 15 2008

DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

/lam

Settlement Agreement

J.T. by her Guardians ad Litem ST and B.T. v. Hillsborough Township Board of Education

OAL Docket No. EDU 2978-08

Whereas, the parties in the above referenced matter [redacted] appeared before the Honorable Ana C. Viscomi A.L.J. for an Emergent Relief hearing on May 7, 2008, and

Whereas, prior to commencing the hearing the parties engaged in settlement discussions.; and

Whereas, the parties, with the assistance of Judge Viscomi were able to reach a mutually agreeable settlement; and

Whereas, the parties agree to settle the above referenced matter as per the terms set forth below:

1) J.T. shall serve three (3) days of afterschool detention.

2) There shall be no record of any discipline regarding the April 7, 2008 incident in any of J.T.'s student records.

J-1

3) This settlement shall constitute a full + complete resolution of all issues regarding & arising from the April 7, 2008 incident.

4) Neither party shall be considered a prevailing party.

5) Any documentation of the April 7, 2008 incident that is currently in J.T's student records shall be expunged upon the completion of the three day detention.

Hillsborough Board of Education
Brent R Pohlmen Esq.
Board Attorney

S.F. o/b/o J.T

Date May 7, 2008

287-08

OAL DKT. NO EDU 12531-07
(EDU 3969-07 ON REMAND)
AGENCY DKT. NO. 93-3/07

IN THE MATTER OF THE TENURE	:	
HEARING OF ELBERT WINSTON,	:	
SCHOOL DISTRICT OF THE CITY	:	COMMISSIONER OF EDUCATION
OF ELIZABETH, UNION COUNTY.	:	DECISION
	:	

The record of this remanded matter and the Initial Decision of the Office of Administrative Law (OAL) – wherein the Administrative Law Judge (ALJ) recommends dismissal of the instant tenure charges based on the District's purported inability to proceed – have been reviewed. The parties filed no exceptions to the Initial Decision.

Initially, it must be remembered that the tenure charges certified by the District against respondent are of a very serious nature; specifically, two counts of unbecoming conduct alleging "violent physical contact" made upon minor students on two separate occasions, *i.e.*, student T.G. in May 2004 and student I.S. in May 2005. As such, the Commissioner cannot countenance the dismissal of these charges due to the District's claim of an inability to proceed based solely on its reluctance to assume possible transportation and hotel room costs for an out-of-state witness and what amounts to 3rd party hearsay with respect to the availability of another witness. Particularly troubling in this regard is the District's unequivocal acceptance of said 3rd party assertions rather than utilizing the subpoena power available to it to secure the attendance of its necessary witness. Under these circumstances, the Commissioner finds no

justification for dismissal of these charges which necessarily contemplate respondent's return to the classroom absent an adjudication of the formidable charges against him.[1]

Accordingly, the recommended decision of the OAL is rejected. The District is hereby directed to exhaust all possible resources available to it to fulfill its obligation of adjudicating the certified charges against respondent. Remanded to OAL.

IT IS SO ORDERED.[2]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 6/25/08
Date of Mailing: 6/26/08

[1] This said, it is noted – by way of background – that this matter initially came before the Commissioner for decision on October 31, 2007 by way of an Initial Decision recommending the Commissioner's adoption of a settlement agreement – freely and voluntarily entered into by the parties and approved by the Elizabeth Board of Education. Upon her review, such agreement appeared to confer upon respondent what the Commissioner viewed as a wide breadth of generous benefits – including a paid administrative leave up to the time of his negotiated resignation from the District on November 1, 2009 – some two years hence. In that neither the Initial Decision, the parties' agreement nor the record provided any more than a perfunctory explanation as to how this agreement satisfied the requisite standard for settlement of tenure matters as set forth in *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board of Education April 6, 1983, 1990 *S.L.D.* 842, and *N.J.A.C.* 6A:3-5.6 – most specifically, how it was justifiably consistent with the public interest – the Commissioner was compelled, by decision dated December 14, 2007, to reject the parties' agreement and return this matter to the OAL for further explication and/or modification of the agreement or – in the alternative – the Commissioner directed that the matter proceed to hearing.

Upon receipt of the record of this remanded matter from the OAL in mid-April 2008, it was noted that such record had been significantly supplemented. More particularly, the record now contained a transcript of a hearing conducted by the ALJ with counsel for the parties on October 25, 2007 dealing specifically with the issue of how and why the parties' proposed settlement agreement was consistent with public policy. (The cover page of this transcript contained two date stamps – the first of December 18, 2007 was unidentified as to the stamping entity – the second stamp indicates receipt of the document at the State of N.J. Office of Administrative Law on January 11, 2008). Testimony adduced from counsel and Harold Kennedy, Jr., the District's Business Administrator/Board Secretary, in this 48 page document provided full explication of the concerns which had necessitated the Commissioner's December 14, 2007 rejection of the parties' agreement. (Specifically, Mr. Kennedy testified that, but for this settlement agreement, upon his separation from the District respondent would be entitled to full payment for 240 accumulated leave days.) This being the case, now assured that the parties' proposed settlement is consistent with the established standards governing settlement of tenure matters, *Cardonick, supra*, the Commissioner advises the parties that, should it be resubmitted for review, the settlement agreement is approvable.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 12531-07
AGENCY DKT. NO. 93-3/07

IN THE MATTER OF THE TENURE HEARING OF ELBERT WINSTON, SCHOOL DISTRICT OF THE CITY OF ELIZABETH, UNION COUNTY

Karen A. Murray, Esq. and **Kirk Nelson**, Esq., for petitioner (The Murray Law Firm, LLC, attorneys)

Sheldon H. Pincus, Esq., for respondent (Bucceri and Pincus, attorneys)

Record Closed: April 7, 2008 Decided: April 14, 2008

BEFORE **J. HOWARD SOLOMON,** ALJ:

STATEMENT OF CASE

The School District of the City of Elizabeth, Union County (District), brought charges of unbecoming conduct against respondent, Elbert Winston, a certificated and tenured employee holding the position of teacher in the District for allegedly committing violent physical contact upon T.G., a minor student, on or about May 12, 2004 and also upon I.S., a minor student, on or about May 26, 2005. The District sought his removal.

PROCEDURAL DISCUSSION

On March 30, 2007, the District filed the following documents with the Department of Education (Department): a Certificate of Determination for filing of tenure charges, the District's sworn tenure charges, a sworn Statement of Evidence, and proof of service, all in compliance with N.J.S.A. 18A:6-9,6-11 and N.J.A.C. 6:24-5.2. On April 13, 2007, respondent's answer was filed. The Department then transmitted this matter to the Office of Administrative Law (AOL) where it was received on April 23, 2007 (under OAL Docket No. EDU 03969-07) for hearing as a contested case pursuant to N.J.S.A. 18A:6-11 and N.J.S.A. 52:14B-2(b).

Concomitant with this matter was an action brought by the Department of Children and Families (DCF)/Institutional Abuse Investigation Unit, under OAL Docket No. HDY 05208-07/Agency Docket. No. AHU#07-154, for the allegations involving T.G. on May 12, 2004. The DCF was not involved with the matter concerning I.S. Respondent denied the allegations and his appeal was forwarded to the OAL. By Order of the undersigned dated May 18, 2007, the two matters were consolidated for hearing with the DCF having the predominant interest in the conduct and outcome of this consolidated proceeding.

The hearing was assigned various dates, commencing on August 10, 2007.

By letter dated July 31, 2007, Keri Ann Eglentowicz, Deputy Attorney General, in behalf of the DCF, notified all parties and the undersigned that the DCF had modified its finding of substantiated abuse against respondent to "not substantiated" and removed his name from its Central Registry. Accordingly, the DCF withdrew from these proceedings.

On or about the date the hearing was to commence on the tenure charges, the parties advised that they were near a settlement and needed to complete the agreement,

requesting that on September 5, 2007, one of the hearing dates, the agreement be placed on the record.

On September 5, 2007, a hearing took place on the issue of whether the proposed settlement agreement should be accepted. Counsel for both parties set forth on the record their reasons why the settlement would be in the public interest in accordance with In Re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board of Education April 6, 1983, 1990 S.L.D. 842, 846, and N.J.A.C. 6A:3-5.6. Respondent testified that he understood and voluntarily agreed to the terms of the settlement. On September 20, 2007, the Elizabeth Board of Education (Board) approved the settlement, as evidenced by its resolution which was received at the OAL on September 27, 2007.

Upon additional review of the proposed settlement agreement in preparation of the Initial Decision, the undersigned had reservations about the agreement being consistent with the public interest, and accordingly notified both counsel of its intent to disapprove the agreement. At the request of the parties, the undersigned scheduled oral argument for October 25, 2007 on the issue of the public interest. On that date, the District produced Harold Kennedy, Jr., the Business Administrator-Secretary to the Board. As represented by counsel for respondent and counsel for the District, and as confirmed by the sworn testimony of Kennedy, the respondent had accrued more than 240 days of leave time over a twenty-three year teaching career, and agreed to waive payment. Accordingly, after hearing these representations and the testimony of Mr. Kennedy, the undersigned rendered its Initial Decision approving the settlement.

By decision of the Commissioner dated December 14, 2007, the proposed settlement was rejected on the grounds that it did not meet the established standard for settlement of tenure matters as set forth in In Re Cardonick, supra. The Commissioner, therefore, remanded this matter back to the OAL "for further expansion of the record and revision of the Settlement Agreement, consistent with concerns set forth [in her decision]. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing on the merits." (See decision of Commissioner).

Upon receipt of the Commissioner's decision, the undersigned, on January 3, 2008, held a telephone conference with counsel for both parties and scheduled peremptory hearing dates for April 7, 8, 9, 11 and, 14, 2008, which was confirmed by letter of the undersigned dated January 7, 2008.[1]

On Friday, April 4, 2008, the undersigned received a telephone conference call from Ms. Murray and her adversary wherein Ms. Murray requested an adjournment of the peremptory hearing scheduled to start on April 7 because one of her witnesses, T.G. had, since the original hearing date in August 2007, moved to the State of Georgia. She advised that there were no authorized District funds to provide transportation for T.G., and presumably a relative to accompany her, back to New Jersey, and provide a hotel room, if needed. Accordingly, she wanted to request these funds from the Commissioner, or in the alternative, request that the Commissioner revisit the settlement agreement. She stated, however, that the other student, I.S., was available to testify. Her request for an adjournment was denied since this hearing was made peremptory in January.

On April 7, 2008, Ms. Murray, along with Kirk Nelson, Esq., general counsel to the Elizabeth Board of Education, and counsel for respondent appeared before the undersigned. During a brief meeting in chambers, Ms. Murray advised that I.S. and his mother were attending a local funeral scheduled for 10 a.m. that morning. Accordingly, the undersigned rescheduled the matter for 1:30 p.m.

Prior to 1:30 p.m., Mr. Nelson, respondent and his attorney returned to the OAL. Ms. Murray did not appear. Mr. Nelson advised the undersigned that I.S. and his mother refused to appear. The matter was then placed on the record where Mr. Nelson represented the following: on April 3, 2008, both he and Ms. Murray were told that I.S. would appear at the hearing. Mr. Nelson followed up with a telephone call on Friday, April 4, 2008 and spoke with the mother of I.S. giving her instructions to meet at the Office of the Elizabeth Board of Education at 8:00 a.m. on April 7 where they would be

[1]Both counsel requested later dates since they were both involved in an ongoing and protracted tenure hearing before the Honorable Ken Springer, ALAJ and because of other schedule conflicts.

transported to the OAL. On Monday, April 7, I.S. and his mother failed to appear. Mr. Nelson called the mother's cell telephone number, but she did not answer. He left a message for her to return his call. When he did not hear from her, Mr. Nelson called the grandmother's home telephone number and was told that I.S.' mother did receive his message, but that both she and I.S. were planning to attend a funeral.

Mr. Nelson further related that after leaving the OAL, expecting to return at 1:30 p.m., Ms. Murray, in his presence, telephoned I.S.' mother at her residence since neither she nor Mr. Nelson had had any response from her. The grandfather answered and told her to call back in a few minutes, which she did. She was then told by the grandfather that I.S. and his mother had no intention of ever appearing at the hearing. Since it was Mr. Nelson's clear understanding that I.S. would not appear at all in this matter, and since the District was unable to produce either eyewitness, Mr. Nelson represented that the District was unable to proceed and dismissed the tenure charges, subject to the Commissioner's approval.

ORDER

Based upon the foregoing representations of counsel and of the District's inability to proceed on the peremptory scheduled date of this matter, it is **ORDERED** that the within matter be and is hereby **DISMISSED** and that respondent be reinstated to his position and be given back pay and other benefits to which he is entitled, less any compensation earned from the date of his last salary payment from District.

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

April 14, 2008

DATE

J. HOWARD SOLOMON, ALJ

Date Received at Agency: 4-16-08

Mailed to Parties:

APR 16 2008

DATE

OFFICE OF ADMINISTRATIVE LAW

lr

SETTLEMENT AGREEMENT

RECEIVED
STATE OF N.J.
OFFICE OF ADM. LAW

This Agreement is made this 5th day of September, 2007, by and between Elbert Winston (hereinafter "Winston"), who resides at 930 Prospect Avenue, Plainfield, New Jersey 07060, and the Board of Education, with its principal offices located at 500 North Broad Street, Elizabeth, New Jersey 07207 (hereinafter the "Board").

WITNESSETH:

WHEREAS, Winston is currently employed as a tenured teaching staff member; and,

WHEREAS, Wurster and the Board are parties to two (2) proceedings that were consolidated for hearings and which bear captions and docket numbers as follows: (a) In the Matter of the Tenure Hearing of Elbert Winston, School District of Elizabeth, Agency Dkt. No. 93-3/07, O.A.L. Dkt. No. EDU 03969-07; and DCF v E.W., Agency Dkt. No. AHU #07-154, O.A.L. Dkt. No. HDY 05208-07,

WHEREAS, on July 31, 2007, The Department of Children and Families (DCF) determined to modify its finding of substantiated abused against Winston to "not substantiated" thereby mooting the appeal in DCF v E.W., supra,

WHEREAS in light of the aforesaid determination by DCF, and in view of the costs of litigation for an Abbott District, the Board is agreeable to the dismissal of the tenure charges, subject to the conditions set forth in this Agreement;

WHEREAS, both the Board and Winston desire to enter into a Settlement Agreement stipulating the terms of his separation from all employment with the Board, together with the release of all his tenure and seniority rights as an employee of the Board, as well as providing for the exchange of General Releases of any and all claims

which the parties may have against the other arising from Winston's employment or otherwise;

WHEREAS, the terms of settlement take into account the public interest, as well as the fact that the litigation of these two (2) actions, and anticipated appeals thereafter, have caused and will continue to cause disruption to the educational program in the Elizabeth School District due to the absence of administrators, teachers and students who have or will hereafter have to testify at hearings, and that the Board and Winston have incurred and will continue to incur substantial financial costs to continue the litigation;

NOW, THEREFORE, in consideration of the mutual promises of the parties and in exchange for the consideration more particularly noted below, it is hereby agreed:

1. The Board agrees that the Tenure Charges in this matter bearing Agency Dkt. No. 93-3/07, O.A.L. Dkt. No. EDU 03969-07 shall be dismissed, with prejudice, subject to the approval of this Agreement by the Office of Administrative Law and the Commissioner of Education.

2. The Board shall pay to Winston the amount of salary that it withheld from Winston pursuant to N.J.S.A. 18A: 6-14, which sum is stipulated to be Twenty Four Thousand, Four Hundred Forty Seven Dollars and Thirty Six Cents ($24,447.36). The aforesaid amount shall be paid net of normal payroll deductions for State and Federal income taxes and pension contribution. Additionally, this sum of $24,447.36 shall be paid to Winston within thirty (30) days of the approval of this Agreement by the Office of Administrative Law and the New Jersey Commissioner of Education.

3. Winston agrees to sign an irrevocable letter of resignation from all employment with the Board effective at the close of business on November 1, 2009. The resignation letter shall be in the form annexed hereto as Exhibit A and shall be expressly conditioned upon the Board's compliance with this Separation of Employment Agreement. The letter of resignation shall be null and void if the terms of the Separation of Employment Agreement are not met. The resignation is otherwise irrevocable. The Board waives all statutory or contractual claims for notification of Winston's resignation.

4. The Board will publicly approve and accept the resignation of Winston at its next regularly scheduled meeting, effective the close of business on November 1, 2009.

5. The Board shall approve the continuation of an administrative leave for Winston through and until the close of business on November 1, 2009.

6. The Board shall restore the salary, adjustment and longevity increment(s) that it withheld from Winston for the 2006-2007 school year, which sum is stipulated to be One Thousand Eight Hundred Fifty Four Dollars ($ 1854.00). The sum of $1854.00 shall be paid to Winston as and for the increment amount that was to have been paid to him in the 2006-2007 school year. The aforesaid amount shall be paid net of normal payroll deductions for State and Federal income taxes and pension contribution. Additionally, this sum of $ 1854.00 shall be paid to Winston within thirty (30) days of the approval of this Agreement by the New Jersey Commissioner of Education. The Board shall further undertake to amend its payroll records and pension reports to the N.J. Division of Pensions so that Winston's salary for the 2006-2007 school year is established to be Seventy Three Thousand Eight Dollars ($73,008.00), plus longevity in the amount of Seven Hundred Fifty Dollars ($750.00) for a total salary of Seventy Three Thousand Seven Hundred Fifty Eight Dollars ($73,758.00).

7. The Board shall restore the salary, adjustment and longevity increment(s) that it withheld from Winston for the 2007-2008 school year, which sum is stipulated to

be One Thousand Six Hundred Dollars ($1600.00). Subject to the terms of Paragraph 8, the Board shall further undertake to amend its payroll records and pension reports to the N.J. Division of Pensions so that Winston's salary for the 2007-2008 school year is established to be Seventy Four Thousand Six Hundred Eight Dollars ($74,608.00), plus longevity in the amount of Seven Hundred Fifty Dollar ($750.00) for a total salary of Seventy Five Thousand, Three Hundred Fifty Eight Dollars ($75,358.00).

8. Upon Winston providing the Board with proof of the satisfactory attainment of a Masters Degree, the Board agrees that he shall be granted lateral movement on the salary guide and that his 2007-2008 salary shall be adjusted to Seventy Eight Thousand, Eight Hundred Eighty Four Dollars ($78,884.00), plus longevity in the amount of Seven Hundred Fifty Dollars ($750.00) for a total salary of Seventy Nine Thousand Six Hundred Thirty Four Dollars ($79,634.00). The Board shall then further undertake to amend its payroll records and pension reports to the N.J. Division of Pensions so that Winston's salary for the 2007-2008 school year is established to be Seventy Eight Thousand, Eight Hundred Eighty Four Dollars ($78,884.00), plus longevity in the amount of Seven Hundred Fifty Dollars ($750.00) for a total salary of Seventy Nine Thousand Six Hundred Thirty Four Dollars ($79,634.00).

9. Subject to effectuation of the adjustments to salary set forth in Paragraphs 6-8, and for the period through and until November 1, 2009, Winston shall be paid at the applicable salaries set forth in the collective negotiations agreement with the Elizabeth Education Association for the 2007-2008, 2008-2009 and 2009-2010 school years, inclusive of all salary, adjustment and longevity increments. The parties stipulate and agree that Winston's salary shall be $ 79,634.00 for the 2007-2008 school year, $81,434.00 for the 2008-2009 school year and the salary to be determined through collective negotiations at the MA Max step of the applicable salary guide for the 2009-2010 school year. Such salary shall be paid to Winston in the normal course of business, net of normal payroll deductions for State and Federal income taxes and pension contribution.

10. Through and until November 1 2009, the Board shall continue to provide Winston all of the insurance coverage(s) that it is presently providing to Winston under the plan(s) applicable to teaching staff members employed by the Board.

11. Upon the termination of Winston's employment on November 1, 2009 and consistent with his rights under the Consolidated Omnibus Reconciliation Act of 1986 ("COBRA"), Winston shall be able to purchase, at his own cost and expense, the insurance coverage presently provided to other teaching staff members employed by the Board.

12. In the event that Winston is unable to find alternative employment, the Board agrees that it will not contest, or oppose any claim for unemployment compensation that may be filed by Winston after November 1, 2009.

13. Winston's entry into this Settlement Agreement shall not constitute nor shall it be interpreted as an admission of wrongdoing or guilt, or liability in any manner on his part.

14. Winston waives any and all rights to tenure, seniority, recall or reinstatement as of the effective date of his resignation. It is understood and agreed that Winston shall not, as of the effective date of his resignation, receive any other compensation or benefits or emoluments of employment except as otherwise provided in this Settlement Agreement.

15. In consideration of the above, Winston agrees for himself and his heirs, successors and assigns, to release irrevocably and unconditionally, and discharges the Board, its members past, present and future; welfare and/or pension plans; trustees, officers, supervisors, employees, students, and agents of the Board ("Releasees"), past, present and future; of and from any debts, obligations, claims, demands, judgments, claims for attorneys' fees, claims seeking employment or reemployment with the Board, claims for contributions and/or in tort, contract, by statute, or on any other basis, whether

in law or in equity, which he, or his estate, might otherwise have or have had. This release includes but is not limited to claims under Title VII of the Civil Rights Act of 1964, The Civil Rights Act of 1866, The Civil Rights Act of 1991, The Age Discrimination in Employment Act of 1967, The Americans With Disabilities Act of 1990, The Employment Retirement Income Security Act of 1974, The Vietnam Era Veterans Readjustment Assistance Act of 1974, The New Jersey Law Against Discrimination, The New Jersey Conscientious Employee Protection Act, the New Jersey Employer-Employee Relations Act, and all Federal, State, and Local law claims, whether statutory or common law, for defamation, libel, tortious interference, wrongful discharge, harassment, or for discrimination on the basis of race, color, sex, religion, national origin, age, handicap or disability, sexual orientation, veteran's status, or marital status or on any other prohibited basis, or any other claim arising out of or related to his employment or his termination from employment with the Board.

Notwithstanding the signing of the release by Winston, the Board shall remain obligated to indemnify Winston against claims of third parties arising on or prior to November 1, 2009 pursuant to N.J.S.A. 18A: 16-6 and 6.1.

16. The Board, its members, agents, servants and employees ("Releasees"), agree to release irrevocably and unconditionally, and discharge Winston from any and all claims which it may have against Winston. It specifically releases Winston from any and all claims arising out of the employment relationship, including but not limited to any cause of action pursuable before any state or federal court or agency (including the filing and/or certification of tenure charges under the N.J. Tenure Employees' Hearing Law), or any other federal or state statutory provision, administrative regulation, collective negotiations agreement or other act that has the force and effect of law; as well as any claims for counsel fees, or any statutory or common law claim or cause of action for defamation, libel, tortious interference, breach of duty or loyalty, harassment, or for discrimination on the basis of race, color, sex, religion, national origin, age, handicap or disability, sexual orientation, veteran's status, or marital status or on any other prohibited basis.

17. The parties agree that, subsequent to the date of this Agreement, any inquiries from potential employers regarding Winston shall be channeled solely to the then current Assistant Superintendent for Human Resources. Responses to such inquiries shall be limited to providing the dates of Winston's employment, his position, his salary, and that he left the district voluntarily to pursue other career opportunities. Nothing in this Settlement Agreement shall prohibit Winston from seeking other employment after the date of this Agreement.

18. The Board and Winston agree that Winston shall be provided a mutually convenient opportunity to obtain whatever personal belongings of his remain within the school district, as well as to return any district materials that Winston has in his possession.

19. The parties acknowledge that this Settlement Agreement shall be submitted to the Office of Administrative Law and to the Commissioner of Education for review and approval, and that the terms of the Agreement are expressly made subject to and contingent upon such review and approval by each of said agencies. In the event that either the Office of Administrative Law and/or Commissioner of Education disapproves and/or rejects any of the terms contained herein, this Settlement Agreement shall be null and void and shall not be evidential or used by any party in any proceeding involving any party to this Settlement Agreement. In addition, each of the parties shall return to the same position(s) which they held prior to this Settlement Agreement, and all rights are reserved in that event.

20. Winston acknowledges that, notwithstanding the parties entry into this Settlement Agreement, he has been made aware that the Commissioner of Education may nonetheless refer the matter to the New Jersey State Board of Examiners for such action regarding his teaching certificates as it deems appropriate.

21. In the event that the State Board of Examiners determines to initiate proceedings that results in a final determination for the suspension or revocation of Winston's teaching certificates, the Board agrees that it will nonetheless remain obligated to pay to Winston the full amount of salary, benefits and/or other consideration required under this Settlement Agreement. Any salary or benefits that would have been due to be paid to Winston between the effective date of any such final decision suspending or revoking Winston's teaching certificates and the effective date of Winston's resignation shall thereafter be paid to Winston by the Board in lump sum.

22. Nothing in this Settlement Agreement or the Releases set forth above shall preclude either party from bringing an action to enforce performance of any term of this Agreement should there be a default in performance.

23. The parties expressly agree that they shall act in good faith to ensure implementation of this Settlement Agreement. The parties mutually agree to refrain from retaliation, in any manner, against the other party (or, their families, members, agents and employees). The parties further mutually agree not to make any derogatory comments, statements or misrepresentations about the other (or, their families, members, agents and employees).

24. The parties acknowledge that each has had the opportunity to consult with an attorney or a representative of their own choosing prior to signing this Settlement Agreement and that each signs this Settlement Agreement freely and voluntarily and without coercion or duress. The parties further acknowledge that they fully understand the duties and obligations enumerated herein and has been informed of their legal rights and obligations.

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

26. The undersigned representatives of the Board hereby acknowledge that they have been duly authorized by the Board to sign this Settlement Agreement and bind the Board to its terms. Upon ratification of this Agreement, the Board authorizes its President and Secretary to execute the same on its behalf.

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

28. This Separation of Employment Agreement incorporates and settles all claims and disputes which may exist between Winston and the Board arising from his employment or otherwise. Further, this Settlement Agreement incorporates the complete financial obligation of the Board with regard to its employment relationship with Winston and Winston's separation from employment.

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

Witness

Elbert Winston

Dated: 9/5/07

Board Secretary/Business Administrator

Board President

Dated:

Exhibit A

ELBERT WINSTON

930 Prospect Avenue
Plainfield, New Jersey 07060

September 5, 2007

Armando Da Silva, Board President
Elizabeth Board of Education
500 North Broad Street
Elizabeth, New Jersey 07207

Re: Letter of Resignation

Dear Mr. DaSilva :

Pursuant to the terms of the Settlement Agreement between the Elizabeth Board of Education and myself, I hereby submit my irrevocable resignation from the position of Teacher, effective the close of business on November 1, 2009. This resignation is expressly conditioned upon the Board's compliance with the terms of the parties' Settlement Agreement and the general releases contained therein; and, is of no force and effect, even if accepted, unless said Settlement Agreement and the general releases contained therein which I have executed are fully performed by the Board.

Sincerely,

Elbert Winston

Elbert Winston

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Y

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2007 SEP 27 P 4: 17

BOARD OF EDUCATION

RESOLUTION

WHEREAS, the counsel for the Elizabeth Board of Education and Elbert Winston have negotiated a resolution of the following case: In the Matter of the Tenure Hearing of Elbert Winston, School District of the City of Elizabeth, Agency Dkt. No. 93-3/07, OAL Dkt. No. EDU 03969-07, and DCF v. E.W., Agency Dkt. No. AHU 07-154, OAL Dkt. No. HDY 05208-07.

WHEREAS, in the interest of cost efficiency and judicial economy, and in lieu of a hearing, the parties have agreed to resolve the above-referenced case, with prejudice;

NOW, THEREFORE, BE IT RESOLVED, that the Board hereby accepts the Confidential Settlement Agreement on file with the School Business Administrator/Board Secretary.

Elizabeth, New Jersey

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD SEPTEMBER 20, 2007

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary

07-65

289-08

OAL DKT. NO. EDU 12232-07
AGENCY DKT. NO. 348-11/07

IN THE MATTER OF THE TENURE HEARING OF JOSHUA L. DAVIS, III, STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

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

Upon review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case, with the following observation. Sections 1, 2, and 6 of the Stipulation make reference to a May 15, 2008 resignation date and related actions that fell before the settlement was considered by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves same.

Accordingly, the Commissioner adopts the Initial Decision as the final decision in this case, providing that the parties have already implemented the settlement terms, or have agreed upon a mutually satisfactory alternate date for the effectuation of same. Assuming the foregoing, the matter is hereby dismissed, subject to compliance with the terms of the settlement.*

IT IS SO ORDERED.

Lucille E. Davy
COMMISSIONER OF EDUCATION

Date of Decision: 6/27/08
Date of Mailing: 6/27/08

* This matter shall be transmitted to the State Board of Examiners for action against respondent's certificate as it deems appropriate.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 12232-07
AGENCY DKT. NO. 348-11/07

I/M/O THE TENURE HEARING OF
JOSHUA L. DAVIS, III,
STATE OPERATED SCHOOL DISTRICT
OF THE CITY OF NEWARK,

Christopher Roberts, Esq., for petitioner Joshua L. Davis, III

Arsen Zartarian, Esq., for respondent State Operated School District of the City of Newark (Office of the General Counsel, attorney)

Record Closed: May 5, 2008 Decided: May 12, 2008

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

This matter was transmitted to the Office of Administrative Law on November 27, 2007, for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

A hearing was scheduled for March 12, 2008. Prior to the date of hearing, the parties agreed to settle the matter. The attached Settlement Agreement was submitted on May 5, 2008, indicating the terms of agreement which are incorporated herein by reference.

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

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

2. The settlement complies with the standards set forth in Cardonick v. Brookline BOE, dec'd by the Comm'r, April 7, 1992, aff'd. St. Bd. of Ed., April 6, 1983, 1990 SLD 842, 846.

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

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

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

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

May 12, 2008
DATE

LESLIE Z. CELENTANO, ALJ

Receipt Acknowledged:

Date Received at Agency: MAY 14 2008

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAY 14 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

sej

The Newark Public Schools
Office of the General Counsel
2 Cedar Street
Newark, New Jersey 07102-3091
Phone: 973-733-7139
Fax: 973-733-8771

Dr. Marion A. Bolden
State District Superintendent

Lucille E. Davy
Commissioner of Education

Perry L. Lattiboudere, Esq.
General Counsel

Arsen Zartarian, Esq.
Adam S. Herman, Esq.
Senior Associate Counsel

RECEIVED
N.J.
LAW
2008 MAY 5 P 5:1

May 1, 2008

Honorable Leslie Z. Celentano, A.L.J.
State of New Jersey
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Re: In Re Tenure Hearing of Josh Davis (State-operated School District of the City of Newark)
Docket No.: 12232-2007N

Dear Judge Celentano:

Enclosed for the Court's forwarding to the Commissioner of Education please find an original Settlement Agreement fully executed by all parties.

Thank you for the Court's courtesy and cooperation.

Respectfully submitted,

ARSEN ZARTARIAN

AZ/sf

Encl.

c: Christopher Roberts, Esq. (w/ encl.)

NEWARK PUBLIC SCHOOLS
Office of the General Counsel
2 Cedar Street
Newark, New Jersey 07102
(973) 733-7139

RECEIVED
N.J. LAW
2008 MAY -5 P 5:19

In the Matter of the Tenure Charges of JOSHUA L. DAVIS III, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY Docket No. EDUTH-12232-2007N Agency Docket No. 348-11/07 **STIPULATION OF SETTLEMENT**

WHEREAS, Joshua L. Davis III ("Ms. Archer"), residing at 459 North Grove Street, East Orange, New Jersey 07017, is a tenured teacher employed by the State-Operated School District of the City of Newark ("District");

WHEREAS, on or about September 18, 2007, tenure charges alleging conduct unbecoming, insubordination and other sufficient cause were filed against Mr. Davis;

WHEREAS, on or about November 9, 2007, the tenure charges were certified to the Commissioner of Education ("Commissioner");

WHEREAS, in connection with the certification of the tenure charges to the Commissioner, Mr. Davis was suspended without pay effective November 13, 2007 for a period of 120 days, pursuant to N.J.S.A. 18A:6-14;

WHEREAS, on or about November 20, 2007, Mr. Davis, through his counsel, Christopher C. Roberts, LLC, filed an Answer with the Commissioner denying all charges;

WHEREAS, the Commissioner transmitted the file to the Office of Administrative Law as a contested case for hearing on or about November 26, 2007, bearing Docket No. EDUTH-12232-2007N;

WHEREAS, on March 7, 2008 and March 12, 2008, the parties engaged in settlement discussions regarding this matter;

WHEREAS, due to the uncertainties of the outcome of litigation, the expenditure of resources due to multiple days of hearing with numerous witnesses, and the concern that school personnel will be removed from educational duties and responsibilities during that time, the parties seek to amicably resolve this matter and hereby stipulate and agree as follows:

1. Mr. Davis hereby agrees to resign his tenured teaching position effective May 15, 2008. Annexed as Exhibit A is a copy of the signed Letter of Resignation. Upon the final approval of the signed Stipulation and Letter of Resignation, the District shall and hereby does withdraw the tenure charges.

2. Mr. Davis will receive his salary and benefits as an employee from March 13, 2008 (the date of Mr. Davis' return from the 120-day unpaid suspension) through May 15, 2008. Mr. Davis will not be required to return to active service. The salary rate to be paid to him will continue at the same rate paid during the 2007-08 school year.

3. Mr. Davis will receive reimbursement for his accumulated sick and personal days as if he were retiring from the District, in accordance with the terms of Article X, Section 7 of the Collective Bargaining Agreement between the Newark Public Schools and the Newark Teachers Union, annexed hereto as Exhibit B.

4. Mr. Davis' separation from employment will be deemed a voluntary resignation. Upon inquiry from any third parties, the District will only confirm Mr. Davis' title, salary, and dates of employment.

5. Mr. Davis is allowed to seek letters of reference on his own, and the District will not take action or prevent any District employee from writing a personal (rather than "District-sanctioned") letter of reference/recommendation on behalf of Mr. Davis.

6. As of May 15, 2008, all of Mr. Davis' employment rights, including but not limited to salary, insurance coverage, tenure and seniority, will permanently end.

7. The District will not pursue tenure charges against Mr. Davis as long as this Stipulation remains in effect and is not voided by any court or administrative agency of competent jurisdiction. However, if the Stipulation is voided, the District retains the right to file and consider for certification tenure charges against Mr. Davis, including such charges that previously have been filed by the District against Mr. Davis.

8. In accordance with N.J.A.C. 6A:3-5.6, Mr. Davis has been advised that this matter must be forwarded to the Commissioner has been advised that the Commissioner's may refer this matter to the State Board of Examiners.

9. The parties respectively acknowledge that counsel has advised them and that each is signing this Stipulation freely and voluntarily, without duress, coercion or pressure from the other party.

10. This Stipulation does not represent an admission of liability by either party

11. This Stipulation constitutes the full agreement between the parties, and shall be construed and enforced in accordance with New Jersey law.

12. The undersigned representatives of the parties hereby acknowledge that they have been duly authorized by the respective parties to sign this Stipulation and bind their principals to its terms.

13. By entering this Stipulation, each party releases and discharges the other with respect to all claims or rights that either party may have against the other. This includes without limitation, any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Mr. Davis' employment with the District. It specifically includes, without limitation, all claims which Mr. Davis may have regarding tenure, withholding of increment, discrimination on any basis, any federal or state civil rights law, claims under the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, and any other federal or state civil rights claims, including claims of age discrimination and other rights and claims arising under the Age Discrimination in Employment Act and the Older Workers' Benefits Protection Act, rights under any collective bargaining agreement, disability payments, sick leave, salary or any other matter pertaining to his employment.

14. It is further understood and agreed by the parties hereto, and their respective agents, that the contents and existence of this settlement agreement shall be considered confidential and shall not be disclosed to any third person or entity by

either party without the prior written approval of the other party, except as mandated by law or upon the order of a court of competent jurisdiction.

Dated: 21 April 08

Joshua L. Davis, III

Dated: 4/21/08

Christopher C. Roberts, Esq.
Attorney for Joshua L. Davis III

Dated: 5/1/08

Arsen Zartarian, Esq.
Senior Associate Counsel
Newark Public Schools

Dated: 5/1/08

Dr. Marion Bolden
District Superintendent

March 14, 2008

Dr. Marion Bolden, Superintendent
Newark Public Schools
2 Cedar Street
Newark, New Jersey 07102

Dear Ms. Bolden:

I hereby irrevocably resign my tenured teaching position with the State-operated School District of the City of Newark, effective May 15, 2008.

Very truly yours,

Joshua L Davis III

Joshua L. Davis III

STATE OF NEW JERSEY:
COUNTY OF ESSEX:

I CERTIFY that on March __, 2008, Joshua L. Davis III personally came before me and acknowledged under oath to my satisfaction that he personally signed, sealed and delivered this document as his act and deed.

_____
Christopher C. Roberts, Esq.
Attorney at Law of the State of New Jersey

291-08

OAL DKT. NO. EDU 9609-07
AGENCY DKT. NO. 238-8/07

DR. PAULA E. HOWARD, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY, : DECISION

RESPONDENT. :

The record of this matter, the proposed "Settlement Agreement and Release," and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon such review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/03/08

Date of Mailing: 7/03/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO.EDU 09609-07

Agency Docket No. 238-8/07

DR. PAULA E. HOWARD,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY,

Respondent.

Beth L. Finkelstein, Esq. appearing on behalf of petitioner

Raymond L. Hamlin, Esq., appearing on behalf of respondent (Hunt, Hamlin & Ridley)

Record Closed: May 15, 2008 Decided: May 16, 2008

BEFORE **JOANN LaSALA CANDIDO**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on September 13, 2007 for resolution as a contested case pursuant to N.J.S.*A*. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

On May 15, 2008 the undersigned received the fully executed settlement and release as well as the Plainfield Board of Resolution dated April 29, 2008 which is attached hereto.

I have reviewed the record and terms of the settlement agreement and **FIND**:

Having reviewed the contents of the attached Settlement Agreement, and Board of Education Resolution, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

May 16, 2008
DATE

JOANN LASALA CANDIDO, ALJ

Date Received at Agency: 5-21-08

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAY 21 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

ljb

PLAINFIELD BOARD OF EDUCATION
Plainfield, New Jersey

CERTIFIED RESOLUTION FROM THE APRIL 29, 2008 ORGANIZATION MEETING

Cc. **Dr. Paula Howard**

The following is in order for board adoption, moved by Ms. Rivers and seconded by Ms. Barksdale.

RESOLUTION

RESOLVED, that the Board of Education approve the settlement in the matter entitled Dr. Paula Howard v. Plainfield Board of Education docket number, EDU 51 09609-2007N, agency reference number 238-8107, pursuant to the terms set forth in the settlement agreement which includes payment for unused vacation days in the amount of $25,000, pursuant to Dr. Howard's contract of employment in existence in June of 2007, and a $4,000.00 annuity payment and a payment of $1,333.34 for two days of unpaid salary, and the withdrawal of her petition against the Board with prejudice;

* The within settlement is subject to the approval of the court and Commissioner of Education

The motion carried with eight members in favor and Mr. Cathcart abstaining.

THE FORGOING RESOLUTION IS A CORRECT COPY OF THE ORGANIZATION MEETING MINUTES OF THE PLAINFIELD BOARD OF EDUCATION CONDUCTED ON APRIL 29, 2008.

Gary L. Ottmann, Board Secretary

GLO/bsc

SETTLEMENT AGREEMENT
AND GENERAL RELEASE

2008 MAY 15 P 4:37
STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL

This Settlement Agreement and Release ("Agreement") is made and entered into between the Board of Education of the Plainfield School District (the "Board") and Dr. Paula E. Howard ("Dr. Howard"). This Agreement is made pursuant to the following terms and conditions.

RECITALS

WHEREAS, on or about December 19, 2006, with the term ending June 30, 2010, Dr. Howard became employed by the Board pursuant to a contract of employment; and,

WHEREAS, the contract of employment provided for the payment of unused accumulated sick and vacation days upon separation from service; and,

WHEREAS, Dr. Howard's contract of employment also provided for payment by the Board into a tax-qualified plan in the amount of $4,000; and

WHEREAS, Dr. Howard submitted of resignation to the Board on June 6, 2007; and

WHEREAS, the Board met to accept her letter of resignation on June 8, 2007; and,

WHEREAS, Dr. Howard continued to report for work on June 7th and June 8th but was not paid for those days; and,

WHEREAS, Dr. Howard has not received payment for her unused accumulated sick and vacation days, or payment for the two days salary, or payment into her tax-qualified plan; and,

WHEREAS, the parties elected to settle all outstanding matters and allegations in dispute so as to avoid expending future resources and to eliminate the uncertainties of litigation; and,

WHEREAS, the Board and Dr. Howard deem it to be in their best interests to set forth in a formal written agreement their respective rights, duties and obligations; and,

WHEREAS, the Board and Dr. Howard are now mutually desirous of settling the matters and allegations in dispute; and

WHEREAS, all parties have been afforded the opportunity to consider the terms of this Agreement with advice of counsel and/or a representative of their choice;

NOW THEREFORE, in consideration of the promises and the mutual covenants herein contained, and for other good and valuable considerations, the parties hereby agree as follows:

1. The "Board," as used herein, shall, at all times, mean the Board of Education of the Plainfield School District, its affiliates, predecessors, successors and assigns of any and all of them, their present and former directors, officials, officers, representatives, associates, partners, servants, employees, agents, attorneys, and successors, whether in their individual or official capacities, and all other persons, firms, corporations, associations, partnerships or any other entity connected therewith.

2. "Dr. Howard," as used herein, shall mean Dr. Paula E. Howard, her heirs, representatives, privies, executors, administrators, assigns, successors-in-interest and predecessors-in-interest.

3. Dr. Howard shall cause to be filed a withdrawal, with prejudice, of the matter currently pending before the Office of Administrative Law and docketed as EDU 11590-2006N, subject to the approval of this Settlement and Release Agreement by the Office of Administrative Law and the Commissioner of Education.

4. Within thirty (30) days of execution of the Settlement Agreement, or by July 1, 2008, whichever is later, by all parties, and approval of this Settlement Agreement by the Office of Administrative Law, the Board shall pay Dr. Howard as follows:

(a) the lump sum of Twenty-five Thousand Dollars ($25,000) representing payment for unused, accumulated sick and vacation days;

(b) the lump sum of One Thousand, Three Hundred, Thirty-three 34/100 Dollars ($1,333.34) representing unpaid salary; and

(c) the lump sum of Four Thousand Dollars ($4,000) to be deposited into Dr. Howard's tax-qualified plan.

The Board acknowledges and agrees that said payment is in full and complete settlement of any and all claims that have been asserted or can be asserted or may be asserted or could be asserted by Dr. Howard arising from her employment by the Board. Dr. Howard and the Board expressly understand and agree that said payment includes any and all amounts that may be claimed by Dr. Howard or on her behalf, or by her attorneys, heirs, successors or assigns, against the Board. Specifically excluded from this release are her rights upon cessation of employment with the district to obtain medical coverage at her own expense as authorized by the Consolidated Omnibus Reconciliation Act of 1976 (COBRA) and Dr. Howard's rights arising under the Teachers' Pension and Annuity Fund (TPAF) and related statutes and regulations and any rights she may have for indemnification by the Board, pursuant to *N.J.S.A.* 18A:16-6 and 6.1.

The Board hereby releases any and all claims it may have against Dr. Howard, heirs, successors or assigns, which may have arisen in the past up to the date of the signing of this Settlement Agreement. In addition, this Release and Settlement Agreement do not preclude Dr. Howard from suing for enforcement of its terms.

5. In addition to the foregoing, on or before May 30, 2008, Dr. Howard shall be permitted to meet with the current Business Administrator and/or Dr. Howard's confidential secretary to permit Dr. Howard to view and pack her remaining personal possessions.

6. This Settlement Agreement is contingent upon the approval of the Office of Administrative Law and the Commissioner of Education.

7. Dr. Howard and the Board agree and acknowledge that this Settlement Agreement and General Release is also contingent on and subject to approval and ratification by the Board.

8. In any action commenced by either party to enforce the provisions of this Settlement Agreement, the prevailing party, shall be entitled to recover its reasonable attorneys' fees, costs and disbursements incurred in prosecuting the action.

9. Dr. Howard specifically acknowledges that the payment(s) referred to in Paragraph 4 hereof constitute any and all additional consideration not otherwise owed to her for this Settlement Agreement and General Release. Dr. Howard agrees that she shall not seek any further amount from the Board other than the amount stated in Paragraph 4.

10. This Settlement Agreement and General Release contains the full agreement of Dr. Howard and the Board and may not be modified, altered, changed or terminated except upon the express prior written consent of Dr. Howard and the Board, which consent must be signed by Dr. Howard and the Board, or their duly authorized agents.

11. The waiver by Dr. Howard and/or the Board of a breach of any provision hereof shall not operate or be construed as a waiver of that breach by the other, or as a waiver of any subsequent breach by the other.

12. If any term, provision or condition of this Settlement Agreement and General Release is held invalid or unenforceable by a court of competent jurisdiction, such holding shall be without effect upon the validity or enforceability of any other provision, term or condition of this Settlement Agreement and General Release.

13. This Settlement Agreement and General Release shall be construed and interpreted in accordance with the laws of the State of New Jersey.

14. Dr. Howard and the Board agree to cooperate fully and execute any and all supplementary documents and to take all additional actions which may be necessary or appropriate to get full force and effect of the basic terms and interests of this Settlement Agreement and General Release.

15. This Settlement Agreement and General Release may be executed in counterparts, with each of which shall be deemed to be an original copy, but all of which together shall be deemed one and the same instrument.

16. In entering into this Settlement Agreement and General Release, Dr. Howard has relied upon the legal advice of her attorney, who is the attorney of her own choice, as to the terms of this Settlement Agreement and General Release which have been completely read and explained by her attorney and those terms are fully understood and voluntarily accepted.

IN WITNESS WHERE OF, Dr. Paula E. Howard and the Plainfield Board have hereunto set their hands.

PAULA E. HOWARD

WITNESS:

Date: 5-1-08

BOARD OF EDUCATION OF THE PLAINFIELD SCHOOL DISTRICT

WITNESS:

Date:

JAMES B. GORDON
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Feb. 19, 2012

SETTLEMENT AGREEMENT
AND GENERAL RELEASE

This Settlement Agreement and Release ("Agreement") is made and entered into between the Board of Education of the Plainfield School District (the "Board") and Dr. Paula E. Howard ("Dr. Howard"). This Agreement is made pursuant to the following terms and conditions.

RECITALS

WHEREAS, on or about December 19, 2006, with the term ending June 30, 2010, Dr. Howard became employed by the Board pursuant to a contract of employment; and,

WHEREAS, the contract of employment provided for the payment of unused accumulated sick and vacation days upon separation from service; and,

WHEREAS, Dr. Howard's contract of employment also provided for payment by the Board into a tax-qualified plan in the amount of $4,000; and

WHEREAS, Dr. Howard submitted of resignation to the Board on June 6, 2007; and

WHEREAS, the Board met to accept her letter of resignation on June 8, 2007; and,

WHEREAS, Dr. Howard continued to report for work on June 7th and June 8th but was not paid for those days; and,

WHEREAS, Dr. Howard has not received payment for her unused accumulated sick and vacation days, or payment for the two days salary, or payment into her tax-qualified plan; and,

WHEREAS, the parties elected to settle all outstanding matters and allegations in dispute so as to avoid expending future resources and to eliminate the uncertainties of litigation; and,

WHEREAS, the Board and Dr. Howard deem it to be in their best interests to set forth in a formal written agreement their respective rights, duties and obligations; and,

WHEREAS, the Board and Dr. Howard are now mutually desirous of settling the matters and allegations in dispute; and

WHEREAS, all parties have been afforded the opportunity to consider the terms of this Agreement with advice of counsel and/or a representative of their choice;

NOW THEREFORE, in consideration of the promises and the mutual covenants herein contained, and for other good and valuable considerations, the parties hereby agree as follows:

1. The "Board," as used herein, shall, at all times, mean the Board of Education of the Plainfield School District, its affiliates, predecessors, successors and assigns of any and all of them, their present and former directors, officials, officers, representatives, associates, partners, servants, employees, agents, attorneys, and successors, whether in their individual or official capacities, and all other persons, firms, corporations, associations, partnerships or any other entity connected therewith.

2. "Dr. Howard," as used herein, shall mean Dr. Paula E. Howard, her heirs, representatives, privies, executors, administrators, assigns, successors-in-interest and predecessors-in-interest.

3. Dr. Howard shall cause to be filed a withdrawal, with prejudice, of the matter currently pending before the Office of Administrative Law and docketed as EDU 11590-2006N, subject to the approval of this Settlement and Release Agreement by the Office of Administrative Law and the Commissioner of Education.

4. Within thirty (30) days of execution of the Settlement Agreement, or by July 1, 2008, whichever is later, by all parties, and approval of this Settlement Agreement by the Office of Administrative Law, the Board shall pay Dr. Howard as follows:

(a) the lump sum of Twenty-five Thousand Dollars ($25,000) representing payment for unused, accumulated sick and vacation days;

(b) the lump sum of One Thousand, Three Hundred, Thirty-three 34/100 Dollars ($1,333.34) representing unpaid salary; and

(c) the lump sum of Four Thousand Dollars ($4,000) to be deposited into Dr. Howard's tax-qualified plan.

The Board acknowledges and agrees that said payment is in full and complete settlement of any and all claims that have been asserted or can be asserted or may be asserted or could be asserted by Dr. Howard arising from her employment by the Board. Dr. Howard and the Board expressly understand and agree that said payment includes any and all amounts that may be claimed by Dr. Howard or on her behalf, or by her attorneys, heirs, successors or assigns, against the Board. Specifically excluded from this release are her rights upon cessation of employment with the district to obtain medical coverage at her own expense as authorized by the Consolidated Omnibus Reconciliation Act of 1976 (COBRA) and Dr. Howard's rights arising under the Teachers' Pension and Annuity Fund (TPAF) and related statutes and regulations and any rights she may have for indemnification by the Board, pursuant to *N.J.S.A.* 18A:16-6 and 6.1.

The Board hereby releases any and all claims it may have against Dr. Howard, heirs, successors or assigns, which may have arisen in the past up to the date of the signing of this Settlement Agreement. In addition, this Release and Settlement Agreement do not preclude Dr. Howard from suing for enforcement of its terms.

5. In addition to the foregoing, on or before May 30, 2008, Dr. Howard shall be permitted to meet with the current Business Administrator and/or Dr. Howard's confidential secretary to permit Dr. Howard to view and pack her remaining personal possessions.

6. This Settlement Agreement is contingent upon the approval of the Office of Administrative Law and the Commissioner of Education.

7. Dr. Howard and the Board agree and acknowledge that this Settlement Agreement and General Release is also contingent on and subject to approval and ratification by the Board.

8. In any action commenced by either party to enforce the provisions of this Settlement Agreement, the prevailing party, shall be entitled to recover its reasonable attorneys' fees, costs and disbursements incurred in prosecuting the action.

9. Dr. Howard specifically acknowledges that the payment(s) referred to in Paragraph 4 hereof constitute any and all additional consideration not otherwise owed to her for this Settlement Agreement and General Release. Dr. Howard agrees that she shall not seek any further amount from the Board other than the amount stated in Paragraph 4.

10. This Settlement Agreement and General Release contains the full agreement of Dr. Howard and the Board and may not be modified, altered, changed or terminated except upon the express prior written consent of Dr. Howard and the Board, which consent must be signed by Dr. Howard and the Board, or their duly authorized agents.

11. The waiver by Dr. Howard and/or the Board of a breach of any provision hereof shall not operate or be construed as a waiver of that breach by the other, or as a waiver of any subsequent breach by the other.

12. If any term, provision or condition of this Settlement Agreement and General Release is held invalid or unenforceable by a court of competent jurisdiction, such holding shall be without effect upon the validity or enforceability of any other provision, term or condition of this Settlement Agreement and General Release.

13. This Settlement Agreement and General Release shall be construed and interpreted in accordance with the laws of the State of New Jersey.

14. Dr. Howard and the Board agree to cooperate fully and execute any and all supplementary documents and to take all additional actions which may be necessary or appropriate to get full force and effect of the basic terms and interests of this Settlement Agreement and General Release.

15. This Settlement Agreement and General Release may be executed in counterparts, with each of which shall be deemed to be an original copy, but all of which together shall be deemed one and the same instrument.

16. In entering into this Settlement Agreement and General Release, Dr. Howard has relied upon the legal advice of her attorney, who is the attorney of her own choice, as to the terms of this Settlement Agreement and General Release which have been completely read and explained by her attorney and those terms are fully understood and voluntarily accepted.

IN WITNESS WHERE OF, Dr. Paula E. Howard and the Plainfield Board have hereunto set their hands.

PAULA E. HOWARD

_____

WITNESS:

_____

Date:_____

BOARD OF EDUCATION OF THE PLAINFIELD SCHOOL DISTRICT

Bridget D. Lee

WITNESS:

Date: 5/5/08

292-08

#292-08

E.T. on behalf of minor child, T.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR, ATLANTIC COUNTY, ET AL.,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed respondent's action suspending his minor child, T.T., for eight days after he allegedly made a terrorist threat in class, and sought expungement of the record of this suspension from T.T.'s student file. The respondent Board, contends, *inter alia*, that the petitioner failed to exhaust all administrative remedies regarding expungement of student records, pursuant to *N.J.A.C.* 6A:32-7.7(b), prior to filing his appeal; it further asserts that no appeal to the Commissioner is permitted in this case, as the provisions of *N.J.A.C.* 6A:16-7.2 which address short term suspensions provide no such remedy. The Board filed a motion for summary decision.

The ALJ found that: T.T.'s short term suspension falls under the provisions of *N.J.A.C.* 6A:16-7.2, which does not provide for an appeal to the Commissioner; petitioner failed to file pleadings opposing respondent's motion for summary decision, and accordingly does not dispute that he failed to comply with *N.J.A.C.* 6A:32-7.7(b); petitioner has not exhausted the administrative remedy afforded him in this regulation. The ALJ granted summary decision to the Board, and ordered the petition dismissed.

Upon thorough and independent review of this matter, the Commissioner rejected the Initial Decision of the OAL, finding that: the Board's arguments that the petitioner did not exhaust administrative remedies pertaining to record expungement do not resolve the case, as the instant petition is a challenge to the discipline imposed upon T.T., and – as an ancillary matter – to the placement of references to that discipline into his student file; the ALJ decided the case on the papers, without evaluation of whether the discipline imposed upon T.T. was arbitrary, capricious or unreasonable; and there is no bar in *N.J.A.C.* 6A:16-7.2 to appealing short-term suspensions to the Commissioner. Accordingly, this matter was remanded to the OAL for a hearing concerning the sufficiency of the district's procedures under *N.J.A.C.* 6A:16-7.2 and the merits of petitioner's challenge to the discipline imposed upon T.T.; petitioner's request for expungement of T.T.'s record must await resolution of the merits of the district's imposition of the discipline.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

July 7, 2008

OAL DKT. NO. EDU 10505-07
AGENCY DKT. NO. 314-10/07

E.T. on behalf of minor child, T.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR, ATLANTIC COUNTY, ET AL.,	:	DECISION
RESPONDENT.	:	

The record of this matter, including respondent's summary disposition motion papers, and the Initial Decision of the Office of Administrative Law (OAL), have been reviewed. For the reasons that follow, the Initial Decision is rejected.

E.T. appeals the discipline imposed upon his minor child, T.T., consequent to an incident which took place in school on September 18, 2007. At the outset, the Commissioner notes that T.T. had been classified as a special education student about a week before the incident. Thus, on September 28, 2007, a manifestation hearing was held, after which it was determined that the behavior for which T.T. received discipline was not a function of his disability. He received a suspension, which he served.

T.T. returned to school on October 1, 2007, and three weeks later E.T. filed a *pro se* petition with the Commissioner's Office of Controversies and Disputes. The required proof of service was submitted subsequently, on December 11, 2007. It appears from examination of the record that papers were also submitted by V.T., T.T.'s other parent, to the

Commissioner's Special Education Office; however that case was withdrawn by V.T. on December 12, 2007.

The Office of Controversies and Disputes transmitted the case to the OAL on December 13, 2007, and it was scheduled for an OAL hearing on June 11, 2008. On April 29, 2008, however, respondent filed a motion for summary disposition, which petitioner apparently did not answer. The Administrative Law Judge (ALJ) decided the case on the papers.

Curiously, in its motion, respondent framed this matter solely as a dispute concerning the expungement of the record of T.T.'s September 19, 2007 suspension. It argued that it was not acting arbitrarily or unreasonably when it recorded T.T.'s discipline, and that petitioner was in any event barred from filing a petition with the Commissioner seeking expungement because he did not first follow the steps set forth in *N.J.A.C.* 6A:32-7.7 (b) concerning requests for expungement of records.

Respondent only cursorily referred to the discipline that precipitated the entries into T.T.'s student file. In a footnote on page 9 of its brief it stated "V.T. or E.T. did not file a written objection to T.T.'s suspension for these actions, nor does he [sic] deny T.T. made these statements," and on page ten of the brief it asserted that petitioner was not disagreeing with "the findings of the Board regarding the reports pertaining to T.T."

At the outset, the Commissioner notes that the papers filed by petitioner indicate that he did challenge the facts underlying the discipline imposed upon T.T. Further, there is no requirement that a parent submit a writing to the school administrators that registers his or her disagreement with the discipline imposed upon his or her child before appealing that discipline to

the Commissioner.[1] Thus, the instant petition is a challenge to the discipline imposed upon T.T. and – as an ancillary matter – to the placement into T.T.'s file of references to that discipline. Accordingly, respondent's arguments that the petition is barred for lack of exhaustion of administrative remedies pertaining to record expungement do not resolve the case.

Rather, the Office of Controversies and Disputes sent the matter to the OAL for a determination as to whether the discipline imposed was arbitrary, capricious or unreasonable. This required an evaluation of the circumstances presented and a determination both as to whether T.T.'s rights were upheld and whether the facts warranted the discipline.

In the Initial Decision, the ALJ correctly noted that under the applicable regulations, T.T.'s suspension was "short-term" and covered by the less formal procedures of *N.J.A.C.* 6A:16-7.2.[2] Unfortunately, it is unclear from the record before the Commissioner whether, on the day that he was suspended, T.T. was given the full process required by that regulation. More specifically, the record does not reveal whether – pursuant to *N.J.A.C.* 6A:16-7.2 (a) (1) and (2) – T.T. was given notice of the charges, the evidence upon which they were based, and an informal hearing with a school administrator.

The record does confirm that T.T.'s parents were sent a letter identifying the date of the suspension and the charge, as mandated by *N.J.A.C.* 6A:16-7.2 (a) (3) (i). However, the facts upon which the charge was based, the policy number alleged to have been violated, and articulation of T.T.'s due process rights (*see N.J.A.C.* 6A:16-7.2 (a) (3) (ii), (iii) and (iv)) were not evident in the notice. A letter dated September 21, 2007, from the assistant principal of

[1] Additionally, as the record does not appear to contain any Board findings, the Commissioner cannot place any weight upon respondent's assertion that petitioner agreed with same.

[2] The process due recipients of short-term suspensions is less formal than that required for recipients of long-term suspensions – the latter being controlled by *N.J.A.C.* 6A:16-7.3.

T.T.'s school to his parents, does indicate that academic instruction was arranged for T.T. during his suspension and was provided at the school after normal school hours.

The ALJ did not find these factual deficits in the record to be significant because he determined that petitioner had no right to appeal the suspension to the Commissioner. For this conclusion he relied upon *N.J.A.C.* 6A:16-7.3 and *N.J.A.C.* 6A:16-7.2:

> *N.J.A.C.* 6A:16-7.3 deals with long term suspensions, which are defined as suspensions of at least ten days duration [sic].[3] *N.J.A.C.* 6A:16-7.3 specifically provides that a long term suspension may be appealed to the Commissioner. *N.J.A.C.* 6A:16-7.2 affords no such protection to the student subjected to a short term suspension.
>
> Initial Decision at 3.

This interpretation, however, constitutes a misreading of the regulations.

N.J.A.C. 6A:16-7.3 (a) (11) directs that after a formal hearing a district must provide a student's parents with a statement setting forth the charges that were brought, a summary of the evidence, its factual findings and determinations, the terms and conditions of the suspension, the educational services to be provided during the suspension and an advisement that the parent may appeal to the Commissioner. This regulatory provision does not bestow the right of appeal – it merely requires the district to advise the parent of that right. Similarly, the absence of that provision from *N.J.A.C.* 6A:16-7.2 does not signify the absence of a right to appeal.

Because there is, in fact, no bar in *N.J.A.C.* 6A:16-7.2 to appealing short-term suspensions to the Commissioner, this case is remanded to the OAL for a hearing with findings of fact and legal conclusions concerning the sufficiency of the district's procedures under *N.J.A.C.* 6A:16-7.2 and the merits of petitioner's challenge to the discipline imposed upon T.T.

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[3] A short term suspension is ten or less days in duration. *N.J.A.C.* 6A:16-7.2 (a). A long term suspension is over ten days in duration. *N.J.A.C.* 6A:16-7.3 (a).

Petitioner's request for expungement from T.T.'s file of references to the suspension must await resolution of the merits of the district's imposition of the discipline.[4]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/07/08

Date of Mailing: 7/07/08

[4] The Commissioner cannot agree with respondent's contention, in its summary disposition motion, that T.T.'s attendance in another school renders the controversy moot. The question of whether the discipline was properly imposed upon T.T. must be adjudicated between the parties named in this action.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10505-07
AGENCY DKT. NO. 314-10/07

E.T. ON BEHALF OF MINOR CHILD, T.T.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR, ATLANTC COUNTY, ET AL,
Respondent.

E.T., petitioner, pro se

William S. Donio, Esq., for respondent (Cooper Levenson, attorneys)

Record Closed: May 19, 2008 Decided: May 20, 2008

BEFORE **BRUCE M. GORMAN**, ALJ:

STATEMENT OF THE CASE

Petitioner appealed respondent's action suspending his child T.T. for eight days, and seeking expungment of the record of said suspension from T.T.'s records.

PROCEDURAL HISTORY

On October 22, 2007 petitioner filed a petition with the Commissioner of Education. The petitioner requested a fair hearing and the matter was transmitted to the OAL on December 26, 2007, to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The matter was scheduled for a hearing on June 11, 2008. However, on April 29, 2008 respondent filed a motion for summary decision. Petitioner filed no response to respondent's motion and the record closed on May 19, 2008. This Initial Decision disposes of that motion.

FACTUAL DISCUSSION

This matter arises out of disciplinary action taken by respondent Board of Education (Board) against petitioner's son T.T. E.T. is T.T.'s father. On or about September 19, 2007, the Board's Assistant Principal suspended T.T. ten days for allegedly making a terroristic threat. That suspension was reduced to eight days. Because this suspension was for less than ten days, no formal hearing pursuant to N.J.A.C. 6A:16-7.3 was required.

T.T. served the suspension. Thereafter, on October 22, 2007, petitioner filed this action with the Commissioner of Education. The petition demanded reversal of the suspension and removal of all record of the suspension from T.T.'s school file. In advance of filing the petition, petitioner did not notify the chief school administrator in writing of the specific issues relating to T.T.'s school records. Nor did he meet with the chief school administrator.

CONCLUSIONS OF LAW

The Board argues that no hearing on the suspension itself is warranted. The Board notes that N.J.A.C. 6A:16-7.2 requires only an informal hearing for suspensions of less than ten days. Consequently, argues the Board, no appeal to the Commissioner is permitted.

The Board's position is well founded. N.J.A.C. 6A:16-7.3 deals with long term suspensions, which are defined as suspensions of at least ten days duration. N.J.A.C. 6A:16-7.3 specifically provides that a long term suspension may be appealed to the Commissioner. N.J.A.C. 6A:16-7.2 affords no such protection to the student subjected to a short term suspension.

Accordingly, the Board's motion for summary decision with regard to petitioner's appeal of T.T.'s suspension must be **GRANTED.**

The Board also seeks summary decision dismissing petitioner's action to expunge T.T.'s records. The Board relies upon N.J.A.C. 6A:32-7.7(b), which states in pertinent part:

> To request a change in the record or to request a stay of disclosure pending final determination of the challenged procedure, a parent or adult student shall notify the chief school administrator in writing of the specific issues relating to the student record. Within 10 days of notification, the chief school administrator or his or her designee shall notify the parent or adult student of the school district's decision. If the school district disagrees with the request, the chief school administrator or his or her designee shall meet with the parent or adult student to revise the issues set forth in the appeal. If the matter is not satisfactorily resolved, the parent or adult student may appeal this decision either to the district board of education or the Commissioner of Education within 10 days. If appeal is made to the district board of education, a decision shall be rendered within 20 days. The decision of the district board of education may be appealed to the Commissioner pursuant to N.J.S.A. 18A:6-9 and N.J.A.C. 6A:3, Controversies and Disputes.

The Board asserts that petitioner failed to comply with the requirements of the regulation. The Board argues that petitioner did not notify the chief school administrator in writing that he was disputing the placement of the suspension record in T.T.'s file. Consequently, no meeting between the parties ever took place.

Petitioner has filed no opposing pleadings, and accordingly does not dispute that he failed to comply with N.J.A.C. 6A:32-7.7(b). Since petitioner has failed to exhaust the administrative remedy afforded him in the regulation, the Board's motion for summary decision on this issue must be **GRANTED.**

ORDER

I **ORDER** that the Board's motion for summary decision be **GRANTED.**

I **ORDER** that the petition be **DISMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 20, 2008
DATE

BRUCE M. GORMAN, ALJ

Date Received at Agency: 5-20-08

Mailed to Parties:

MAY 22 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

/sd

DOCUMENTS CONSIDERED

For Petitioner:

None

For Respondent:

Respondent's Motion for Summary Decision, April 28, 2008

293-08

DINA LONKY, WILLS, O'NEILL AND MELLK AND THE HORACE MANN INSURANCE COMPANY,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner Lonky – a former special education teacher in the Bayonne School District – challenged the respondent's denial of her request for reimbursement of legal fees incurred in connection with her defense against two civil law suits which were based on allegations that Lonky mistreated two students she taught in her classroom. The civil suits were settled without admissions of liability, and the cases were dismissed. A criminal indictment based on the same charges was dismissed after Lonky completed a Pre-Trial Intervention Program (PTI). Lonky was covered by an educator's employment liability policy underwritten by the Horace Mann Insurance Company, which sought legal services on behalf of Lonky through the Wills, O'Neill and Mellk law firm. Petitioner claimed indemnification for her legal fees relating to both civil suits pursuant to *N.J.S.A.* 18A:16-6 and *N.J.S.A.* 18A:16-6.1. Cross motions for summary decision were filed by the parties.

The ALJ found, *inter alia,* that: the single issue in this proceeding is whether petitioners are entitled to indemnification from respondent pursuant to *N.J.S.A.* 18A:16-6 and *N.J.S.A.* 18A:16-6.1; there is no genuine dispute of material facts, and the matter is ripe for summary decision; there was no determination as to criminality against petitioner Lonky; the indictment and civil complaints against her were dismissed in her favor; and the civil and criminal statutes therefore require respondent to provide indemnification. Accordingly, the ALJ concluded that petitioners are entitled to indemnification pursuant to *N.J.S.A.* 18A:16-6, and ordered respondent to defray all reasonable counsel fees and expenses relating to Lonky's defense.

Upon a thorough and independent review, the Commissioner concurred that summary decision is appropriately granted to petitioners, and adopted the recommended decision of the OAL with the clarification that petitioners did not seek – nor are they entitled to – reimbursement for defense of the criminal matter, as PTI is an "indecisive" as opposed to "favorable" conclusion of a legal proceeding.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

July 7, 2008

OAL DKT. NO. EDU 7205-07
AGENCY DKT. NO. 125-5/07

DINA LONKY, WILLS, O'NEILL AND MELLK AND THE HORACE MANN INSURANCE COMPANY,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of the Board and replies thereto of petitioners – filed in accordance with the prescriptions of *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in reaching her determination herein.

On exception the Board essentially recasts and reiterates its arguments advanced before the Administrative Law Judge (ALJ) below, *i.e.*, 1) that the instant claim is barred by the entire controversy doctrine and/or the New Jersey Tort Claims Act; and 2) because the criminal charges were not resolved in Ms. Lonky's favor, the underlying acts cannot be considered to have arisen out of and in the course of the performance of her duties of employment since the duties of employment cannot incorporate criminal conduct. As it is determined that such proffers were considered and addressed by the ALJ in her decision and – in the case of #2 – further clarified herein, they will not be reprised here.

Upon a full and independent review of this matter, the Commissioner concurs that summary decision is appropriately granted to petitioners as she fully agrees with the ALJ's findings and her conclusion that petitioners are entitled to indemnification from the Board for the reasonable legal fees and costs of Ms. Lonky's defense against the two civil lawsuits filed against her. However, to the extent that the ALJ's conclusion may convey the impression that petitioners are also entitled to indemnification for defense of the criminal charges against Ms. Lonky, the Commissioner is compelled to clarify that such is not the case.

There are two statutes which control the issue of whether a school employee is entitled to reimbursement for his or her legal fees and costs in connection with the defense of a civil, administrative, criminal or quasi-criminal matter – *i.e., N.J.S.A.* 18A:16-6 and *N.J.S.A.* 18A:16-6.1. *N.J.S.A.* 18A:16-6 deals with the issue of whether a school employee is entitled to indemnification in connection with a civil or administrative action and – in pertinent part – specifies :

> Whenever any civil or administrative action or other legal proceeding has been or shall be brought against any person holding any...employment under the jurisdiction of any board of education...for any act or omission arising out of and in the course of the performance of the duties of such... employment...the board shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom.

By its very terms, central to qualifying for protection afforded under this statute is that *the conduct triggering the legal action against him or her must have 1) arisen out of the performance of his/her duties, and 2) occurred in the course of performing those duties.* In the context of the defense of a civil action, the outcome of the litigation is irrelevant, the statute protects both successful and unsuccessful litigants as long as the above two criteria are satisfied.

However, in the context of a *criminal or quasi-criminal* charge made against a school employee, in addition to the above referenced criteria, *N.J.S.A.* 18A:16-6.1 imposes a third criteria as a prerequisite to indemnification, *i.e., the legal action must result in a final disposition in favor of the school employee.*

Despite any intimations to the contrary in the Initial Decision, the petitioners in their appeal here did not seek – nor are they entitled to – reimbursement for defense of the criminal matter. Such criminal charges were dismissed by virtue of Ms. Lonky's acceptance into and completion of the Pre-Trial Intervention (PTI) Program. Her completion of PTI signifies nothing regarding the truth of the charges – as it involves no determination that Ms. Lonky did or did not engage in criminal conduct. Rather, it is indicative only of the fact that the prosecuting authorities believed she was a good candidate for diversion from the criminal process. Because PTI is diversion oriented rather than an outcome which is dispositive as to guilt or innocence, it is viewed as an "indecisive" termination of a legal proceeding. It is by now well-established that dismissal of criminal charges through the completion of PTI is not a "favorable" conclusion within the intendment of *N.J.S.A.* 18A: 16-6.1. (*See Cressinger v. Board of Education of the City of Newark*, 256 *N.J. Super.* 155, 156 (App. Div. 1992))

Here, however, it is uncontroverted that petitioner is seeking reimbursement for defending two *civil* lawsuits brought against her. As such, notwithstanding that the gravamen of this civil litigation is related to the underlying factual conduct contained in the prior criminal action against petitioner, the focus here is upon the lawsuits for which petitioner is seeking to be indemnified. Consequently, petitioner's acceptance into and completion of PTI is wholly irrelevant in determining this matter. The cases against Ms. Lonky were dismissed without admissions or adjudication of the alleged facts and there is, therefore, no proof that she

mistreated any children in her care. The only undisputed conduct present in this matter is that the alleged events took place at school – during school hours – while Ms. Lonky was to be performing her duties as a teacher. As such, the alleged behavior on which the civil suits were predicated *arose out of and in the course of the performance of the duties of Ms. Lonky's employment* (*See Bower v. Board of Education of the City of East* Orange, 149 *N.J.* 416 (1997)), thereby satisfying the criteria which entitles petitioners to indemnification pursuant to the terms of *N.J.S.A.* 18A:16-6.

Accordingly, the recommended decision of the OAL is adopted as clarified above. The Board is hereby directed to compensate petitioners for the reasonable legal fees and costs of defense of the two civil suits against Ms. Lonky.

IT IS SO ORDERED.*

Lucille T Davy

COMMISSIONER OF EDUCATION

Date of Decision: 7/07/08

Date of Mailing: 7/07/08

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

SUMMARY DECISION
OAL DKT. NO. EDU 07205-07
AGENCY DKT. NO. 125-5/07

DINA LONKY, WILLS, O'NEILL AND MELLK
AND THE HORACE MANN INSURANCE COMPANY,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF BAYONNE,
HUDSON COUNTY,
Respondent.

Arnold M. Mellk, Esq., for petitioners Dina Lonky, Wills, O'Neill and Mellk and the Horace Mann Insurance Company (Wills, O'Neill and Mellk, attorneys)

Howard M. Nirenberg, Esq., for respondent Bayonne Board of Education (Nirenberg and Varano, attorneys)

Record Closed: April 30, 2008 Decided: May 22, 2008

BEFORE **SANDRA ANN ROBINSON**, ALJ:

STATEMENT OF THE CASE

Respondent, Bayonne Board of Education (Board) employed petitioner Dina Lonky as a special education teacher at the Woodrow Wilson Community School

between 1999 and 2002. In 2003 Lonky was indicted on allegations of mistreating two students she taught in her classroom during 2002. Lonky was accepted into and completed a Pre-Trial Intervention Program (PTI); thereafter the indictment was dismissed.

During 2004 two civil lawsuits were filed in the Hudson County Superior Court Law Division, against Lonky on behalf of the two students. The New Jersey Education Association held educators' employment liability insurance on Lonky, which was underwritten by the Horace Mann Insurance Company. The Board did not provide Lonky with legal representation and the Horace Mann Insurance Company sought legal services on behalf of Lonky through Wills, O'Neill and Mellk law firm. In both civil lawsuits Lonky made claims for indemnification and contributions from the Board. The lawsuits were settled without admissions of liability, the cases were dismissed and warrants of satisfaction were filed. Petitioners requested respondent to reimburse the costs of defending the actions; respondent refused.

Petitioners filed a claim for indemnification based on New Jersey education statutes, which require in, N.J.S.A. 18A:16-6,

> Whenever any civil . . . or other legal proceeding . . . shall be brought against any person holding any . . . employment under the jurisdiction of any board of education, . . . for any act or omission arising out of and in the course of the performance of the duties of such . . . employment . . . the board shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal.

The Board argues that petitioners are not entitled to reimbursement for counsel fees, costs, expenses and contributions toward the settlement of the two civil lawsuits because the action for indemnification is impermissible against a public entity; the Entire Controversy Doctrine is a bar to statutory indemnification, and Lonky's action did not arise out of and in the course of the performance of the duties she was hired to do.

The issues to be decided by the undersigned is whether Lonky's actions arose out of and in the course of the performance of her duties, thereby entitling her to indemnification of the costs for defending the two civil lawsuits.

PROCEDURAL HISTORY

The Department of Education Bureau of Controversies and Disputes transmitted this case to the Office of Administrative Law (OAL) on June 27, 2007, for a hearing pursuant to N.J.S.A. 52:14B-1, et seq. and N.J.S.A. 52:14F-1, et. seq. Multiple hearing dates were scheduled for commencement on January 16, 2008. In January 2008 counsel for the parties agreed that a legal issue had to be decided, which could be resolved with the presentations of cross motions for summary decision. Oral arguments were presented prior to the simultaneous submissions of cross-motions and reply briefs; the record closed on April 30, 2008.

FINDINGS OF FACT

Based on the arguments and documents presented, I **FIND** as follows:

1. Petitioner Lonky was indicted on allegations that she mistreated two children;
2. Petitioner completed Pre-Trial Intervention and the indictment was dismissed;
3. Two civil lawsuits were filed against petitioner Lonky in 2004;
4. Petitioner requested respondent to provide her with legal defense;
5. Respondent refused to secure legal services for petitioner;
6. Respondent was required to carry educators' liability insurance on petitioner;
7. The insurance company sought legal services for petitioner, when respondent would not do so;
8. The law firm of Wills, O'Neill and Mellk was retained by the insurance company on behalf of petitioner Lonky;
9. The law firm successfully defended petitioner's civil actions;

10. Petitioner Lonky's two civil lawsuits were settled, warrants of satisfaction were filed and the matters were dismissed without admissions of any wrongdoing;
11. Petitioner Lonky sought reimbursement from respondent for legal expenses, costs and contributions towards the settlements;
12. Respondent refused payment and a claim for indemnification was filed by petitioner, petitioner's attorneys and the insurance company;
13. Petitioner Lonky met the statutory requirement for receiving indemnification under N.J.S.A. 18A:16-6, since any alleged act by petitioner Lonky was done while she was teaching the students assigned to her class on school property;
14. Pre-Trial Intervention completion is irrelevant in determining this matter;
15. The Entire Controversy Doctrine is inapplicable in this matter;
16. The New Jersey Tort Claim Act is inapplicable in this matter.

LEGAL ANALYSIS AND DISCUSSION

SUMMARY DECISION

When considering a Motion for Summary Decision, this tribunal must determine whether the pleadings and affidavits demonstrate that no genuine issue of material fact exists. Motions for Summary Decision are the administrative counterpart to Summary Judgment and should be granted if the pleadings, discovery and certifications "show there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5; Contini v. Bd. of Educ., 286 N.J. Super. 106, 121(App. Div. 1995). In Brill v. Guardian Life Insurance Company of America, 142 N.J. 520, 541 (1995) the New Jersey Supreme Court encouraged trial courts to grant summary judgment whenever the proper circumstances present

themselves. When the evidence is so one-sided that one party must prevail, courts should not hesitate to grant summary judgment. Brill, supra, 142 N.J. at 540.

The single issue in this proceeding is whether petitioners are entitled to indemnification from respondent, pursuant to the interpretation the New Jersey

education statutes. Respondent does not offer disputed facts or supporting documentation showing contradictory findings of issues raised in the indictment or civil lawsuits. The cases which are the subject matter for petitioners' claim of indemnification have been dismissed and settled. A party's mere reliance on arguments in a brief and the bare allegations of the petition without more is insufficient to create a genuine issue of fact. In re LaRusso, 97 N.J.A.R.2d (EDU) at 506 (citations omitted); Camuso v. City of Newark, CSV 3667-98, Initial Decision (October 26, 1999), <http://lawlibrary.rutgers.edu/oal/search.html>. Moreover, a party's "misguided subjective belief," without more are also insufficient to create a fact issue. In re Bergen Pines County Hospital Layoff, CSV 11139-98, Initial Decision (November 8, 2000) (citation omitted), affirmed, Merit Sys. Bd. (December 19, 2000), <http://lawlibrary.rutgers.edu/oal/search.html>. There was no adjudication of the alleged criminal or civil facts in the previous matters. In this case, neither petitioner or respondent submitted evidence that would create a genuine issue of material fact, which could only be determined by an evidentiary hearing. 37 New Jersey Practice, Administrative Law and Practices, § 194, at 202 (Lefelt) (1988), N.J.A.C. 1:1-12.5; R. 4:46-2; Boyle v. Bd. of Educ. of the City of Bayonne, EDU 11549-96, Initial Decision (October 27, 1997), <http://lawlibrary.rutgers.edu/oal/search.html>; Contini, supra, 286 N.J. Super. at 121; and Brill, supra, 142 N.J. at 541. This case is limited to determining whether petitioners have a right to reimbursement for legal defenses via indemnification pursuant to the New Jersey education statutes. There is no genuine dispute of material facts in this matter and the case is ripe for Summary Decision.

LEGAL ANALYSIS AND DISCUSSION

N.J.S.A. 18A:16-6, entitled Indemnity of Officers and Employees Against Civil Actions and Proceedings, provides, (in pertinent part):

> Whenever any civil or administrative action or other legal proceeding has been or shall be brought against any person holding any . . . employment under the jurisdiction of any board of education, . . . for any act or omission arising out of and in the course of the performance of the duties of such . . . employment . . . the board shall defray all costs of defending such action, including reasonable counsel fees

> and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom.

The allegation that if an act was committed, which amounted to mistreatment of students, that the act was committed by petitioner on students she taught in her classroom. The statements and reports from the parties, the police, and the Division of Youth and Family Services, contained information that Lonky mistreated two of her students during the hours of her teaching responsibilities, while the two students were in her classroom. Accordingly N.J.S.A. 18A:16-6, is satisfied in Lonky's case since the alleged acts arose out of and in the course of the performance of her employment duties with respondent. In Bower v Board of Education of the City of East Orange, 149 N.J. 416 (1997), the school teacher was indicted on charges alleging sexual abuse of students he taught during the school day on school premises. Once Bower proved he was at work in the capacity of a teacher at the time of the alleged incidents, N.J.S.A. 18A:16-6 was applicable, because the criminal charges arose out of and in the course of the performance of his duties as an employee. Even though reimbursement was not the focus in Bower, he was entitled to indemnification, pursuant to the statute. It is noted that N.J.S.A. 18A:16-6 does not require that civil actions against an employee conclude with a disposition in favor of the employee. Consequently, there is an entitlement to indemnification if the sole criteria for satisfying the statute has been met by showing that the employee was performing the job she was hired for when the act occurred.

Here, respondent contends that since Lonky completed Pre-Trial Intervention prior to the dismissal of the indictments, that the overall outcome is considered an unfavorable dismissal of the matters, which leaves Lonky responsible for paying her own legal expenses. N.J.S.A. 18A:16-6.1 addresses indemnity of education employees in certain criminal or quasi-criminal actions, as follows, (in pertinent part):

> Should any criminal or quasi-criminal action be instituted against any such person for any such act or omission and should such proceeding be dismissed or result in a final disposition in favor of such person, the board of education shall reimburse him for the cost of defending such proceeding, including reasonable counsel fees and

> expenses of the original hearing or trial and all appeals . . . (emphasis added).

No determination was made that Lonky committed a criminal act. The completion of PTI does not establish criminality or the truth of the charges set forth in an indictment. Petitioners contend that placement in PTI illustrated the prosecutor's belief and confidence that completion of such a program would divert the criminal process. PTI provides an inconclusive ending or an irresolute termination to allegations in a criminal proceeding. See In re Pawlak, Docket No. A-3298-87T7 (App. Div. July 7, 1989); and Lopez v Board of Education of the City of Bridgeton, EDU 6786-02, Initial Decision (October 3, 2004), modified, Commissioner (November 6, 2003), <http://lawlibrary.rutgers.edu/oal/search.html>.

Petitioners contend that committing a tort may be job-related, even though the job responsibility does not intend for an employee to commit a tortuous act. Petitioners indicate, if there were acts of mistreatment, the alleged acts occurred in Lonky's classroom during school hours and happened while techniques to manage, control and monitor the behavior of the two autistic students were being implemented. Petitioners contend that behavior modification techniques should not be mislabeled as mistreatment. When applying the undisputed facts about location and timing of the alleged acts and when learning of the alleged circumstances for the cause of the alleged acts, it appears certain that the contact Lonky had with the two students in this matter, was because she was their teacher. N.J.S.A. 18A:16-6.1 requires that for indemnity to be granted in criminal and quasi-criminal actions there must be a dismissal or favorable final disposition in favor of the employee. The cases against Lonky were dismissed without admissions or the adjudication of the alleged facts; therefore there was no proof that Lonky mistreated any student. When a nexus was established between Lonky's teaching position and her contact with the two students, she satisfied the criteria in the education statute relative to indemnification in instances of criminal or quasi-criminal actions. N.J.S.A. 18A:16-6.1. It is clear from the facts in this matter that there was no determination as to criminality, the indictments and civil complaints against Lonky were dismissed in her favor; and therefore when the civil and criminal statutes are applied, respondent is required to provide indemnification.

Respondent argues that the petitioners' cause of action for indemnification is barred by the New Jersey Tort Claim Act at N.J.S.A. 59: 9-2(e), because petitioners' action is against a public entity. The education statutes require that school boards indemnify education employees, N.J.S.A. 18A:16-6, which supersedes the bar to a claim under the Tort Claim Act. In the Lonky case, reimbursement is sought through statutory indemnification, not in the capacity of a tortfeasor.

Respondent argues that the Entire Controversy Doctrine bars petitioners' entitlement to statutory indemnification. Respondent was required to hold indemnity insurance on Lonky for the purpose of assuring that she is defended in actions arising out of or during her employment. When respondent refused to pay for Lonky's defense, her right to adjudicate the correctness of that refusal ripened. The Horace Mann Insurance Company independently decided to secure the services of attorneys from Will, O'Neill and Mellk law firm, who successfully defended Lonky. Petitioners' claim for reimbursement of legal fees and settlement costs on the grounds that respondent wrongfully refused indemnification should not be barred in this case by the Entire Controversy Doctrine. In McNally v. Providence Washington Insurance Company, 304 N.J. Super. 83 (App. Div. 1997), the court concluded that even though a request for declaratory judgment could have been filed simultaneously with the litigation at hand, that the Entire Controversy Doctrine would not bar a subsequent action for indemnification when there was no duplication of litigation and fairness and equity would prevail. The indemnification claim by petitioners is not duplicative of the issues in the cases previously before the Hudson County Law Division. The nature of this case strictly concerns whether petitioners have a right to indemnification.

CONCLUSION

Based on the foregoing, I **CONCLUDE** that the completion of PTI without adjudication of the alleged facts renders allegations regarding criminality irresolute. The evidence shows that the indictment and the two civil lawsuits against petitioner Lonky

were dismissed, there were no admissions, there were no trials or adjudication of evidence, the parties entered into settlement agreements, warrants of satisfaction were filed and the criminal and civil matters were disposed of in favor of petitioner Lonky. I also **CONCLUDE** that the preponderance of evidence indicates that petitioner Lonky was employed by respondent at the time of the alleged actions; and that the alleged incidents occurred in petitioner's classroom, during school hours and involved students taught by petitioner. Finally, I **CONCLUDE** that petitioners have established that petitioner Lonky is entitled to indemnification pursuant to N.J.S.A. 18A:16-6 and all costs for Lonky's defenses, including reasonable counsel fees and expenses should be defrayed by respondent so as to hold harmless and protect Lonky from financial loss.

ORDER

Based on the foregoing I **ORDER** that the requests of petitioners Dina Lonky, Wills, O'Neill and Mellk and the Horace Mann Insurance Company for Summary Decision be **GRANTED**; and that respondent Bayonne Board of Education's request for Summary Decision be **DENIED**.

I further **ORDER** pursuant to N.J.S.A. 18A: 16-6, that all cost associated with the legal defense for petitioner Dina Lonky be paid by respondent Bayonne Board of Education, in conformity with the statute.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 22, 2008
DATE

Sandra Ann Robinson
SANDRA ANN ROBINSON, ALJ

Date Received at Agency: 5-28-08

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAY 28 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

lr

APPENDIX

EXHIBITS

For Petitioners:

P-1 Verified Petition, dated April 27, 2007

P-2 Certificate of Insurance, New Jersey Education Association

P-3 Complaint and Jury Demand, Superior Court of New Jersey, Law Division, Hudson County, Vetter v. Lonky, filed July 30, 2004

P-4 Complaint, Superior Court of New Jersey, Law Division, Hudson County, Deitrich v. Lonky, filed September 29, 2004

P-5 Vetter settlement check and Deitrich settlement check

P-6 Warrants to Satisfy Judgments for Vetter and Deitrich, filed February 13, 2007

P-7 Petitioner's attorney's letter to respondent requesting indemnification, dated March 16, 2007

P-8 Certification of Arnold M. Mellk, dated April 20, 2007

P-9 Letter from petitioner's attorney to respondent's business administrator - additional costs, dated March 23, 2007

P-10 Letter from petitioner's attorney to respondent's business administrator - costs for defending civil actions brought against petitioner, March 16, 2007

P-11 Letter from respondent to Attorney Mellk - Payment for Legal Services, dated March 22, 2007

P-12 a. Indictment, State of New Jersey v. Lonky, 0173 01 2003 Endangering Welfare of A Child and Child Abuse (and) 1987 11 2003 Child Abuse;

b. Pretrial Intervention Program Report showing 1987 11 2003 supersedes 0173 01 2003

P-13 Order of Dismissal of indictment no. 1987 11 2003 Complaint /Indictment/ Accusation for child abuse, neglect cruelty

For Respondent:

R-1 Response to Verified Petition

R-2 Amended Complaint

R-3 Amended Complaint and Jury, dated Demand January 17, 2006

R-4 Arrest Report, dated September 13, 2002

R-5 Warrant and Complaint, State of New Jersey v. Lonky, dated September 12, 2002, as to Deitrich

R-6 Warrant and Complaint, State of New Jersey v. Lonky, dated September 12, 2002, as to Vetter

R-7 Indictment 0173 01 2003, State of New Jersey v. Lonky, endangering welfare of child, two counts, child abuse, two counts

R-8 Indictment 1987 11 2003, State of New Jersey v. Lonky, child abuse against Deitrich and Vetter

R-9 Petitioner's Objections and Responses to respondent's Request for Admissions and Interrogatories, dated December 11, 2007

R-10 Answer to Complaint, Separate Defenses and Jury Demand, dated December 8, 2004

R-11 Form of Order for Summary Judgment in favor of defendant Lonky

R-12 Order Entering Judgment and Directing Deposit of Funds, dated November 9 2006, and November 29, 2006, respectively

R-13 Orders of Dismissal for Vetter v. Lonky and Deitrich v. Lonky, dated September 20, 2006

R-14 Answers, Separate Defenses, Cross-Claims and Jury Demands for Vetter v. Lonky and Deitrich v. Lonky, Certifications dated September 27, 2004, and October 26, 2004, respectively

R-15 Deposition of Lonky, dated November 1, 2005

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OAL DKT. NO. EDU 2876-08
AGENCY DKT. NO. 26-1/08

V.T. and H.K.C., ON BEHALF OF MINOR CHILDREN, A.C. and D.C.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the parties' fully executed Stipulation of Settlement – erroneously returned to this agency by the Office of Administrative Law as a withdrawal pursuant to *N.J.A.C.* 1:1-19.2 – have been reviewed in accordance with *N.J.A.C.* 1:1-19.1.

Upon such review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 7/07/08
Date of Mailing: 7/07/08

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER LLC
44 Whippany Road, Suite 210
P.O. Box 2355
Morristown, NJ 07962
Tel. (973) 301-0001; Fax (973) 993-3152
Attorneys for Respondent.

V.T. and H.K.C. o/b/o minor children, A.C. and D.C., *Petitioners,* -v.- Board of Education of the Township of Cherry Hill, *Respondent.*	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY/ OFFICE OF ADMINISTRATIVE LAW AGENCY DOCKET NO. 26-1/08 OAL DKT # 2876-08 ADMINISTRATIVE ACTION **STIPULATION OF SETTLEMENT**

WHEREAS, Petitioners filed a residency petition against the Cherry Hill Township Board of Education ("Board") before the Commissioner of Education, Agency Docket No. 26-1/08; and

WHEREAS, the Board filed a response denying certain of the allegations made by Petitioners on the basis that the parents were not domiciled in the District and entered a counterclaim for tuition reimbursement; and

WHEREAS, the Parties deem it to be in their best interests to settle the Petition on the terms set forth herein;

NOW THEREFORE, in consideration of the promises and mutual covenants, understandings, and agreements contained in this Stipulation, it is hereby agreed by and between the Parties as follows:

1. SETTLEMENT PAYMENT:

(a) Within ten (10) days of the date of execution of this Stipulation by the Petitioners, the Petitioners shall pay to the Cherry Hill School District, through its attorneys, Schwartz, Simon, Edelstein, Celso & Kessler LLC, the sum of Seven Thousand, Two Hundred and Thirteen Dollars ($7,213.00) in one payment, which represents settlement of tuition claims for the 2007-2008 school year; and

(b) Upon execution and delivery of a fully executed Stipulation to Petitioners' attorney, Archer & Greiner, P.C., and issuance and receipt of the above payment, Petitioners will withdraw their petition and Respondent will withdraw its counterclaim, both with prejudice and without costs.

2. The Parties hereto represent and acknowledge that, in executing this Stipulation, they have not relied upon any representation or statement, written or oral, made by any of the Parties' agents, attorneys or representatives with regard to the subject matter, basis or effect of this Agreement or otherwise, except those specifically stated in this Settlement Agreement.

3. The Parties hereto acknowledge that they were represented by competent counsel, that they understand the contents of this Stipulation of Settlement and that this Agreement is entered into voluntarily. This Stipulation of Settlement constitutes the entire Agreement and understandings between the parties and constitutes full and final Settlement as to all issues which were or could have been raised in these proceedings to date.

4. This Agreement and all of its terms are and will remain confidential to the maximum extent permitted by law. Specifically, the Petitioners shall not disclose, cause or suffer to be disclosed, either directly or indirectly, the terms of this Stipulation or Settlement Agreement except as required by law.

Petitioners

Respondent Cherry Hill Board of Education

By: Maryann Lucas

By: _____

Dated: 6/16/08

Dated: 6-24-08

Cherry Hill Board of Education
June 24, 2008

WHEREAS, a residency hearing concerning pupils 3005108 and 3001857 was offered and declined by the parents of these pupils; and

WHEREAS, on December 18, 2007 the Board of Education adopted a resolution accepting the Superintendent's recommendation that A.C. and D.C. be removed from the District as they were not domiciled in Cherry Hill during a portion of the 2007-2008 school year; and

WHEREAS, the parents of 3005108 and 3001857 filed a petition of appeal with the Commissioner of Education; and

WHEREAS, the appeal was transferred to the Office of Administrative Law, Agency Ref. No. 26-1/08, OAL Docket No. 2876-08; and

WHEREAS, the parties conferred and agreed to a settlement of the matter; and

WHEREAS, the terms of the settlement are reflected in a written Stipulation of Settlement, which Stipulation was prepared and approved by the Board Solicitor; and

WHEREAS, the Board of Education, having reviewed the terms of the proposed settlement, has determined that the resolution of this matter without further litigation is in the best interests of the District;

NOW, THEREFORE, BE IT RESOLVED, that the Board approves settlement of the pending action in accordance with the terms of the Stipulation as presented to the Board; and be it

FURTHER RESOLVED, that the Board Solicitor is authorized to withdraw the District's counterclaim for tuition reimbursement upon the petitioners' withdrawal of the residency petition and clearance of the petitioners' payment to the Board; and be it

FURTHER RESOLVED, that the Board President is authorized to execute any and all documents necessary to effectuate this request.

#297-08

297-08

OAL DKT. NOS. EDU 11437-07, EDU 11556-07, EDU 11745-07, EDU 11956-07,
EDU 11971-07, EDU 11972-07 AND EDU 12569-07
AGENCY DKT. NOS. 292-10/07, 291-10/07, 298-10/07, 293-10/07, 294-10/07, 300-10/07,
AND 332-10/07

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF NADIRA RAGHUNANDAN, GRAY CHARTER SCHOOL, ESSEX COUNTY,

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF MELISSA VAN PELT, GRAY CHARTER SCHOOL, ESSEX COUNTY,

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF CLAUDE GENTIL, GRAY CHARTER SCHOOL, ESSEX COUNTY,

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF TYARRA HUNTER, GRAY CHARTER SCHOOL, ESSEX COUNTY,

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF DANIELLE PONTI, GRAY CHARTER SCHOOL, ESSEX COUNTY,

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF TAHEERAH JACKSON, GRAY CHARTER SCHOOL, ESSEX COUNTY,

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF JENELLE STOKES, GRAY CHARTER SCHOOL, ESSEX COUNTY,

COMMISSIONER OF EDUCATION

DECISION ON MOTION
FOR INTERLOCUTORY REVIEW

The Order of the Administrative Law Judge (ALJ) and the parties' papers on application for interlocutory review have been considered by the Commissioner pursuant to *N.J.A.C.* 1:1-14.10.[1] [2]

Upon such consideration, the Commissioner fully concurs with the ALJ's conclusions on the threshold questions of law collectively raised by the seven appeals herein encompassed.

Like the ALJ, the Commissioner finds that *N.J.S.A.* 18A:26-10 and *N.J.S.A.* 18A:28-8 do, in fact, apply to teaching staff members of charter schools. Initially, the Charter School Program Act of 1995 states on its face that charter schools are public schools, required – except as expressly specified by law – to operate in accordance with the provisions of law and regulation governing other public schools. P.L. 1995, c. 426; *N.J.S.A.* 18A:36A-3, 18A:36A-6, 18A:6A-11. Such operation extends to the employment of teaching staff, who are required to hold appropriate certification and who acquire tenured status upon meeting the requisite conditions. *N.J.S.A.* 18A:36A-6, 18A:36-14c, 18A:36-14e. While respondents argue that the statutory directive as to operation in accordance with law governing other public schools applies to the charter *schools* and not to charter school *employees*, this argument ignores that *N.J.S.A.* 18A:26-10 and *N.J.S.A.* 18A:28-8 impose obligations on any person holding employment as a teaching staff member, since they flow – as evidenced by their contexts within

[1] By letter dated June 26, 2008, the Department notified the parties that the Commissioner had agreed to review the ALJ's order on an interlocutory basis because all parties disputed some aspect of the ALJ's order and the questions it addressed were matters of statutory interpretation best resolved prior to the conduct of seven separate hearings on the allegations against each individual respondent.

[2] Through the aforementioned June 26, 2008 notice, counsel were accorded three working days to submit any further argument in support of their clients' respective positions. Because this notice was faxed to counsel, with receipt by all confirmed on June 26, 2008, the Commissioner has not considered the submission filed on behalf of the Gray Charter School on July 3, 2008.

the statutes[3] – from certification and tenure status, respectively, and together seek to ensure that the education of public school students will not be compromised by the abrupt departure of any teaching staff member, whether employed for a fixed term by contract or policy (18A:26-10) or indefinitely under tenure (18A:28-8). Since charter school employees are nowhere exempted from compliance with these statutes, there is no basis for concluding that the laws do not apply to them. Indeed, given the purpose of *N.J.S.A.* 18A:26-10 and *N.J.S.A.* 18A:28-8, the very notion of charter school employees having no obligation in this regard flies in the face of the Legislature's intended scope of protection as well as sound educational policy and common sense.

Nor is this conclusion altered by the 2005 amendment extending the provisions of *N.J.S.A.* 18A:26-10 to teaching staff members of private schools for the disabled. As the statements accompanying the amendment plainly indicate, the purpose of the Legislature in enacting that amendment was to ensure that public school students educated through contracts with private schools would be afforded the same protection against disruption to their education as other public school pupils. P.L. 2005, c. 74; Sponsor's Statement and Senate Education Committee Statement for Senate Bill 1419, 2004-05 Session. Since charter school students are – by definition – public school pupils, there was no need for the Legislature to specify inclusion of charter schools employees when revising the statute; indeed, construing inclusion of employees of private schools for the disabled as an implied exclusion of charter school employees actually undermines the Legislature's explicitly expressed intent.

With respect to whether *N.J.S.A.* 18A:28-8 applies to teaching staff members who do not have tenure, the Commissioner finds no merit whatsoever in the Gray Charter School's

[3] *N.J.S.A.* 18A:26-10 appears in the chapter generally addressing teacher certification, while 18A:28-8 appears in the chapter governing acquisition and operation of tenure.

contention that the phrase "under tenure of service" as used in that statute has any meaning other than having acquired the status of tenured employment. It is clear from both the contexts and the language of the two enactments that they are intended to address differently situated groups of employees; indeed, the Legislature itself recognized this distinction in amending *N.J.S.A.* 18A:26-10 without concomitantly amending *N.J.S.A.* 18A:28-8, since tenured status does not pertain to teachers at private schools for the disabled. As noted by the ALJ, it is of no import that the two statutes may, in the past, have been referenced collectively or interchangeably in decisional contexts where the question herein was not raised or addressed and the respondent's employment status was not material to the determination of improper departure.

Accordingly, for the reasons expressed therein and above, the order of the ALJ is adopted as the Commissioner's final decision in this interlocutory matter, so that the hearings contemplated with respect to the allegations against each individual respondent shall proceed at the Office of Administrative Law consistent with the rulings of law herein.

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 7/09/08

Date of Mailing: 7/09/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF NADIRA RAGHUNANDAN, GRAY CHARTER SCHOOL, ESSEX COUNTY.	OAL DKT. NO. EDU 11437-07 AGENCY DKT. NO. 292-10/07
IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF MELISSA VAN PELT, GRAY CHARTER SCHOOL, ESSEX COUNTY.	OAL DKT. NO. EDU 11556-07 AGENCY DKT. NO. 291-10/07
IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF CLAUDE GENTIL, GRAY CHARTER SCHOOL, ESSEX COUTNY.	OAL DKT. NO. EDU 11745-07 AGENCY DKT. NO. 298-10/07
IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF TYARRA HUNTER, GRAY CHARTER SCHOOL, ESSEX COUTNY.	OAL DKT. NO. EDU 11956-07 AGENCY DKT. NO. 293-10/07
IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF DANIELLE PONTI, GRAY CHARTER SCHOOL, ESSEX COUNTY.	OAL DKT. NO. EDU 11971-07 AGENCY DKT. NO. 294-10/07

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF TAHEERAH JACKSON, GRAY CHARTER SCHOOL, ESSEX COUNTY.	OAL DKT. NO. EDU 11972-07 AGENCY DKT. NO. 300-10/07
IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF JENELLE STOKES, GRAY CHARTER SCHOOL, ESSEX COUNTY	OAL DKT. NO. EDU 12569-07 AGENCY DKT. NO. 332-10/07 (CONSOLIDATED)

Cherie L. Adams, Esq., for Gray Charter School (Adams, Stern, Gutierrez & Lattiboudere, attorneys)

Howard S. Feintuch, Esq., for respondent Nadira Raghunandan (Feintuch, Porwich & Feintuch, attorneys)

Nancy I. Oxfeld, Esq., and Randi Doner April, Esq., for respondent Melissa Van Pelt (Oxfeld Cohen, attorneys)

Philip Feintuch, Esq., for respondent Claude Gentil (Feintuch, Porwich & Feintuch, attorneys)

Gregory T. Syrek, Esq., for respondents Tyarra Hunter, Taheerah Jackson and Jenelle Stokes (Bucceri and Pincus, attorneys)

Lane J. Biviano, Esq., for respondent Danielle Ponti

Before **RICHARD MCGILL, ALJ:**

This matter involves seven Orders to Show Cause issued by the Commissioner of Education at the request of Gray Charter School, which seeks suspensions of the

teaching certificates of the above - named individuals ("respondents") pursuant to N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8 for unprofessional conduct. Specifically, Gray Charter School alleges that respondents resigned from their positions as teachers without providing adequate notice.

PROCEDUAL HISTORY

Gray Charter School requested the Orders to Show Cause by letters dated September 21, 2007, to the Commissioner of Education. The Orders to Show Cause were issued on dates ranging from September 27, 2007, to October 24, 2007. Respondents filed answers on dates ranging from October 19, 2007, to November 28, 2007.

The Orders to Show Cause were transmitted to the Office of Administrative Law between October 25, 2007, and December 26, 2007, for determination as contested cases. By Order dated March 31, 2008, the seven matters were consolidated for the purpose of determining the applicability of N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8 to charter schools.

Respondents Tyarra Hunter, Taheerah Jackson and Jenelle Stokes filed a motion to dismiss based on the contention that N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8 do not apply to charter schools. Other respondents submitted briefs which support the motion, and Gray Charter School filed a response in opposition to the motion on April 28, 2008.

ISSUES

The motion and briefs submitted by respondents raise two issues. The first issue is whether two statutes, N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8, are applicable to charter schools. The second issue is whether N.J.S.A. 18A:28-8 applies to a teacher who does not have tenure.

LAW AND ANALYSIS

The first issue is whether the two statutes, N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8, apply to charter schools. This is purely a question of law.

One statute, N.J.S.A. 18A:28-8, states as follows;

> Any teaching staff member, under tenure of service, desiring to relinquish his position shall give the employing board of education at least 60 days written notice of his intention, unless the board shall approve 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 other statute, N.J.S.A. 18A:26-10, provides as follows:

> Any teaching staff member employed by a board of education or an approved private school for the disabled, who shall, without the consent of the board or, in the case of an approved private school for the disabled, the board of directors of the school, cease to perform his duties before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct, and the commissioner may, upon receiving notice thereof, suspend his certificate for a period not exceeding one year.
>
> As used in this section, "approved private school for the disabled" means a private entity approved by the Department of Education to provide special education and related services to students with disabilities who have been placed by the district board of education or charter school responsible for providing their education.

Respondents maintain that N.J.S.A. 18A:28-8 by its terms applies to teaching staff members who are employed by a board of education. Similarly, N.J.S.A. 18A:26-10 applies to teaching staff members employed by a board of education or an approved private school for the disabled.

According to respondents, a charter school is different from both a board of education and an approved private school for the disabled. As set forth in N.J.S.A. 18A:36A-3, a charter school is a public school operated under a charter granted by the Commissioner of Education, operates independently of a local board of education and is managed by a board of trustees. Respondents argue that N.J.S.A. 18A:28-8 and N.J.S.A. 18A:26-10 were not incorporated into the charter school law. Rather, in accordance with legislative intent, charter schools have their own statutes and regulations related to tenure.

An employee of a charter school shall not accrue tenure pursuant to N.J.S.A. 18A:17-2, N.J.S.A. 18A:17-3 or N.J.S.A. 18A:28-5 but shall acquire streamlined tenure pursuant to guidelines to be promulgated by the commissioner. N.J.S.A. 18A:36A-14(e); N.J.A.C. 6A:11-6.1. In contrast, a teaching staff member employed by a board of education could obtain tenure pursuant to N.J.S.A. 18A:28-5. Likewise, there are separate procedures for tenure charges. For a tenured employee of a board of education, the procedures are set forth in N.J.S.A. 18A:6-11. The procedures for tenure charges for an employee of a charter school are set forth in N.J.A.C. 6A:11-6.2 and -6.3.

Under the circumstances, respondents infer that N.J.S.A. 18A:28-8 and N.J.S.A. 18A:26-10 are not applicable to charter schools. Simply stated, N.J.S.A. 18A:28-8 and N.J.S.A. 18A:26-10 are not applicable, because a charter school is not a board of education or a private school for the disabled.

In response, Gray Charter School cities N.J.S.A. 18A:36A-11, which states that a charter school shall operate in accordance with its charter and the provisions of law and regulation which govern other public schools. According to Gray Charter School, N.J.S.A. 18A:28-8 and N.J.S.A. 18A:26-10 are provisions of law which govern other public schools and are therefore applicable to charter schools.

The arguments of Gray Charter School are more persuasive. In accordance with N.J.S.A. 18A:36A-11, a charter school shall operate in accordance with the provisions of law, i.e., statutes and regulations, which govern public schools. By this

sweeping language, the Legislature avoided a need to amend each statutory section individually but nonetheless applied the provisions thereof to charter schools. Therefore, the absence of references to charter schools in N.J.S.A. 18A:28-8 and N.J.S.A. 18A:26-10 does not mean that they are not applicable thereto.

Several parties advance arguments based on an amendment to N.J.S.A. 18A:26-10. The amendment adds a reference to "an approved private school for the disabled" to N.J.S.A. 18A:26-10.

The general purpose of N.J.S.A. 18A:26-10, like N.J.S.A. 18AA28-8, is to protect pupils from the disruptions that would result from resignations by teachers without adequate notice. Similarly, the purpose of the amendment is to extend this protection to public school pupils who have been placed by a district board of education or a charter school in a private school for the disabled. Under the circumstances, it is highly unlikely that the Legislature intended to deprive public school pupils attending charter schools of this same protection. Therefore, I **CONCLUDE** that N.J.S.A. 18A:28-8 and N.J.S.A. 18A:26-10 are applicable to charter schools.

The next issue is whether N.J.S.A. 18A:28-8 applies to a teacher who does not have tenure. Respondents argue that N.J.S.A. 18A:28-8, which refers to a "teaching staff member, under tenure of service," would not apply to a teacher who does not have tenure. Only two respondents, Tyarra Hunter and Jenelle Stokes, have tenure.

In response, Gray Carter School contends that the word "tenure" does not mean a tenured teacher in the statutory sense but rather refers generally to the period or term of something, such as the position of teacher. According to Gray Charter School, certificates of non-tenured teachers have been suspended pursuant to N.J.S.A. 18A:28-8, e.g., In the Matter of the Suspension of the Teaching Certificate of Robert Falco, OAL Dkt. No. EDU 9283-98; In the Matter of the Suspension of the Teaching Certificate of Mary Savino, OAL Dkt. No. EDU 11688-04.

The arguments of Gray Charter School are unpersuasive for several reasons. First, N.J.S.A. 18A:28-8 is a section of Chapter 28, which is entitled, "Tenure." As the

title suggests, the general subject of the entire Chapter is tenure in the statutory sense, e.g., N.J.S.A. 18A:28-5 concerns the acquisition of tenure; N.J.S.A. 18A:28-9 relates to the effect of tenure in the context of a reduction of force. Aside from N.J.S.A. 18A:28-8, every use of the term "tenure" in Chapter 28 seems to be in the statutory sense. Under the circumstances, it is highly probable that the term "tenure" in N.J.S.A. 18A:28-8 is in the statutory sense.

Second, the two cases cited by Gray Charter School do not support its position. While there was one reference to N.J.S.A. 18A:28-8 in Falco, the case was clearly decided on the basis of N.J.S.A. 18A:26-10 for failure to provide the notice required by the employment contract. In Savino, a determination was made that the teacher violated N.J.S.A. 18A:28-8 and N.J.S.A. 18A:26-10, but the real issue in the case related to the length of the suspension. With respect to the violations, the findings of fact indicate that the teacher did not comply with the notice requirement in the contract. At the same time, there is no express finding with respect to tenure. Since the teacher violated N.J.S.A. 18A:26-10, the determination that there was a violation of N.J.S.A. 18A:28-8 did not change the situation in any respect. Further, N.J.S.A.18A:28-8 was not the focus of discussion and may not have received careful consideration. Under the circumstances, these precedents do not provide significant support for the position of Gray Charter School.

In sum, five respondents did not have tenure in the statutory sense. Therefore, I **CONCLUDE** that N.J.S.A. 18A:28-8 is not applicable to these five respondents.

In view of the above, it is **ORDERED** that:

1. The motion to dismiss based on the contention that N.J.S.A. 18A:28-8 and N.J.S.A. 18A:26-10 are not applicable to charter schools is denied.

2. The portion of the Order to Show based on N.J.S.A. 18A:28-8 is dismissed with respect to respondents Nadira Raghunandan, Melissa Van Pelt, Claude Gentil, Danielle Ponti and Taheerah Jackson.

This order may be reviewed by the Commissioner of Education, either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case pursuant to N.J.A.C. 1:1-18.6.

June 6, 2008
DATE

RICHARD McGILL, ALJ

tbj

298-08

#298-08

IN THE MATTER OF THE TENURE	:	
HEARING OF PAUL ASH,	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF	:	DECISION
LAW AND PUBLIC SAFETY,	:	
JUVENILE JUSTICE COMMISSION.	:	
	:	

SYNOPSIS

Petitioner certified three sets of tenure charges against respondent – a tenured health and physical education teacher – for neglecting his duties, insubordination and unbecoming conduct. Specifically, respondent: failed to give proper attention to his teaching duties, falsified time and attendance records, failed to heed numerous warnings regarding his behavior, and violated an order prohibiting him from attending sports tournaments.

The ALJ found, *inter alia,* that: the petitioner has established its charges by a preponderance of the credible evidence through the credible testimony of supervisors and documentation presented at hearing; the record shows that respondent falsified numerous timesheets; failed to prepare lesson plans; habitually arrived late and left early; and was unprepared to teach. The ALJ concluded that the only appropriate penalty for these longstanding problems is removal of the respondent from his tenured position, and so ordered.

Upon careful and independent review of the record, the Initial Decision of the OAL was adopted as the final decision in this matter, and the Commissioner directed that respondent be dismissed from his tenured position. A copy of this decision has been transmitted to the State Board of Examiners for action as that body deems appropriate.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

July 10, 2008

OAL DKT. NO. EDU 2799-03, EDU 2658-04, AND EDU 2861-06
AGENCY DKT NO. 134-4/03, 128-4/04, AND 131-4/06
(CONSOLIDATED)

IN THE MATTER OF THE TENURE	:	
HEARING OF PAUL ASH,	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF	:	DECISION
LAW AND PUBLIC SAFETY,	:	
JUVENILE JUSTICE COMMISSION.	:	
	:	

The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon her full consideration of this tenure matter, which included transcripts of the hearing conducted at the OAL[1] – the Commissioner agrees with the Administrative Law Judge (ALJ) that the record amply demonstrates that the Juvenile Justice Commission has sustained its burden of establishing – by a preponderance of the credible evidence – its charges of unbecoming conduct, insubordination and neglect of duties against respondent. The Commissioner further concurs with the ALJ that respondent's dismissal from his tenured teaching position is warranted.

Accordingly the Commissioner adopts the recommended decision of the OAL – for the reasons comprehensively detailed therein – and hereby orders that Paul Ash be dismissed from his teaching position with the New Jersey Department of Law and Public Safety, Juvenile Justice Commission as of the date of this decision. This matter shall be transmitted to

[1] Hearing dates were August 19 and October 24, 2005, September 14 and November 28, 2006 and March 27, 2007.

the State Board of Examiners for action, as that body deems appropriate, against Mr. Ash's certificate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/10/08

Date of Mailing: 7/10/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NOS. EDU 2799-03, EDU 2658-04 and EDU 2861-06
AGENCY DKT. NOS. 134-4/03, 128-4/04 and 131-4/06

IN THE MATTER OF THE TENURE HEARINGS OF PAUL ASH, NEW JERSEY DEPARTMENT OF LAW AND PUBLIC SAFETY, JUVENILE JUSTICE COMMISSION.

Christopher C. Josephson, Deputy Attorney General, for respondent (Anne Milgram, Attorney General of New Jersey, attorney)

Mark A. Furey, Esq., appearing for Petitioner (Capehart & Scatchard, P.A., attorneys)

Record Closed: August 10, 2007 Decided: May 30, 2008[1]

BEFORE **ISRAEL D. DUBIN**, ALJ:

This matter arises out of three sets of tenure charges filed by petitioner, the Juvenile Justice Commission ("JJC" or "Commission"), against respondent Paul Ash ("Ash"), a Health and Physical Education teacher, seeking his dismissal pursuant to

[1] Extensions of the 45-day period in which an initial decision must be filed were granted by the Commissioner of Education.

N.J.S.A. 18A:6-10. In each set of charges Ash is accused of neglecting his duties, insubordination and unbecoming conduct. The central theme of these charges is that Ash failed to give proper attention to his teaching duties, did not heed numerous warnings, falsified time and attendance records, and violated an order prohibiting him from attending sports tournaments. He is also charged with giving a false statement to a Willingboro police officer.

The matters were transmitted to the Office of Administrative Law as contested cases and subsequently consolidated into one matter. Hearings were conducted on August 19, 2005; October 24, 2005; September 14, 2006; November 28, 2006; and March 27, 2007. The JJC called eleven witnesses[2] and Mr. Ash called none, electing not to testify in his own behalf. The record was closed on August 3, 2007, when it became apparent that Mr. Ash would not be filing a post-hearing brief or otherwise responding to the brief filed by the JJC.

Mary Adele Lundy has been employed by the JJC for approximately nineteen years; the last three as a Regional Education Manager. In her current position, Ms. Lundy oversees all of the community program supervisors and education staff within the Southern Region. Her duties include reviewing written records, visiting each facility, meeting with and observing the staff, and addressing individual problems.

Ms. Lundy is familiar with Mr. Ash in his capacity as a Health and Physical Education teacher and was his direct supervisor when he was at the Cumberland Day Program, some 15 years ago. She continued to monitor his activities and abilities as a teacher when Ash worked at the Pinelands and Burlington facilities, which are in the Southern Region.

Ms. Lundy testified that teachers and staff participate in JJC sports tournaments by preparing and supervising the students, coaching, and officiating. In August 2002, Ash was suspended from attending sports tournaments for a period of six months and Ms. Lundy was present when he was informed of the decision. As she recalled, Ash

[2] I have not summarized the testimony of every witness because much of it was cumulative. Rather, I have focused on the testimony offered in support of the specific charges.

disagreed with the decision and didn't think it was fair, but Ms. Lundy stressed how important it was for him to comply with the order. Nevertheless, it wasn't long before Ash's supervisors reported that Ash was continuing to attend tournaments.

According to Ms. Lundy, Ash's direct supervisors also reported that he was violating time, leave and attendance policies on almost a daily basis. In fact, she was able to see this for herself when she asked to see him at the end of a work day, only to find that he'd left early and failed to sign out. Although she gave Ash verbal warnings, he failed to take heed and written reprimands followed. See e.g. Exhibit P-7 (eight violations of the sign in/sign out procedures, four instances of leaving his work assignment without permission, and chronic absenteeism or reporting for work late). Even these proved ineffective in altering his behavior.

Ms. Lundy further testified that she personally observed Ash in the classroom on several occasions and found that he was not prepared to teach. There were no lesson plans, the materials he used were outdated, the lessons were presented in disjointed fashion, the students were not engaged in learning and he did not instruct for the full period. Ash repeatedly ignored subsequent requests for copies of his lesson plans.

Mark Tyrone Myers has been an Education Supervisor with the JJC since June 2000 and served as Ash's supervisor at Burlington, where Ash taught one day a week. Mr. Myers testified that Ash did not prepare appropriate lesson plans and on several occasions was simply unprepared to teach. Mr. Myers provided Ash with examples of appropriate lesson plans and a copy of the standards he was to follow in drafting his plans, but still Ash failed to complete his lesson plans properly. Therefore, Mr. Myers reduced these observations to writing. See e.g. Exhibit P-13 (refusal to accept input from supervisors, tardiness, failure to report to offsite locations in a timely manner or at all, and failure to follow proper norms and guidelines of an educator).

Mr. Myers also testified that all employees at Burlington, including Ash, were required to sign in/out and needed permission to take leave, even if only for a few hours. However, he was personally aware of several instances when Ash failed to sign in/out and took leave without receiving permission. He reduced these observations to

writing as well. See e.g. Exhibit P-9 (inappropriate log entries and unauthorized absences), Exhibit P-10 (unauthorized use of time), and Exhibit P-11 (reporting late and calling out sick after lunch).

Mr. Myers was also aware that Ash had been suspended from attending or officiating at JJC tournaments but had been attending them anyway. Moreover, he did this without regard for the classes he should have been teaching. Consequently, Mr. Myers and others at the facility had to stand in for him, taking away from their prep time and other duties.

Donna Thatcher is a Supervisor of Education for the JJC and supervised Ash at the Pinelands facility from July to December 2002. Although Ash was out on sick leave for approximately two of the six months, Ms. Thatcher stated that she'd had sufficient time to observe his unacceptable conduct.

Ms. Thatcher testified that Ash repeatedly violated time, leave, and attendance policies. For example, although teachers were required to document attendance on a time sheet or in a log book, depending on the facility, there were many instances when Ash did not sign in/out at all, falsified arrival and departure times, or simply left early without permission. She met with him on numerous occasions to discuss these problems, issued written warnings, and even referred him to Employee Assistance, but none of this caused him to alter his behavior.

Additionally, teachers at Pinelands were required to prepare and submit weekly lesson plans to their supervisors for approval. However, according to Ms. Thatcher, Ash never submitted any plans for her review, even after she personally instructed him on lesson plan preparation. Moreover, there were at least two occasions when she went to observe Ash's class only to find that he wasn't there.

Margie Brown has been employed by the JCC as Assistant Superintendent of Schools Administration for eight years and counts among her many responsibilities oversight of the Health and Physical Education teachers. She testified that when she

includes the time she spent in her previous position, she has indirectly or directly supervised Ash for approximately ten years.

Ms. Brown testified that gym teachers serve as coaches and officials at JJC sports tournaments. However, on August 14, 2002, Ash was suspended from officiating at tournaments due to his recurrent attendance problems. The only exception was that he could still coach at a tournament, but only if one of his teams was competing. Otherwise, he could not attend or participate in any capacity.

According to Ms. Brown, Ash did not abide by the terms of the suspension and attended several tournaments even though he was not coaching a team. On April 24, 2003, Ash attended an indoor volleyball tournament even though he was not coaching the team. When Ms, Brown ordered him to leave, he refused and had to be escorted from the premises by corrections officers. Additionally, between February 19 and March 3, 2003 Ash failed to report to his assigned facilities and instead attended indoor basketball tournaments in violation of his suspension. As a result, his students did not receive Physical Education classes for two weeks. Ash's pay was docked and he was disciplined for violating his suspension.

Kim Spencer Hudgins has been employed by the JJC for 21 years and served as the Superintendent of Pinelands during the 4 ½ years Ash served there as a Physical Education and Health teacher. Ms. Hudgins' testified that on several occasions she personally observed Ash violating JJC time policies by signing in/out at the same time and otherwise falsifying his entries. Additionally, he frequently left work early without permission and sometimes did not report for work at all. She also observed that Ash was not always prepared to teach his class because he did not have lesson plans or a clear curriculum. As a result, on August 28, 2002, Ms. Hudgins asked that disciplinary charges be preferred against him.

According to Ms. Hudgins, one of Mr. Ash's responsibilities at Pinelands was to provide one-on-one tutoring for residents. On April 2, 2002, Ms. Hudgins observed a tutoring session where Ash was reading a book and not interacting with his student in any way. She reported this incident and Ash received a verbal admonition.

Tremaine Harrison is a Supervisor of Educational Programs at Jamesburg and has held this position since 2004. Since one of his job responsibilities was supervision of the faculty, he had numerous opportunities to observe Ash in his work environment. In carrying out this duty, he observed that Ash frequently violated the JJC's timekeeping policy by improperly signing in/out and falsifying his entries to reflect an 8:00 a.m. – 4:00 p.m. schedule even though he came in late or left early. Mr. Harrison testified that Ash's actions made it necessary for other faculty and staff to cover his classes. The corrections officers in particular complained when they were enlisted to watch his students.

Diane Cameron is a Senior Investigator in the JJC's Office of Investigations and conducts internal affairs investigations involving JJC employees and residents. Ms. Cameron testified that on August 27, 2005, Ash was stopped by the Willingboro Police Department and lied to the officer in an attempt to get out of a speeding ticket. Specifically, he told the officer that he was the Superintendent of Jamesburg and was speeding because he was responding to a suicide at the facility. Ms. Cameron was assigned to conduct an investigation when the police officer called the facility to confirm Ash's story and was referred to the Office of Investigations.

This is the substance of the record.

The Board must establish the charges against Ash by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). This has been accomplished through the credible testimony of supervisors and the documentation they presented. As Ash did not testify or call a witness, the record contains no alternative version of events.

Collectively, the record reflects that Ash falsified numerous timesheets even after receiving memos and warnings on the matter. He neglected his teaching duties by failing to prepare lesson plans, habitually arriving late and leaving early, and by being unprepared to teach. He also attended several sports tournaments after specifically being directed not to attend. Moreover, he lied in order to avoid a speeding ticket by

telling the police officer that he was the Superintendent at Jamesburg and was rushing to the facility to deal with a suicide. All of this bespeaks an employee who disobeys orders and completely disregards his duties and responsibilities in order to do what he wants to do, at the expense of his students and colleagues. The only appropriate penalty for these longstanding problems is removal.

Based on the foregoing it is **ORDERED** that Paul Ash be removed from his tenured position as a Health and Physical Education teacher with the JJC.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 30, 2008

DATE

ISRAEL D. DUBIN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

5-30-08

DATE

Mailed to Parties:

JUN 4 2008

DATE

OFFICE OF ADMINISTRATIVE LAW
CHIEF ADMINISTRATIVE LAW JUDGE

/lam

APPENDIX

LIST OF WITNESSES

For petitioner:

John Amberg
Lisa Bell
Margie Brown
Diane Cameron
Tremaine Harrison
Mary Lundy
Mark Myers
Karen Samsel
Michelle Shapiro
Kim Spencer-Hudgins
Donna Thatcher

For respondent:

None

LIST OF EXHIBITS[3]

For petitioner:

P-1 Unsatisfactory Attendance Memo (February 9, 1990)

P-2 Notification of Minor Disciplinary Action (August 14, 1990)

P-3 (a) Certification of Determination of Tenure Charges (May 22, 1995)

(b) In the Matter of the Tenure Hearing of Paul Ash, Division of

[3] There is a discrepancy between the lists of exhibits moved into evidence in the hearing transcripts and the list in this Appendix, which was compiled from my notes and cross-checked against the actual exhibits in or missing from the file. Be that as it may, the parties referred to and treated the exhibits listed below as evidence and did not ask for any of them to be returned. Consequently, I have included these exhibits in the record of these proceedings.

Juvenile Services, EDU 6594-95, Initial Decision (December 27, 1995) and Commissioner's Decision (February 7, 1996)

P-4 Written Reprimand (August 27, 2002)

P-5 Written Reprimand (January 15, 2003)

P-6 Written Reprimand (January 23, 2003)

P-7 Written Reprimand (January 23, 2003) - Corrected

P-8 Incorrect Sign-In Procedure Memo (January 28, 2003)

P-9 Inappropriate Log Entries/Unauthorized Absences Memo (January 28, 2003)

P-10 Unauthorized Use of Time Memo (March 7, 2003)

P-11 Reporting Late for Duty Memo (May 30, 2003)

P-12 Unauthorized Attendance at Tournament Memo (May 13, 2003)

P-13 Unacceptable Conduct Memo (September 16, 2003)

P-14 Memo of Understanding (July 15, 2002)

P-15 Written Reprimand (August 27, 2002)

P-16 Meeting Summary Memo (December 4, 2002)

P-17 p. 1 - March 2003 Calendar of Unacceptable Conduct

p. 2 - Unauthorized Use of Time Memo (March 7, 2003)

p. 3 - Unexcused Absences and Related Conduct Memo (March 7, 2003)

p. 4 - Unacceptable Conduct Chart (January 3 - March 7, 2003)

p. 5 - Unacceptable Absence Note (March 10, 2003)

p. 6 - PE Safety Committee Meeting Memo (March 17, 2003)

p. 7 - Unauthorized Use of Time Memo (March 24, 2003)

p. 8 - Continued Disregard of Rules Memo (April 29, 2003)

p. 9 - Continued Disregard of Rules Memo (April 22, 2003)

p. 10 - Continued Disregard of Rules Memo (April 24, 2003)

p. 11 - Reporting Late to PE Teachers' Training Memo (March 26, 2003)

P-17(a) p. 1 - April 2003 Calendar of Unacceptable Conduct

p. 2 - Continued Disregard of Rules Memo (April 22, 2003)

p. 3 - Attendance at Indoor Volleyball Tournament Memo (April 21, 2003)

p. 4 - Lesson Plans Memo (April 24, 2003)

p. 5 - Unauthorized Attendance at Tournament Memo (April 24, 2003)

p. 6 - Continued Disregard of Rules Memo (April 24, 2003)

p. 7 - Restriction on Attendance at Tournaments Memo (April 25, 2003)

p. 8 - Tutoring Memo (April 2, 2003)

p. 9 - Continued Disregard of Rules Memo (April 29, 2003)

P-17(b) p. 1 - May 2003 Calendar of Unacceptable Conduct

p. 2 - Performance Assessment Review 3/1/02 - 2/28/03

p. 3 - Suspension from Officiating Tournaments Memo (May 6, 2003)

p. 4 - Spring Retreat Memo (May 12, 2003)

p. 5 - Unauthorized Attendance at Tournament Memo (May 13, 2003)

p. 6 - Violation of Directive Memo (May 29, 2003)

p. 7 - Logbook/Time Sheets Memo (May 23, 2003)

p. 8 - Violation of Supervision Policy Memo (May 23, 2003)

p. 9 - Memo of Understanding (May 15, 2003)

p. 10 - Unauthorized Attendance at Tournament Memo (May 13, 2003)

p. 11 - Attendance and Time Violations Memo (May 30, 2003)

P-17(c) p. 1 - May 2003 Calendar of Unacceptable Conduct

p. 2 - Unprofessional Behavior Memo (June 3, 2003)

p. 3 - Memo of Understanding - Insubordination/Absence Memo (June 17, 2003)

p. 4 - Memo of Understanding - Insubordination/Absence Memo (June 19, 2003)

p. 5 - Track & Field Tournament Travel Memo - June 19, 2003)

p. 6 - Unauthorized Use of Time Memo (March 7, 2003)

P-18 Summary of Unacceptable Conduct while at Pinelands Facility (December 12, 2002)

P-19 Summary of August 14, 2002 Meeting (August 22, 2002)

P-20 Suspension from Officiating Memo (February 19, 2003)

P-21 Brown Affidavit in Support of Disciplinary Action against Paul Ash (March 6, 2003)

P-22 Unauthorized Attendance at Tournament Memo (April 21, 2003)

P-23 Unauthorized Attendance at Tournament Memo (April 24, 2003)

P-24 Suspension from Officiating Memo (May 6, 2003)

P-25 Unauthorized Attendance at Tournament Memo (August 11, 2003)

P-26 Unauthorized Attendance at Tournaments Memo (August 22, 2003)

P-27 Notice of Intention to File Tenure Charges (March 3, 2004)

P-28 Response to Allegations of Oppression, Discrimination and Harassment (December 19, 2002)

P-29 Sick Leave Policy (effective November 3, 2005)

P-30 Timekeeping/Time Sheets Memo (December 12, 2002

P-31 Logbook/Time Sheet Violation Memo (January 22, 2003)

P-32 Weekly Sign In Sheets - Weeks of March 8, 15 & 22, 2003; April 19, 2003; May 10 & 24, 2003; June 7, 14 & 21, 2003; July 5 & 19, 2003; and August 2, 9, 16 & 23, 2003

P-33 Disciplinary Action Charges Memo (August 28, 2002)

P-34 Chronology of Time and Attendance Violations (February 23, 2003)

P-35 Chronology of Violations following March 13, 2003 Meeting (March 25, 2003)

P-36 Supplemental Violations Memo (April 22, 2003)

P-37 Tutoring Memo (April 2, 2003)

P-38 Unauthorized Attendance at Tournament Memo (May 13, 2003)

P-39 Unauthorized Use of Time Memo (June 24, 2003)

P-40 Weekly Sign In Sheets - Weeks of September 17 & 24, 2005; October 1, 8, 15, 22 & 29, 2005; November 5, 12, 19 & 26, 2005; and December 3, 10, 17, 24 & 31, 2005

P-41 Recap of February 8, 2006 Meeting Memo (February 8, 2006)

P-42 Accountability for February 16, 2006 Time Sheet Violation (February 17, 2006)

P-43 Lesson Plan Violations Memo (March 15, 2006)

P-44 Accountability for February 9 & 14, 2006 Time Sheet Violations (February 16, 2006)

P-45 Reporting Accidental Injury and Requesting Sick Leave Injury (SLI) Policy (effective November 1, 2005)

P-46 Leaves of Absence Memo (effective November 3, 2005)

P-47 (a) Letter Approving Sick Leave Injury September 14-15, 2005 (September 19, 2005)

(b) Letter Confirming Extension of Light Duty Status (September 29, 2005)

(c) Letter Confirming Extension of Light Duty Status (October 21, 2005)

(d) Letter Confirming Extension of Light Duty Status (November 2, 2005)

(e) Letter Confirming Extension of Light Duty Status (November 15, 2005)

P-48 Letter concerning Time and Attendance Records Discrepancies (February 3, 2006)

P-49 Letter concerning Reinstatement of Personal Benefit Time (February 6, 2006)

P-50 Letter Denying Sick Leave Injury for Absences of December 15, 2005 - January 2, 2006 (February 27, 2006)

P-51 Chronology of Events Related to Paul Ash's Work Related Injury of September 12, 2005 (March 2, 2006)

P-52 Investigation Report - Conduct Unbecoming (September 28, 2005)

P-53 [Retained by Petitioner]

P-54 Time Sheet/Teacher Schedule Memo (August 17, 2004)

P-55 Time Sheet Memo (October 7, 2004)

P-56 Proper Call Out Procedure Memo (December 29, 2004)

P-57 First Report of Accidental Injury (September 14, 2005)

P-58 Time Sheet Violation Memo (January 9, 2006)

P-59 Letter of Understanding Memo (February 8, 2006)

P-60 List of Physician and Physical Therapy Appointments - September 28 - December 8, 2005 (February 17, 2006)

P-61 Clarification of List of Physician and Physical Therapy Appointments (February 22, 2006)

P-62 Weekly Lesson Plans Requirement Memo (January 4, 2006)

For respondent:

R-1 Marked for Identification Only

R-2 Marked for Identification Only

R-3 Marked for Identification Only

R-4 Lesson Plans/Class Lessons Memo (May 7, 2003)

R-5 (a) Resident Weight Lifting Memo (August 22, 2002)
(b) Weightlifting Memo (August 22, 2002)
(c) Proposed Training Document Memo (August 23, 2002)

R-6 Response to Allegations of Oppression, Discrimination and Harassment (December 19, 2002) (Duplicate of Exhibit P-28)

R-7 Summary of August 14, 2002 Memo (August 22, 2002) (Duplicate of Exhibit P-19)

R-8 Suspension from Officiating Memo (February 19, 2003) (Duplicate of Exhibit P-20)

R-9 Suspension from Officiating Tournaments Memo (May 6, 2003) (Duplicate of Exhibit P-17(b), p. 3)

R-10 Requests for Leaves (a) June 12, (b) June 16 & 17, and (c) June 18, 2003

R-11 Request for Leave of 2 Hours on January 29, 2003

R-12 Logbook/Time Sheets Memo (May 23, 2003) (Duplicate of Exhibit P-17(b), p. 7)

#299-08

299-08

OAL DKT. NO. EDU 3308-03
AGENCY DKT. NO. 79-3/03

MARIA VINDAS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed "Settlement Agreement," and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed.

Upon such review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/10/08

Date of Mailing: 7/10/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3308-03

AGENCY DKT. NO. 79-3/03

MARIA VINDAS,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,

Respondent.

Nancy I. Oxfeld, Esq., for petitioner (Oxfeld Cohen, attorneys)

Karen A. Murray, Esq., for respondent (The Murray Law Firm, attorneys)

Record Closed and Decided: May 23, 2008

BEFORE **JESSE H. STRAUSS**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education where it was filed on March 26, 2003, for hearing as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The matter had been on the OAL's Inactive List since April 7, 2003, since the claim asserted at OAL was dependent upon the outcome of a companion Workers' Compensation petition.

On May 23, 2008, the parties submitted a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

May 23, 2008
DATE

Jesse H. Strauss
JESSE H. STRAUSS, ALJ

Date Received at Agency: 5-29-08

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAY 29 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

The Murray Law Firm, LLC
3 Revmont Drive
Suite 318
Shrewsbury, New Jersey 07702
Attorneys for Respondent, Elizabeth Board of Education

2010 MAY 23 P 1:20
OFFICE OF ADMIN

MARIA VINDAS, **Petitioner,** **v.** **ELIZABETH BOARD OF EDUCATION,** **Respondent.**	**BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY** **OAL DKT. NO.: EDU 03308-03** **AGENCY DKT. NO.: 79-3/03** **SETTLEMENT AGREEMENT**

Petitioner, **MARIA VINDAS** (M.V.) hereby agrees, with the Respondent, the **ELIZABETH BOARD OF EDUCATION** (the "Board"), to settle the above-referenced matter as follows:

1. Respondent shall reinstate to Petitioner, M.V., a total of eighteen (18) sick days for the paid sick days utilized on October 23, 24, 25, 28, 29, 30 and 31, 2002 and November 1, 4, 5, 6, 12, 13, 14, 15, 18, 19 and 20, 2002.

2. The parties agree that this settlement shall not constitute any admission of wrongdoing by Respondent in this matter.

3. Petitioner, M.V., agrees that this Settlement resolves any and all claims that she had, or may have had against Respondent relative to Petitioner's injuries that occurred in October 2002.

4. Petitioner, M.V., agrees to waive any rights she had or may have had to file any other grievance, complaint, petition or charge in any court of law or administrative agency, including, but not limited to the Commissioner of Education, Division of Worker's Compensation, Office of Administrative Law and/or the Public Employment Relations Commission, relative to any issues or potential issues that arose or could have arisen during the time period that Petitioner incurred and was treated for injuries that occurred on or about October 22, 2002.

5. Petitioner, M.V., hereby waives any claims for compensatory damages, interest, attorney fees, costs of suit and/or any other forms of relief in relation to any injuries that occurred in October 2002.

6. Petitioner, M.V., agrees that she has entered into this Settlement Agreement voluntarily and without coercion.

7. Petitioner, M.V., agrees that the settlement resolves all of her claims in case Docket No. EDU 03308-03; Agency Docket No. 79-3/03, with prejudice.

8. Petitioner, M.V., agrees that she has been fully and fairly represented by legal counsel throughout this proceeding.

9. All parties mutually agree to accept the terms contained in this Agreement.

10. This Agreement shall not be precedential with respect to any similar claims raised against the Elizabeth Board of Education.

11. All parties agree and acknowledge that this Settlement Agreement embodies the parties' full understanding of the terms of the parties' Settlement.

12. This Settlement Agreement may only be modified in a writing signed by all the parties.

13. All parties hereby agree that the terms of this Settlement Agreement are binding upon all parties, their heirs and their assigns.

ELIZABETH BOARD OF EDUCATION

Harold E. Kennedy, Jr.
Board Secretary and School
Business Administrator

Date:

MARIA VINDAS

Maria Vindas
Petitioner

Date:

ELIZABETH BOARD OF EDUCATION

Karen A. Murray, Esquire
Counsel for Respondent,
Elizabeth Board of Education

Date:

OXFELD & COHEN, P.C.

Nancy I. Oxfeld, Esquire
Counsel for Petitioner

Date: 1/24/08

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2008 MAY 23 P 1:20
OFFICE OF ADMIN LAW

BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and Petitioner, Maria Vindas, have discussed resolution of a dispute before the Commissioner of Education and the Office of Administrative Law (OAL), Docket No. EDU-03308-03; Agency Reference No. 79-3/03; and,

WHEREAS, in the interest of cost effectiveness and judicial economy, the parties have agreed to resolve the above-referenced case, with prejudice, in lieu of a hearing; and,

NOW, THEREFORE, BE IT RESOLVED, that the Board hereby accepts the Confidential Settlement Agreement on file with the School Business Administrator/Board Secretary.

Elizabeth, New Jersey
TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD MAY 8, 2008

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary

07-260

The Murray Law Firm, LLC
3 Revmont Drive
Suite 318
Shrewsbury, New Jersey 07702
Attorneys for Respondent, Elizabeth Board of Education

2008 MAY 23 P 1:20
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

MARIA VINDAS, **Petitioner,** **v.** **ELIZABETH BOARD OF EDUCATION,** **Respondent.**	**BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY** **OAL DKT. NO.: EDU 03308-03** **AGENCY DKT. NO.: 79-3/03** **SETTLEMENT AGREEMENT**

Petitioner, **MARIA VINDAS** (M.V.) hereby agrees, with the Respondent, the **ELIZABETH BOARD OF EDUCATION** (the "Board"), to settle the above-referenced matter as follows:

1. Respondent shall reinstate to Petitioner, M.V., a total of eighteen (18) sick days for the paid sick days utilized on October 23, 24, 25, 28, 29, 30 and 31, 2002 and November 1, 4, 5, 6, 12, 13, 14, 15, 18, 19 and 20, 2002.

2. The parties agree that this settlement shall not constitute any admission of wrongdoing by Respondent in this matter.

3. Petitioner, M.V., agrees that this Settlement resolves any and all claims that she had, or may have had against Respondent relative to Petitioner's injuries that occurred in October 2002.

4. Petitioner, M.V., agrees to waive any rights she had or may have had to file any other grievance, complaint, petition or charge in any court of law or administrative agency, including, but not limited to the Commissioner of Education, Division of Worker's Compensation, Office of Administrative Law and/or the Public Employment Relations Commission, relative to any issues or potential issues that arose or could have arisen during the time period that Petitioner incurred and was treated for injuries that occurred on or about October 22, 2002.

5. Petitioner, M.V., hereby waives any claims for compensatory damages, interest, attorney fees, costs of suit and/or any other forms of relief in relation to any injuries that occurred in October 2002.

6. Petitioner, M.V., agrees that she has entered into this Settlement Agreement voluntarily and without coercion.

7. Petitioner, M.V., agrees that the settlement resolves all of her claims in case Docket No. EDU 03308-03; Agency Docket No. 79-3/03, with prejudice.

8. Petitioner, M.V., agrees that she has been fully and fairly represented by legal counsel throughout this proceeding.

9. All parties mutually agree to accept the terms contained in this Agreement.

10. This Agreement shall not be precedential with respect to any similar claims raised against the Elizabeth Board of Education.

11. All parties agree and acknowledge that this Settlement Agreement embodies the parties' full understanding of the terms of the parties' Settlement.

12. This Settlement Agreement may only be modified in a writing signed by all the parties.

13. All parties hereby agree that the terms of this Settlement Agreement are binding upon all parties, their heirs and their assigns.

ELIZABETH BOARD OF EDUCATION

Harold E. Kennedy, Jr.
Board Secretary and School
Business Administrator

Date:

MARIA VINDAS

Maria Vindas
Petitioner

Date:

ELIZABETH BOARD OF EDUCATION

Karen A. Murray, Esquire
Counsel for Respondent,
Elizabeth Board of Education

Date:

OXFELD & COHEN, P.C.

Nancy I. Oxfeld, Esquire
Counsel for Petitioner

Date: 4/24/08

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2008 MAY 23 P 1:20
OFFICE OF ADMIN LAW

BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and Petitioner, Maria Vindas, have discussed resolution of a dispute before the Commissioner of Education and the Office of Administrative Law (OAL), Docket No. EDU-03308-03; Agency Reference No. 79-3/03; and,

WHEREAS, in the interest of cost effectiveness and judicial economy, the parties have agreed to resolve the above-referenced case, with prejudice, in lieu of a hearing; and,

NOW, THEREFORE, BE IT RESOLVED, that the Board hereby accepts the Confidential Settlement Agreement on file with the School Business Administrator/Board Secretary.

Elizabeth, New Jersey
TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD MAY 8, 2008

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary

07-260

300-08

OAL DKT. NO. EDU 8193-07
AGENCY DKT. NO. 221-8/07

STEVEN MITCHELL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed "Stipulation of Settlement" (Stipulation), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon such review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case, with the following observation. Section 5 of the Stipulation makes reference to action by the respondent and related measures that were to be effectuated before consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves same.

Accordingly, the Commissioner adopts the Initial Decision as the final decision in this case, providing that the parties have already implemented the settlement terms, or have agreed upon a mutually satisfactory alternate date for the execution of same. Assuming the foregoing, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 7/10/08

Date of Mailing: 7/10/08

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8193-07

AGENCY DKT. NO. 221-8/07

STEVEN MITCHELL,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY,

Respondent.

S. Robert Freidel, Jr., Esq., for petitioner

Ronald C. Hunt, Esq., for respondent (Hunt, Hamlin & Ridley, attorneys)

Record Closed: May 27, 2008 Decided: May 28, 2008

BEFORE **BRUCE M. GORMAN,** ALJ:

This matter was transmitted to the Office of Administrative Law on October 2, 2007, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

May 28, 2008
DATE

BRUCE M. GORMAN, ALJ

Date Received at Agency:

JUN 3 2008

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

/sd

2008 MAY 27 A 11:10

HUNT, HAMLIN & RIDLEY
60 Park Place, 16th Floor
Newark, New Jersey 07102
(973)242-4471
Attorneys for Respondent
Pleasantville Board of Education

STEVEN MITCHELL, Petitioner, v. PLEASANTVILLE BOARD OF EDUCATION Respondent.	OFFICE OF ADMINISTRATIVE LAW STATE OF NEW JERSEY OAL DOCKET NO.: EDUOA08193-2007 CIVIL ACTION **STIPULATION OF SETTLEMENT**

The Petitioner, Steven Mitchell (Mitchell) and the Respondent, Pleasantville Board of Education (Board of Education, hereby stipulates and agrees as follows:

WHEREAS, Mitchell is employed by the Board of Education, and

WHEREAS, Mitchell filed the above-captioned lawsuit against the Board of Education; and

WHEREAS, Mitchell and the Board of Education, through their respective counsel have engaged in settlement discussions and as a result have mutually agreed upon the terms set forth in this Settlement Agreement; and,

IT IS HEREBY STIPULATED AND AGREED by and between the parties, for the consideration stated herein as follows:

1. For and in consideration of the undertakings of the Board set forth herein, and intended to be legally bound and the parties being represented by competent counsel and with a full understanding of their rights, Mitchell does hereby remise, release and forever discharge Board of Education from any and all manner of action and causes of action, suits, debts, claims as set forth more fully in his Petition attached hereto (Exhibit 1) and demand whatsoever in law or equity which relate to the subject matter of the above-captioned matter.

2. The Board of Education, for and in consideration of the undertakings of Mitchell set forth herein, and intending to be legally bound do hereby remise, release and forever discharge Mitchell of and from any and all manner of actions and causes of actions, suits, debts,

claims and demands whatsoever in law or equity related to the subject matter of the above captioned matter.

3. The parties having considered the respective claims and defenses and the Board recognizing that an adjustment of the Petitioner's title and salary for purposes of settlement of the claim is reasonable in light of the history of the title and the Petitioner having considered the Board's modification of same agrees to withdraw any and all claims to any additional compensation based on his claim presented herein.

4. Further it is submitted that the agreement to adjust this employee's title/salary is appropriate under the circumstances and in the public's interest to appropriately compensate public employees for work performed.

5. The Board of Education as of the next Board meeting for March 17, 2008, will increase Mitchell's 10 month salary to $30,442.00. On March 20, 2008, Mitchell will receive retro actives pay of $835.65 for the period of September 1, 2007 through March 21, 2008. In the event the support staff contract exceeds 4% Mitchell will be compensated according to that increase (over 4%).

6. As of July 1, 2008, Mitchell will become a 12 month employee as the Attendance Officer for the Board of Education with a salary of $38,175.00. Mitchell has tenure in this position. Mitchell will receive future raises starting with 2009-2010 year as historically handled based upon the Support Staff contract. Mitchell will have 5 vacation days as of July 1, 2009 and 12 sick days as of 7/1/08 once he becomes a 12 month employee and will continue to have 3 personal days.

7. The Board of Education has indicated that there is no such title as Lead Attendance Officer and said title will be removed as the Board is in the process of deleting titles which are on the books but in reality do not exist.

8. By entering into this Agreement, neither party is making any admissions with respect to any of the issues raised by the respective parties.

9. By signing this Agreement, the parties certify that they have had the opportunity to discuss this Agreement with Counsel. They are full satisfied with the services of their counsel with respect to both this agreement and all other aspects of this case and they enter into this Agreement knowingly, willfully, with a full understanding of their respective rights and without any coercion or improper inducement.

10. In the event that any portion of this Agreement is determined to be illegal, the parties agree in advance, to reform the Agreement so that each party receives the full benefit of the bargain.

11. By signing this Agreement, each signature represents that he or she is a party or has been duly authorized by a party to sign on that party's behalf.

12. The parties agree that this Agreement may be signed and counterparts and that facsimiles of signatures will have the same force and effect as original signatures.

Intending to be legally bound hereby, Mitchell and Board of Education, execute and consent to foregoing Agreement this 21st day of May, 2008.

Steven Mitchell, Petitioner

Ronald C. Hunt
On behalf of Pleasantville Board of Education, Respondent

301-08

#301-08SEC

IN THE MATTER OF DORIS GRAVES,	:	COMMISSIONER OF EDUCATION
PLEASANTVILLE BOARD OF EDUCATION,	:	DECISION
ATLANTIC COUNTY.	:	

SYNOPSIS

The School Ethics Commission (Commission) found that respondent – a member of the Pleasantville Board of Education – violated *N.J.S.A.* 18A:12-24.1(d) of the Code of Ethics for School Board Members of the School Ethics Act when she spoke with the district's Facilities Coordinator – and later appeared at a Board personnel meeting – regarding an employee personnel action affecting her cousin by marriage. The Commission transmitted the matter to the OAL for hearing pursuant to *N.J.S.A.* 18A:12-29b; following the hearing, the ALJ issued an Initial Decision finding good cause to determine that respondent's conduct constituted a violation of *N.J.S.A.* 18A:12-24.1(d). The Commission subsequently recommended the penalty of censure in this matter.

The Commissioner, whose jurisdiction is limited to reviewing the Commission's recommended sanction, adopted the Commission's recommendation that respondent be censured, finding that the Commission fairly considered the nature and circumstances of respondent's violations, and concurring that – as a long-time Board member – respondent should have realized that her actions exceeded the scope of her authority.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

July 10, 2008

AGENCY DKT. NO. 152-5/08

IN THE MATTER OF DORIS GRAVES,	:	COMMISSIONER OF EDUCATION
PLEASANTVILLE BOARD OF EDUCATION,	:	DECISION
ATLANTIC COUNTY.	:	

The record of this matter and the decision of the School Ethics Commission ("Commission"), including the recommended penalty of censure, have been reviewed.

This matter comes before the Commissioner to impose a sanction upon Respondent Doris Graves, member of the Pleasantville Board of Education, based upon findings of fact and conclusions of law by the Commission that she violated *N.J.S.A.* 18A:12-24.1(d) of the Code of Ethics for School Board Members which prohibits a Board member from administering the schools. Specifically, the Commission adopted the finding of the Administrative Law Judge that Ms. Graves acted improperly on two occasions:

> Going directly to the Facilities Coordinator, even during what was admittedly a chance encounter, and discussing the proposed personnel action regarding Harry Graves was improper. Her concerns over the proposed actions should have been addressed to Superintendent Brooks. (footnote omitted). Respondent's attendance at the Personnel Committee meeting, of which she was not a member, was a continuation of her involvement in the issue. (Commission Decision at 3, citing the Initial Decision at 9)

Upon issuance of the decision of the Commission, respondent was provided 13 days from the mailing of such decision to file written comments on the recommended penalty for the Commissioner's consideration. No comments were submitted by or on behalf of Ms. Graves.

Initially, it must be emphasized that pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, the determination of the Commission as to violation of the Code of Ethics for School Board Members is **not reviewable by the Commissioner** herein. Only the Commission may determine whether a violation of the Code of Ethics for School Board Members occurred. The Commissioner's jurisdiction is limited to reviewing the sanction to be imposed following a finding of a violation by the Commission. Therefore, this decision is restricted solely to a review of the Commission's recommended penalty.

Upon a thorough review of the record, the Commissioner determines to accept the Commission's recommendation that censure is the appropriate penalty in this matter. As evidenced in its decision, the Commission recommended the more stringent penalty of censure because, even though the violation was for a single provision of the Code of Ethics for School Board Members, Ms. Graves acted improperly on two separate occasions. Additionally, as a long-time Board member, "the respondent should have known that her actions were outside the scope of her authority." (Commission Decision at 3)

Accordingly, IT IS hereby ORDERED that Doris Graves be censured as a school official found to have violated the Code of Ethics for School Board Members.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/10/08

Date of Mailing: 7/11/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EEC 2435-06
AGENCY REF. NO. C47-05

IN THE MATTER OF
DORIS GRAVES,
PLEASANTVILLE BOARD
OF EDUCATION.

Joyce D. Atkins, Deputy Attorney General, for petitioner School Ethics Commission (Anne Milgram, Attorney General of New Jersey, attorney)

Ronald C. Hunt, Esq., for respondent (Hunt, Hamlin & Ridley, attorneys)

Record Closed: January 23, 2008 Decided: March 7, 2008

BEFORE **PATRICIA M. KERINS,** ALJ:

STATEMENT OF THE CASE

The Superintendent of the Pleasantville School District (District) alleged that a Pleasantville Board member, Doris Graves (Graves), violated the School Ethics Act, when she spoke with the district's Facilities Coordinator and appeared at a Board personnel meeting regarding an employee personnel action affecting her cousin by

marriage. As a result, respondent is charged with a violation of the School Ethics Act (Act), N.J.S.A. 18A:12-21 – 34. A violation of that Act subjects the school official to sanctions, including reprimand, suspension, or removal. Respondent denies the allegations and requests that the charges be dismissed.

PROCEDURAL HISTORY

On May 10, 2005, Gail D. Brooks (Brooks), Ed.D., Superintendent of the District, filed a complaint with the School Ethics Commission against Graves, a member of the Pleasantville Board of Education (Board), alleging violations of the Act, N.J.S.A. 18A:12-21 et seq. Brooks alleged that Graves violated N.J.S.A. 18A:12-24(b) and 18A:12-24.1(d)(e) and (f) of the Code of Ethics for School Board Members.

On December 21, 2005, Graves filed her response to the complaint and, after a probable cause hearing by the Commission, was notified by letter of March 30, 2006, that the Commission had found probable cause to credit Brooks' allegations that she had violated the act. N.J.S.A. 18A:12-24(b), 18A:12-24.1(d) and 18A:12-24.1(f). The Commission forwarded the matter to the Office of Administrative Law (OAL) as a contested case where it was filed on April 12, 2006. N.J.S.A. 18A:12-29(b); N.J.S.A. 52:14B-2(b); N.J.A.C. 6A:28-1.14. The matter was heard on November 13, 2006, at the OAL in Mercerville, New Jersey. The record closed on January 23, 2008, after receiving post-hearing submissions and closing statements by the parties.

FACTUAL DISCUSSION

Doris Graves has been a member of the Board since 1987. By all accounts, Graves is a dedicated and involved member of the Board who is outspoken and passionate about the District. Dr. Brooks was the Superintendent of the District from July 2004 to August 2006. This matter concerns actions taken by Graves in September 2005.

William Marsh (Marsh) is employed by the District as the Facilities Coordinator, a position he has held since 1999. In that position, he is responsible for the construction and maintenance needs of the District. In overseeing the custodial needs of the District, he worked with his custodial foreman, Marvin Royal (Royal). Each school has a head custodian who supervises other custodial staff under Royal's direction. The head custodian for the South Main Street School in school year 2004-05 was Harry Graves. As head custodian, Harry Graves received an additional stipend of $850 to $1,200 per year, and was appointed on an annual basis.

After the completion of the 2004-05 school year, Marsh decided to recommend personnel changes to the Board. Included was a recommendation that Harry Graves not be reappointed as head custodian, effectively demoting him, and causing him to lose his stipend. Marsh based his decision on his observations of the physical condition of the South Main Street School and his consultations with Royal. He described the school as below par in several areas, including overall appearance, floors, and restroom maintenance. In August 2005, he made his recommendations for personnel changes to Brooks, and Royal informed Harry Graves of the proposed change. In early September 2005, the recommendation for the personnel changes was placed on the Board's personnel committee agenda for Monday, September 12, 2005. On Friday, September 9, 2005, all Board members received their agenda packages for the Monday meeting.

Doris Graves encountered Marsh in one of the school buildings when she arrived to attend a program on Saturday, September 10, 2005. During their conversation, Graves questioned him concerning the personnel action taken to demote Harry Graves, as well as the other personnel actions. She questioned why the transfers were recommended and whether he had followed proper procedures. After the conversation, Marsh felt uncomfortable and spoke with Brooks regarding his encounter with Graves. Brooks advised him to document what had occurred by placing his concerns in writing. By letter of September 12, 2005, to Dr. Brooks (P-1), Marsh detailed his September 10, 2005, conversation with Graves. In his testimony at this hearing, Marsh described

Graves as someone who speaks her mind and is passionate about what concerns her. He stated that, while she questioned him about his action, she did not ask him to change his recommendation.[1]

On Monday, after the Saturday encounter at the school with Graves, Marsh and Royal attended the personnel committee meeting of the Board to discuss the proposed transfers. Arriving at the meeting, Marsh saw that Graves was present. She spoke with Committee members prior to the actual Committee meeting about the proposed actions. After discussing the transfers, she left and the meeting commenced. Both Royal and Marsh were asked by the members to leave the room when the Committee discussed the proposed transfers. Marsh then was advised by Brooks that the requested transfers had been tabled.

Marsh and Brooks cited the unkempt state of the South Main Street School building as the primary reason for removing Harry Graves as head custodian. Brooks also described the process she used to make personnel recommendations to the Board. After consulting with staff heading each department, she formulated her recommendations to the Board. That process included an initial presentation to the Personnel Committee appointed by the Board. Where appropriate, her administrators would attend the Committee meeting. Members of the public do not attend the Committee meeting, and she stated it was rare for members of the Board not on the Committee to attend.

She recalled Marsh discussing his conversation of September 10, 2005, with her. Describing him as upset, he told her about seeing Graves at the school function and her questions about Harry Graves. He told her he felt intimidated and she told him to document the encounter. She recalled Graves coming to the Committee meeting early on September 12, 2005. One of the Board members then left the room to avoid a quorum issue. She first asserted it was Board member Pressley who left but, when questioned further, admitted that Board member Leary could have left rather than

[1] Marsh also submitted a letter dated May 24, 2006, to this court elaborating on his earlier letter. (R-1)

Pressley. She remembered Graves asking questions about the proposed transfer for Harry Graves, questioning the process used to reach that decision. Brooks said that at the end of the Personnel Committee meeting her sense was that the Board would not act on the proposed recommendations, so she withdrew them. Brooks could not remember whether any documentation on the alleged problems with the South Main Street School existed or whether a written evaluation had been prepared to support the proposed transfer.

In support of her case, respondent presented the testimony of James Pressley, a member of the Personnel Committee who attended the September 12, 2005, meeting. He recalled that Board members Adams, Leary, Hare, himself, and, briefly, Graves were present prior to the formal Committee meeting. Brooks, Royal, and Marsh also were present. When Graves' presence raised a quorum issue, he recalled Leary left the room. Once Leary had excused herself, Graves addressed the custodial transfer issues. He equivocated on whether Graves specifically mentioned Harry Graves.

Concurring with the testimony of Marsh and Brooks, Pressley said it was not unusual for Graves to question actions and state her mind regarding the process used to reach decisions. He said she was not at the meeting very long and that after she left, Marsh and Royal returned to the room. Marsh explained the transfers and responded to questions why no written evaluations had been done. No documentation on the actions was presented and Marsh and Royal then left the room.

Pressley also recalled speaking with Doris Graves regarding the process used to decide upon the transfers. He could not recall whether she had called him between Friday, September 9, 2005, when the Board members received their agenda, and the following Monday, when the meeting occurred, or whether he had called her.

At the hearing, Doris Graves described herself as a former educator who takes public service seriously. She currently is a Board member, having served for 21 years. During her tenure, she has served as Board president, vice president, and committee

member on several Board committees. She admitted to knowing Harry Graves, who is a cousin to her deceased husband. She does not socialize with him, seeing him only at functions such as funerals and weddings. When she became aware of his proposed demotion from head custodian at the South Main Street School, she described herself as being concerned over the process used in the decision making, and the lack of documentation to back up the change. She recalled raising the issue of that process with Marsh when she encountered him by chance at a school on September 10, 2005. She also recalled raising the issue of Harry Graves. She questioned him why the principal of the school did not know of the transfer and wanted to assure herself that the right decision had been made. She described the conversation as lasting no more than five or six minutes.

Graves candidly admitted her conversation with Leary of the Personnel Committee after she reviewed the Board agenda on the transfers. She said it was not unusual for a member to contact the Chair of a committee to discuss an agenda item prior to the meeting. When she called Leary about the transfers, she said Leary invited her to the Personnel Committee meeting to express her concerns. When she arrived at the Committee meeting, Leary informed the others that she had invited her and then excused herself. Graves denied raising the issue of Harry Graves at the meeting and did not tell the members what she thought they should do but, instead, asked that they concern themselves with the process used to reach the transfer decisions. Her discussion with the members at the Committee meeting was a short one. She also denied mentioning Harry Graves to Marsh during their meeting. She stated she did not call Brooks because it was informal policy among Board members once a matter reached the agenda to call the Committee Chairs with their comments.

After a review of the record in this matter, I **FIND** that Doris Graves went to the district's Facilities Coordinator and the Board Personnel Committee, rather than the superintendent to question the proposed personnel actions for custodial staff, including Harry Graves. I further **FIND** that Harry Graves is a cousin of her deceased husband, with whom she did not have a close personal or social relationship.

I also **FIND** that the removal of Harry Graves from his appointment as a head custodian, as well as the other personnel actions proposed for the custodial staff, were matters questioned by Graves and other board members. I further **FIND** that Superintendent Brooks presented neither written evaluations nor documentation to the Board in support of the proposed changes.

LEGAL DISCUSSION AND ANALYSIS

In this matter, the Commission found probable cause to charge respondent Graves with violations of N.J.S.A. 18A:12-24(b) of the School Ethics Act, and N.J.S.A. 18A:12-24.1 (d)(f) of the Code of Ethics for School Board Members. The Commission bears the burden to establish such violations by a preponderance of the evidence. N.J.S.A. 18A:12-29(b) and See In the Matter of the Revocation of the License of Irwin Jacob Polk, 90 N.J. 550, 560 (1982).

N.J.S.A. 18A:12-24(b) provides as follows:

> No school official shall use or attempt to use his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family or others;

Concomitant with that provision, N.J.S.A. 18A:12-24.1(f) of the Code of Ethics for School Board Members provides:

> I will refuse to surrender my independent judgment to special interests or partisan political groups, or to use the schools for personal gain or for the gain of friends.

Petitioner has alleged that Graves violated both provisions when she discussed with the district's Facilities Coordinator his recommendation not to reappoint her deceased husband's cousin as head custodian of one of the district schools. In

addition to speaking with the Facilities Coordinator regarding Harry Graves, respondent also met with the members of the Board's Personnel Committee to discuss the personnel action which affected Harry Graves, as well as others. In determining whether those actions violated the above provisions, it is important to note that, in both instances, the record shows that Graves questioned not only the actions regarding Harry Graves, but the process used to reach a decision on all of the pending personnel actions proposed by the Facilities Coordinator and submitted to the Board by the Superintendent. The record does not show that any personal gain would have flowed through to respondent as a result of these actions. Further, Harry Graves' relationship to her is attenuated. He is a cousin to her deceased husband, and an individual with whom she did not socialize or see unless at family functions or, by chance, at a school facility.

An analysis of the statute shows that it prohibits actions by a school official that would result in "unwarranted privileges, advantages or employment". In this matter, the record shows that the basis and validity of the personnel action proposed for Harry Graves was in dispute. Marsh testified that in consultation with Royal, and after site visits to the school, he decided a new head custodian was needed. However, no record of their observations or evaluations of Harry Graves were provided to the Superintendent or to the Board. Similarly, while Brooks testified that she too was dissatisfied with the state of the South Main Street School facility, neither she nor her staff had prepared written summaries or evaluations for presentation to the Board. Simply put, Harry Graves had been, and was, head custodian of the South Main Street School when respondent questioned the decision to remove him from that position. The record shows that the question of his removal from that position was based on an undocumented and subjective process which was also questioned by other Board members. Given the above facts, his continued appointment as a head custodian may well have been warranted, and Graves' intervention in this matter did not rise to a violation of N.J.S.A. 18A:12-24(b) or 18A:12-241(f).

While respondent's actions did not rise to the level of seeking unwarranted personal gain for herself or another, the manner in which she dealt with the proposed personnel actions by the Facilities Coordinator does implicate the charge that she violated N.J.S.A. 18A:12-24.1(d) of the Code of Ethics. That provision codifies her responsibility to see that the schools are well-run, but not to administer those schools. Going directly to the Facilities Coordinator, even during what was admittedly a chance encounter, and discussing his proposed personnel action regarding Harry Graves and others was improper. Her concerns over the proposed actions should have been addressed to Superintendent Brooks.[2] Respondent's attendance at the Personnel Committee meeting, of which she was not a member, was a continuation of her involvement in the issue. While her contact with her fellow Board member Leary prior to the meeting, and her meeting with committee members was not, per se, a violation of the Act, it must be read in conjunction with her earlier approach to the Facilities Coordinator. Once again, she did not go to the Superintendent with her concerns about the proposed personnel actions or the manner in which they had been reached. Her concerns in both instances should have been addressed first with the head administrator of the district, the official who had approved and proposed the personnel actions to the Board. In not doing so, she violated the Code of Ethics not to involve herself in the administration of the schools.

Respondent herself has admitted she exercised poor judgment in handling the situation, and the record shows that all who presented evidence in this case agreed that she has provided long years of service to the district and has been passionate in her concerns. While those factors do not absolve her of the violation of the Code of Ethics, they are relevant to a determination on the severity of the violation.

Consistent with the findings of facts in this matter, petitioner has proven by a preponderance of the competent and credible evidence that there is good cause for the Commission to determine that respondent's conduct constituted a violation of N.J.S.A.

[2] See also N.J.S.A. 18A:12-24.1(j)

18A:12-24.1(d), and make a recommendation relative to sanction. N.J.S.A. 18A:12-29(c) and N.J.A.C. 6A:28-1.15.

DECISION AND ORDER

I **ORDER** the clerk of the OAL to transmit this contested case back to the commission. The Commission may make a finding and recommendation consistent with N.J.S.A. 18A:12-29, -30; N.J.A.C. 6A:28-1.15.

I hereby **FILE** my initial decision with the **SCHOOL ETHICS COMMISSION**. Pursuant to N.J.S.A. 18A:12-29, the School Ethics Commission has jurisdiction to determine whether a violation of the School Ethics Act occurred. If it concludes that the conduct constitutes a violation of the School Ethics Act, it shall recommend an appropriate penalty to the Commissioner of Education. The Commissioner of Education shall issue the final decision in this matter.

The recommendations of this decision as to whether the conduct constitutes a violation of the School Ethics Act may be adopted, modified or rejected by the **SCHOOL ETHICS COMMISSION**. If the School Ethics Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision.

If the School Ethics Commission determines that a violation has occurred, it shall issue a written decision recommending to the Commissioner of Education an appropriate penalty and shall forward the record, including this recommended decision and its decision, to the Commissioner of Education. The Commissioner of Education may subsequently render a final decision as to the appropriate penalty. If the Commissioner of Education does not render a final decision within forty-five days of its receipt of this initial decision, and unless such time period is otherwise extended, the recommended decision of the School Ethics Commission shall become the final decision.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **SCHOOL ETHICS COMMISSION, DEPARTMENT OF EDUCATION, PO Box 500, Trenton, NJ 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 7, 2008
DATE

Patricia M. Kerins
PATRICIA M. KERINS, ALJ

Date Received at Agency:

Mailed to Parties:

MAR 12 2008
DATE

Laura Sanders
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/bdt/cs

EXHIBITS

For Petitioner:

P-1 Letter dated September 12, 2005, from William H. Marsh, Facilities Coordinator, to Dr. Brooks

P-3 Complaint Form, signed by Gail D. Brooks, dated November 4, 2005

P-4 Fax dated March 15, 2007, from Ronald C. Hunt, Esq., to Cynthia A. Raymond, DAG, containing Doris Graves' answers to interrogatories and request for documents

For Respondent:

R-1 Letter dated May 24, 2006, from William Marsh, Facilities Coordinator to Judge Patricia Kerins (sic)

WITNESSES

For Petitioner:

William Marsh

Gail Brooks

For Respondent:

James Pressley

Doris Graves

IN THE MATTER	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
OF	:	
	:	**SEC Docket No.: C47-05**
	:	**OAL Docket No. EEC2435-06**
DORIS GRAVES,	:	
PLEASANTVILLE BOARD OF EDUCATION, ATLANTIC COUNTY	:	**FINAL DECISION**
	:	

On February 28, 2006, the School Ethics Commission found probable cause to credit the allegation that Doris Graves violated N.J.S.A. 18A:12-24(b) when she spoke with the Facilities Coordinator regarding his recommendation to transfer and demote her cousin, Harry Graves. The Commission also found probable cause to credit the allegations that Ms. Graves violated N.J.S.A. 18A:12-24.1(f) of the Code of Ethics for School Board Members when Ms. Graves spoke with the Facilities Coordinator regarding his recommendation to transfer and demote her cousin. At its meeting of March 28, 2006, the Commission voted to amend its decision to find probable cause that Ms. Graves also violated N.J.S.A. 18A:12-24.1(d) when she went to the personnel committee meeting and to the Facilities Coordinator to discuss the employment of her cousin.

The Commission transmitted the matter to the Office of Administrative Law (OAL) for a hearing in accordance with N.J.S.A. 18A:12-29b. Upon return of the matter from the OAL, pursuant to *N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.8 and for good cause shown, the Commission was granted an extension of time in which to issue its final decision in this matter. The Administrative Law Judge (ALJ) concluded in her initial decision that there is good cause for the Commission to determine that respondent's conduct constituted a violation of N.J.S.A. 18A:12-24.1(d) and to recommend a sanction in relation thereto.

The Deputy Attorney General (DAG) representing the Commission submitted timely exceptions in accordance with N.J.A.C. 1:1-18.4 and N.J.A.C. 1:6C-18.3, which were reviewed by the Commission. Exceptions submitted on behalf of the respondent were untimely; consequently, neither the exceptions nor the reply thereto were considered by the Commission.[1] The DAG argues that "[t]he evidence has demonstrated that respondent was acting in her official position as a Board member and used her official position to secure unwarranted employment and gain for her cousin when she confronted Mr. Marsh about his recommendation to demote Harry Graves." (Commission's Exceptions at page 5). The DAG urges the Commission to consider that N.J.S.A. 18A:12-24.1(f) prohibits using the schools not only for personal gain, but to acquire "a gain for friends." Moreover, the DAG contends that "the testimony of both

[1] The decision was mailed to the parties on March 12, 2008 and the respondent's exceptions were received by the Commission on March 26, 2008 which is outside the 13-day timeline provided in regulation. N.J.A.C. 1:1-18.4 and N.J.A.C. 1:6C-18.3.

Dr. Brooks and William Marsh based on their personal observation of [South Main Street School] support a finding that Harry Graves' reappointment was unwarranted." (Id. at p. 6)

The record of this matter and the Initial Decision of the ALJ were initially reviewed by the Commission at its April 1, 2008 meeting. The matter was tabled for further discussion and research. At its meeting of April 22, 2008, the Commission adopted the conclusions of the ALJ for the reasons expressed in her Initial Decision. In so doing, the Commission underscores that challenges to the factual findings rendered by an ALJ require the objecting party to provide the Commission with relevant portions of the transcript of the hearing in order to permit the Commission to assess the merits of those exceptions. *In re Morrison*, 216 *N.J. Super.* 143, 157-158 (App. Div. 1987) Here, however, no transcript was provided.

The Commission, therefore, accepts the ALJ's factual findings that the respondent and Mr. Graves did not have a close personal or social relationship so as to establish that he was a "friend" within the intendment of N.J.S.A. 18A:12-24.1(f). (Initial Decision at p. 6) Additionally, the Commission notes that even assuming, *arguendo*, Mr. Graves satisfied the definition of "a member of the immediate family," as required by N.J.S.A. 18A:12-24(b), the ALJ specifically found that "the removal of Harry Graves from his appointment as head custodian, as well as the other personnel actions proposed for the custodial staff, were matters questioned by Graves and other board members." (Id. at p. 7). As such, the ALJ properly concluded that Mr. Graves' "continued appointment as a head custodian may well have been warranted...." (Id. at p. 8)

The Commission further concurs that the respondent's actions establish that she violated N.J.S.A. 18A:12-24.1(d), which prohibits a Board member from administering the schools. The Commission notes that the regulations define such conduct as becoming "directly involved in activities or functions that are the responsibility of school personnel or the day to day administration." (N.J.A.C. 6A:28-7.1) The Commission has found a violation of N.J.S.A. 18A:12-24.1(d) where the respondent board member asked for copies of SAT reports directly from the guidance secretary, inspected lockers in the boys' locker room and instructed staff on the supervision of students. In the Matter of Lahn, Delsea Bd. of Ed., C25-05 (December 20, 2005) In Lahn, the guidance secretary was reprimanded because she gave the board member copies of the SAT reports. The respondent was also found in violation of N.J.S.A. 18A:12-24.1(j) for taking a parental complaint directly to the principal without first referring it to the superintendent. The Commission recommended a penalty of censure and the Commissioner concurred. In the Matter of Lahn, Delsea Bd. of Ed., decided by the Commissioner January 23, 2006.

Similarly, the Commission found board members in violation of N.J.S.A. 18A:12-24.1(d) when they met with representatives of the local Association to discuss the Association's concerns without advising or inviting the Superintendent. In the Matter of Gartland and Picardo, West Essex Bd. of Ed., C44-04 (March 28, 2006) The Commission therein recommended a penalty of one-month suspension for respondent Gartland and a penalty of censure for respondent Picardo, both of whom were also found to have violated N.J.S.A. 18A:12-24.1(c). The Commissioner approved the recommended penalties. In the Matter of Gartland and Picardo, West Essex Bd. of Ed., decided by the Commissioner June 12, 2006.

In the instant matter, the Commission recommends a penalty of censure. Although there was a single violation found, the ALJ specifically noted that the responded acted improperly on two occasions:

> Going directly to the Facilities Coordinator, even during what was admittedly a chance encounter, and discussing the proposed personnel action regarding Harry Graves was improper. Her concerns over the proposed actions should have been addressed to Superintendent Brooks. (footnote omitted). Respondent's attendance at the Personnel Committee meeting, of which she was not a member, was a continuation of her involvement in the issue. (Initial Decision at p. 9).

As a veteran Board member (Initial Decision at p. 2), the respondent should have known that her actions were outside the scope of her authority.

Accordingly, the Commission adopts the Initial Decision of the ALJ, as set forth above and recommends that the respondent be censured for violating N.J.S.A. 18A:12-24.1(d) of the Code of Ethics for School Board Members.

This decision has been adopted by a formal resolution of the School Ethics Commission. This matter shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation **for sanction only**, pursuant to N.J.S.A. 18A:12-29. Within 13 days from the date on which the Commission's decision was mailed to the parties, Ms. Graves may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C. Garbarini

Paul C. Garbarini
Chairperson

Mailing Date: 05/28/08

Resolution Adopting Decision – C47-05

Whereas, the Commission found probable cause to credit the allegation that Doris Graves N.J.S.A. 18A:12-24(b), and N.J.S.A. 18A:12-24.1(d) and (f) of the Code of Ethics for School Board Members;

Whereas, the Commission transmitted the matter to the Office of Administrative Law for a hearing; and

Whereas, the Administrative Law Judge concluded in her initial decision that there is good cause for the Commission to determine that respondent's conduct constituted a violation of N.J.S.A. 18A:12-24.1(d) and to recommend a sanction in relation thereto; and

Whereas, the Commission fully considered all of the documentation timely filed in response to the ALJ's decision and accepts the conclusions of the ALJ; and

Whereas, at its meeting of April 22, 2008, the Commission recommended that the Commissioner of Education impose a sanction of censure; and

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that the School Ethics Commission adopted this decision at its public meeting on May 27, 2008.

Joanne Boyle
Executive Director

E/JB/decisions/OAL/C47-05

302-08L

302-08

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

JON S. CORZINE
Governor

LUCILLE E. DAVY
Commissioner

July 11, 2008

Jeffrey W. Goldblatt, Esq.
Williamsburg Commons
4-G Auer Court
East Brunswick, New Jersey 08816

Robin T. McMahon, Esq.
Scarinci & Hollenbeck, LLC
1100 Valley Brook Avenue
P.O. Box 790
Lyndhurst, NJ 07071

Dear Counsel:

I have reviewed the papers filed in the matter of *I.K., on behalf of minor child, A.K. v. Board of Education of the Township of East Brunswick, Middlesex County*, Agency Dkt. No. 149-5/08, including the petition of appeal seeking to have an unwarranted disciplinary action expunged from A.K.'s student record and the Board of Education's motion to dismiss petitioner's claims on grounds of untimely filing. In so doing, I note that petitioner did not file a response to the Board's motion despite having been afforded the opportunity to do so.[1]

Upon review, it is clear from petitioner's own papers that the disciplinary action under appeal – a four-day suspension from school – was imposed on October 5, 2007 (Petition of Appeal, Exhibit A) and appealed to the district administration on October 25, 2007 (Petition of Appeal, Exhibit C) It is further clear that, on October 29, 2007, petitioner's appeal was rejected by the Board's superintendent as filed beyond the five-day period provided by school policy and the student handbook (Petition of Appeal, Exhibit D), and on November 29, 2007, petitioner's counsel wrote to the board attorney inquiring about the superintendent's having "apparently" stated in conversation that no appeal should be granted because A.K. had made self-incriminating admissions notwithstanding the existence of an exculpating statement and asking to be advised "as to whether any other information will be provided by you in this regard in an effort to attempt to resolve this matter without further litigation; otherwise, we will file the

[1] By letter dated June 11, 2008, petitioner was afforded until June 25, 2008 to file a reply to the Board's motion.

necessary appeal with the Commissioner of Education." (Petition of Appeal, Exhibit E, re-punctuated for context) No response was forthcoming (Petition of Appeal at 3, ¶9), and on April 21, 2008, nearly five months later, petitioner's counsel wrote to the Board Attorney stating that he had "not yet received a final decision with regard to this matter" and asking that one be provided "so that I may file an appeal at this time." (Petition of Appeal, Exhibit F).

There is no doubt that, as contended by the Board, petitioner's appeal is subject to the 90-day limitation period set forth by *N.J.A.C.* 6A:3-1.3(i). The Board is further correct that attempts to resolve a dispute by means other than appeal to the Commissioner have long been held not to toll the running of the regulatory limitation period, which may be relaxed only for compelling cause. Under the circumstances described above, I can reach no conclusion but that petitioner – even granting, *arguendo*, that her counsel's November 29, 2007 communication with the Board Attorney constituted an appeal to the Board of the superintendent's decision – could and should have acted to protect her rights long before she did, failing to follow up that communication until the ensuing April and delaying the filing of a petition of appeal until May 27, 2008.

Accordingly, for the reasons herein set forth, the Board's motion is granted and the petition of appeal is dismissed.[2]

Sincerely,

Lucille E. Davy
Commissioner

c: County Superintendent
State Law Library

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to P.L. 2008, c. 36.

303-08

#303-08

O.B. on behalf of minor child, K.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT OLIVE, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, a resident of Mount Olive, filed a *pro se* residency appeal on behalf of K.C., who was enrolled as a high school student in the Mount Olive School District for the 2007-08 school year. The respondent Board contended that K.C. is not eligible for a free public education in the district. The petitioner failed to appear for a scheduled hearing on May 19, 2008, and failed to provide any explanation for her non-appearance. Counsel for the respondent Board submitted a letter requesting payment of tuition in the amount of $12,499.76 for the period of K.C's ineligible attendance in Mount Olive schools.

The ALJ found that petitioner has abandoned this matter, and ordered that the appeal be dismissed pursuant to *N.J.A.C.* 1:1-14.4; the ALJ granted the respondent's counterclaim for tuition reimbursement in the amount of $12,499.76.

The Commissioner adopted the portion of the Initial Decision that finds petitioner liable for tuition, but found that the record contains no competent evidence concerning the per diem tuition rate or the number of days chargeable to O.B. for the period of K.C.'s ineligible attendance. Accordingly, the matter is remanded to the OAL for factual findings concerning the correct amount of tuition due to respondent.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

July 14, 2008

OAL DKT. NO. EDU 11928-07
AGENCY DKT. NO. 282-9/07

O.B. on behalf of minor child, K.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT OLIVE, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record for this matter and the Initial Decision of the Office of Administrative Law (OAL) memorializing the petitioner's failure to appear at the OAL hearing – and a copy of the notification sent to the parties by the OAL on April 22, 2008, informing them that the hearing in this matter would be held on May 19, 2008 – have been reviewed. It is noted that the OAL hearing notice was sent to the address petitioner entered on her petition.

The Commissioner notes that the ALJ held the matter for several days after the hearing to give petitioner the opportunity to offer an explanation for her nonappearance, pursuant to *N.J.A.C.* 1:1-14.4(a). No explanation having been filed, the ALJ rendered his recommended decision on June 2, 2008, and directed that the matter be returned to the Commissioner.

The Commissioner adopts the portion of the Initial Decision that finds petitioner liable for tuition, for the reasons set forth therein. However, the record contains no competent evidence concerning the per diem tuition rate to be charged for K.C., the number of days chargeable to O.B., and the bases for both figures. The letter from respondent's counsel is not evidential.

Accordingly, the Commissioner holds that petitioner is liable for K.C.'s tuition, and remands the matter to the OAL for factual findings concerning the correct amount of tuition to be charged to petitioner and awarded to respondent.

IT IS SO ORDERED. *

COMMISSIONER OF EDUCATION

Date of Decision: 7/14/08

Date of Mailing: 7/14/08

* This decision may be appealed to the Superior Court, Appellate Division, pursuant to P.L. 2008, c. 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11928-07

AGENCY DKT. NO. 282-9/07

O.B. ON BEHALF OF MINOR CHILD K.C.

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MOUT OLIVE, MORRIS COUNTY

Respondent.

O.B., failed to appear

Marc H. Zitomer, Esq. appearing on behalf of respondent (Schwartz, Simon, Edelstein, Celso & Kessler, LLC)

Record Closed: May 27, 2008 Decided: June 2, 2008

BEFORE **WALTER M. BRASWELL**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On September 26, 2007, the petitioner (O.B.), filed a petitioner with the Department of Education challenging the Board of Education's residency determination. The matter was forwarded to the Office of Administrative Law (OAL) on January 10, 2007 pursuant to N.J.S.A. 18a:38-1, for a hearing and determination

as a contested case. A hearing was scheduled for April 18, 2008 which was adjourned to allow the undersigned to answer the Board's Motion to Dismiss. The Motion was denied and a hearing was scheduled on May 19, 2008. The petitioner did not respond to the Notice of Motion, nor did she appear in court. The respondent moved for a dismissal of petitioner's case and submitted a cross petition for tuition reimbursement on May 27, 2008 on which date the record closed.

FINDINGS OF FACT

1. On November 6, 2007 respondent filed its Motion to Dismiss.
2. On April 10, 2008 the undersigned sent out correspondence allowing petitioner additional time to respond to respondent's Motion.
3. On April 22, 2008, the undersigned mailed out correspondence advising that this matter was scheduled for hearing on May 19, 2008.
4. On April 22, 2008, the undersigned's secretary attempted to contact petitioner to advise her of the new hearing date however, her phone was disconnected.
5. On or about April 25, 2008, the OAL-Office of the Clerk mailed a Notice of Hearing to the petitioner at the provided address.
6. The United States Postal Service never returned the above communication as undeliverable.
7. The counsel for the respondent appeared. The OAL received no communication from the petitioner regarding her failure to appear on May 19, 2008.

CONCLUSIONS OF LAW

Based on the foregoing facts and applicable law, I **CONCLUDE** that the petitioner has abandoned this matter, and that it should be dismissed for failure to appear.

N.J.A.C. 1:1-14.4(a) provides that, if after appropriate notice, a party does not appear in a proceeding scheduled by the Clerk of OAL, the judge may direct the Clerk to return the matter to the transmitting agency if the judge does not receive an explanation for the nonappearance within one day.

ORDER

It is hereby **ORDERED** that the petitioner's application for relief is dismissed pursuant to N.J.A.C. 1:1-14.4, and I **DIRECT** the Clerk return the matter to the Board of Education for appropriate disposition.

It is further **ORDERED** that the respondent's cross-petition for tuition reimbursement for the 2006-2007 school year in the amount of 12,499.76 is hereby **GRANTED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 2, 2008
DATE

Walter M Braswell
WALTER M. BRASWELL, ALJ

Date Received at Agency: June 2, 2008

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUN 3 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

ljb

#304-08+

304-08

AGENCY DKT. NO. 174-6/08

IN THE MATTER OF THE TENURE HEARING OF LAURA LACROSS, SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

For the Board, Harold W. George, Esq.

For Respondent, Michael T. Barrett, Esq. (Bergman & Barrett)

This matter was opened before the Commissioner of Education on June 16, 2008, through certification of tenure charges of incapacity by the Board of Education of the City of Trenton (Board) against Laura LaCross (respondent), a tenured teacher in the Board's employ. Upon receipt of the certified charges, the Department of Education directed respondent to file an answer, noting that – pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4 – an individual against whom tenure charges are certified "*shall have 15 days from the day such charges are filed with the Commissioner to file a written response to the charges with the Commissioner,*" and that failure to answer within the prescribed period would result in the charges being deemed admitted.

When no reply or other communication was received from or on behalf of respondent – who had received the Department's certified mailing on June 18, 2008 as evidenced by her signature on the return receipt ("green card") – the Commissioner, on July 14, 2008, deemed the allegations against respondent to be admitted and ordered respondent dismissed from her tenured employment. [1]

[1] The Commissioner also encouraged the Board to consider, if appropriate, filing an application for ordinary disability retirement on respondent's behalf pursuant to *N.J.S.A.* 18A:66-39.

However, on July 17, 2008, counsel for respondent filed a notice of motion to vacate the Commissioner's July 14, 2008 decision, explaining through a supporting certification that respondent's answer to the tenure charges – a copy of which was enclosed – had been timely mailed to the Commissioner (and the Board of Education) on June 23, 2008, but on July 16, 2008, the Commissioner's copy was returned undelivered due to the omission of a post office box number in the address. The Board was afforded an opportunity to object to respondent's papers, but did not do so.

Under the circumstances, the Commissioner finds that the tenure laws and the interests of justice clearly require that respondent not be deprived by an inadvertent clerical error of her opportunity to oppose the charges against her, so that the answer mailed on respondent's behalf on June 23, 2008 is appropriately deemed filed, *nunc pro tunc*, as of June 26, 2008 and the matter may now proceed to hearing as a contested case.

Accordingly, the Commissioner hereby VACATES her decision of July 14, 2008 dismissing respondent from tenured employment and directs that this matter be transmitted forthwith to the Office of Administrative Law for hearing of the charges against respondent pursuant to the Tenure Employees Hearing Law and its implementing rules. A copy of this decision shall be forwarded to the State Board of Examiners, to which the prior decision ordering respondent's dismissal had been forwarded for review and action as it deemed appropriate.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 7/24/08

Date of Mailing: 7/25/08

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

#304-08

IN THE MATTER OF THE TENURE	:	
HEARING OF LAURA LA CROSS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
TRENTON, MERCER COUNTY.	:	
	:	

SYNOPSIS

Petitioning Board filed tenure charges of incapacity against respondent, a tenured teacher, and sought her removal from employment in the Trenton Public Schools. Neither respondent nor any attorney acting on her behalf filed an answer to the charges following notice pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4.

The Commissioner concluded that the allegations – which respondent has chosen not to deny – may be deemed admitted and are sufficient to warrant removal of the respondent from her tenured position. Accordingly, the Commissioner granted summary decision to the Board, ordered respondent dismissed from her tenured position, and transmitted a copy of this decision to the State Board of Examiners for action as that body deems appropriate. The Commissioner additionally encouraged the Board to consider, if appropriate, filing an application for ordinary disability retirement on respondent's behalf pursuant to *N.J.S.A.* 18A:66-39.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

July 14, 2008

AGENCY DKT. NO. 174-6/08

IN THE MATTER OF THE TENURE HEARING OF LAURA LA CROSS, SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

For the Board, Harold W. George, Esq.

No appearance by or on behalf of Respondent, Laura La Cross

This matter was opened before the Commissioner of Education on June 16, 2008, through certification of tenure charges of incapacity by the Board of Education of the City of Trenton (Board) against Laura La Cross (respondent), a tenured teacher in the Board's employ. Following its review of the charges as filed together with the supporting evidence and respondent's reply, the Board had resolved on June 9, 2008 to certify these charges to the Commissioner and had provided respondent with written notice of such certification via regular and certified mail sent on June 13, 2008.[1]

Upon receipt of the certified charges on June 16, 2008, the Department directed respondent – via both certified and regular mail, with respondent's attorney notified via regular mail – to file an answer to the charges. This communication clearly provided notice to respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified "*shall have 15 days from the day such charges are filed with the Commissioner to file a written response to the charges*

[1] On the same date, notice was sent by regular mail to respondent's attorney.

with the Commissioner," and that failure to answer within the prescribed period would – absent granting of an extension for good cause shown – result in the charges being deemed admitted. However, although respondent received the certified mailing on June 18, 2008 – as evidenced by her signature on the return receipt ("green card") – and the regular mailing was not returned as undeliverable, no reply was received from or on behalf of respondent.

The certified tenure charges and statement of supporting evidence filed by the Board in this matter indicate that: 1) respondent was absent for 161 days during the 2005-06 school year, resulting in withholding of her increment for 2006-07; 2) although cleared for duty in the 2007-08 school year by her own physician, shortly after the beginning of the year respondent was involved in a "situation" at Trenton High School, and – on October 16, 2007 – was placed on paid leave pending the Board's investigation of the matter and the results of a Board-ordered medical examination;[2] and 3) upon examination of respondent on November 15, 2007 by a physician acting on the Board's behalf, respondent was diagnosed with a medical condition, the behavioral manifestations of which rendered her unfit for duty.

Deeming these allegations to be admitted and noting that respondent has failed to respond to the charges certified against her, the Commissioner finds that the Board's charges have been proven and that they warrant respondent's dismissal from tenured employment.

Accordingly, summary decision is hereby granted to the Board, and respondent is dismissed from her tenured teaching staff position as of the filing date of

[2] This leave continued until November 30, 2007.

this decision. The Board is encouraged to consider, if appropriate, filing an application for ordinary disability retirement on respondent's behalf pursuant to *N.J.S.A.* 18A:66-39, and a copy of this decision shall be forwarded to the State Board of Examiners for review and action as it deems appropriate.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 7/14/08

Date of Mailing: 7/14/08

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

306-08

#306-08

OAL DKT. NO EDU 12541-07
AGENCY DKT. NO. 345-11/07

IN THE MATTER OF THE TENURE	:	
HEARING OF IRENE B. SPANGLER,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK,	:	DECISION
ESSEX COUNTY.	:	

The record of this matter, the parties' Stipulation of Settlement and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon such review, the Commissioner concurs with the Administrative Law Judge that the proposed settlement is consistent with established standards governing settlement of tenure matters. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846.

Accordingly, the settlement is hereby approved and the tenure matter dismissed, subject to compliance with the terms of the settlement. A copy of this decision shall be forwarded to the State Board of Examiners.

IT IS SO ORDERED.

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 7/14/08
Date of Mailing: 7/15/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 12541-07

AGENCY DKT. NO. 345-11/07

IN THE MATTER OF THE TENURE HEARING OF IRENE B. SPANGLER, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY.

Adam S. Herman, Esq., for petitioner Newark State-Operated School District (Perry L. Lattiboudere, General Counsel)

Philip Feintuch, Esq. for respondent Irene Spangler (Feintuch, Porwich & Feintuch, attorneys)

Record Closed and Decided: June 17, 2008

BEFORE **BARRY N. FRANK**, ALJ:

This matter involves tenure charges of unbecoming conduct, chronic excessive absenteeism and tardy, or just cause certified by the State-Operated School District of the City of Newark ("District") against Irene B. Spangler ("Spangler") under the tenure employee hearing law, N.J.S.A. 18A:6-10 to -18.1.

Spangler is a tenured nurse employed by the District. Basically, the District has accused Spangler of excessive absenteeism, conduct unbecoming and a variety of other certified charges along these lines, all said charges totaling forty-three counts as set forth in the complaint prepared by petitioner. Spangler has consistently denied the charges against her.

On October 2, 2007, the District filed its written charges with the Commissioner of Education ("Commissioner"). Spangler filed her answer on November 29, 2007. Subsequent to this date, the Commissioner referred this matter to the Office of Administrative Law ("OAL") for a hearing as a contested case.

Both parties have agreed to proposed settlement, subject to approval by the Commissioner. In accordance with the decision of the State Board of Education in Cardonick v. Brook Lawn Board of Education, 1983 S.L.D. - (St. Bd. April 6, 1983), the record for any propose settlement must include:

> . . . the nature of the charges, the circumstances justifying the settlement, consent authorization by the board of education of the teacher to the proposed agreement, the administrative law judge's finding that the teacher entered into the agreement with full understanding of his/her rights and [a finding] that the agreement is consistent with the public interest.

On June 11, 2008, the OAL held a public hearing on the issue of whether the proposed settlement should be accepted. Counsel for both parties set forth on the record the reason why settlement would be in the public interest. Spangler testified that she fully understood and voluntarily agreed to the terms of the settlement. In addition, the parties have prepared a stipulation of settlement which is attached to and fully incorporated in this decision. The State District Superintendent approved the settlement terms on June 12, 2008.

Based on my review of the record and the testimony at the hearing, I **FIND** that the proposed settlement is consistent with the public interest for the following reasons:

1. Irene B. Spangler has been employed as a nurse in the Newark School system for approximately fifteen years.

2. It is anticipated that the hearing in this matter would be lengthy and costly. The OAL based upon forty-three count complaint filed would have to schedule at least six to seven days of hearing in order to appropriately try this case.

3. The allegations pertain to events spanning a five-year period dating back to 2003.

4. If a hearing becomes necessary, the District has identified at least five to ten school administrators who are potential witnesses.

5. In addition, Spangler intends to call numerous teachers and co-workers in her defense.

6. Litigation of the charges would lead to the disruption of the District's educational programs due to the great amount of time lost by administrators, teaching staff members and other personnel who would be required to testify to the various incidents that led to the filing of the tenure charges.

7. Under the proposed terms of settlement, Spangler has submitted her resignation effective June 30, 2008. In exchange, Spangler will receive her salary and other benefits through June 30, 2008. Spangler will utilize any and all remaining sick days during this period and she will not be required to return to active service. Salary to be paid to Spangler will continue at the same rate of pay in effect during the 2007-08 school year. The salary for this year for Spangler is fixed at $85,800 plus longevity payment of $1,800 for a total of $87,600.

8. Under the best of circumstances, it is unlikely that the tenure hearing would be concluded until the end of September 2008. The ALJ would have forty-five days to prepare an initial decision and the Commissioner will have an additional forty-five days for review and issue its final decision.

9. Regardless of whether it won or lost, the District would incur the expense of paying Spangler's salary for the better part of the 2008-09 school year should this matter continue.

10. If the tenure matter proceeds to hearing, both parties would incur the additional cost of paying their attorney for a lengthy hearing.

11. From the District's viewpoint, the outcome of this settlement will be as good as or better than could be achieved if it prevailed after a lengthy costly tenure battle. Money spent on litigation cost would be put to better use for the benefit of the children of Newark.

12. Before entering into this agreement, Spangler fully understood her rights and had adequate opportunity to consult with legal counsel.

13. In particular, Spangler acknowledged her understanding that the Commissioner is required under N.J.A.C. 6:11-3.6 to refer the matter to the State Board of Examiners for whatever action deemed appropriate.

14. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that the terms of the settlement are in the public interest.

It is **ORDERED** that the parties comply with the settlement terms and that the proceeding are hereby concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

June 17, 2008
DATE

BARRY A. FRANK, ALJ

Date Received at Agency: 6-19-08

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUN 19 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

NEWARK PUBLIC SCHOOLS
Office of the General Counsel
2 Cedar Street
Newark, New Jersey 07102
(973) 733-8358
Attorney for Newark Public Schools

RECEIVED
2008 JUN 17 A 8:56
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

IN THE MATTER OF TENURE CHARGES AGAINST IRENE B. SPANGLER; STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, IN THE: COUNTY OF ESSEX	OAL DKT. NO. EDU 12541-07 AGENCY REF. NO. 345-11/07 **STIPULATION OF SETTLEMENT**

The above parties in this appeal have voluntarily resolved all disputed matters and enter into the following stipulation of settlement, which fully disposes of all issues in controversy between them.

WHEREAS, Irene Spangler ("Ms. Spangler"), is a tenured teaching staff member employed by the State-Operated School District of the City of Newark ("District") as a school nurse;

WHEREAS, on or about October 2, 2007, tenure charges were filed against Ms. Spangler;

WHEREAS, on or about November 10, 2007, the tenure charges were certified to the Commissioner of Education ("Commissioner");

WHEREAS, in connection with the certification of the tenure charges to the Commissioner, Ms. Spangler was suspended without pay effective November 12, 2007, pursuant to N.J.S.A. 18A:6-14;

WHEREAS, on or about November 22, 2007, Ms. Spangler, through her counsel, Phillip Feintuch, Esq. , filed an Answer with the Commissioner denying all charges;

WHEREAS, on or about December 4, 2007, the Commissioner transmitted the file to the Office of Administrative Law as a contested case for hearing, bearing Docket No. EDUTH-12541-2007N;

WHEREAS, the parties engaged in settlement discussions regarding this matter;

WHEREAS, due to the uncertainties of the outcome of litigation, expenditure of resources due to multiple days of hearing with numerous witnesses, and the concern that school personnel will be removed from educational duties and responsibilities during that time, the parties seek to amicably resolve this matter and hereby stipulate and agree as follows:

1. Ms. Spangler hereby agrees to resign from her tenured position effective June 30, 2008. Attached is a copy of the signed Letter of Resignation (Exhibit A). Upon the final approval of the signed Stipulation, the District shall and hereby does withdraw the instant tenure charges.
2. Ms. Spangler is permitted to utilize her accumulated sick days for the period she served her unpaid suspension subsequent to the charges being certified to the Commissioner. The District will record said days as sick days and Ms. Spangler will receive the respective compensation thereof.
3. After Ms. Spangler's sick days are applied in accordance with Paragraph 2, Ms. Spangler will receive her salary and benefits as an employee through June 30, 2008. Ms. Spangler will utilize any and all remaining sick days during this period. Ms. Spangler will not be required to return to active service. The salary rate to be paid to her will continue at the same rate paid during the 2007-08 school year.
4. Ms. Spangler's separation from employment will be deemed a voluntary resignation. Upon ON UPON MS. SPANGLER'S REQUEST inquiry from any third parties, the District will only confirm Ms. Spangler's title and dates of employment.
5. As of June 30, 2008, all of Ms. Spangler's employment rights, including, but not limited to salary, insurance coverage, tenure and seniority, will permanently end.
6. The District will not pursue tenure charges against Ms. Spangler as long as this Stipulation remains in effect and is not voided by any court or administrative agency of competent jurisdiction. However, if the Stipulation is voided, the District retains the right to file and consider

for certification tenure charges against Ms. Spangler, including such charges that previously have been filed by the District against Ms. Spangler.

7. In accordance with N.J.A.C. 6A:3-5.6, Ms. Spangler has been advised that this matter must be forwarded to the Commissioner for approval.

8. In accordance with N.J.A.C. 6A:3-5.6, Ms. Spangler has been advised that this matter may be referred by the Commissioner to the State Board of Examiners.

9. The parties respectively acknowledge that counsel has advised them and that each is signing this Stipulation freely and voluntarily, without duress, coercion or pressure from the other party.

10. This Stipulation constitutes the full agreement between the parties, and shall be construed and enforced in accordance with New Jersey law.

11. Ms. Spangler agrees that she will not apply for reemployment with the District at any time. If Ms. Spangler does apply for reemployment with the District and is approved for employment, the terms of this settlement agreement shall be grounds for immediate termination of Ms. Spangler's employment.

12. The undersigned representatives of the parties hereby acknowledge that they have been duly authorized by the respective parties to sign this Stipulation and bind their principals to its terms.

13. By entering this Stipulation, each party releases and discharges the other with respect to all claims or rights that either party may have against the other. This includes without limitation, any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Ms. Spangler's employment with the District. It specifically includes, without limitation, all claims which Ms. Spangler may have regarding tenure, withholding of increment, discrimination on any basis, any federal or state civil rights law, claims under the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, and any other federal or state civil rights claims, including claims of age discrimination and other rights and claims arising under the Age Discrimination in Employment Act and the Older Workers' Benefits Protection Act, rights under any collective

bargaining agreement, disability payments, sick leave, salary or any other matter pertaining to his employment.

14. This Stipulation of Settlement is subject to the approval of the State District Superintendent of the State-operated School District of the City of Newark.

FOR RESPONDENT:

Dated: 6/11/08

Irene Spangler

Dated: 6/11/08

Phillip Feintuch, Esq.
Attorney for Irene Spangler

FOR PETITIONER:

Dated: 6/12/08

Dr. Marion Bolden
State District Superintendent

Dated: 6/12/08

Adam S. Herman, Esq.
Senior Associate Counsel
Newark Public Schools

15 THE DISTRICT SHALL REMOVE CHARGES #6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 24, 25, 26, 27, 33, 38, 45

16. SALARY FOR THE 2007-2008 SCHOOL YEAR IS FIXED AT $85,800 PLUS LONGEVITY OF $1800. (TOTAL $87,600.00)

CERTIFICATION

I, Irene Spangler, being the Appellant in this matter, hereby certify that I have reviewed this Stipulation of Settlement and fully understand its meaning and terms. I acknowledge that my representative questioned my understanding and verified my acceptance of the terms of this Stipulation of Settlement. I am satisfied with my representation and I enter into this Settlement of Settlement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Irene Spangler

IRENE SPANGLER

DATED: 6/14/06

303-08

#305-08

L.P. on behalf of minor children J.P. and B.P., :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner – an Irvington resident – filed a *pro se* residency appeal contending that he is the legal guardian of his nephews, J.P. and B.P., and that they are therefore entitled to a free public education in the Irvington School District. Respondent Board was directed by the Bureau of Controversies and Disputes, pursuant to *N.J.A.C.* 6A:3-1.5, to file an answer to the petition within 20 days from the receipt of the petition. Respondent additionally received second and third notices advising that if no response was filed within ten days of the receipt of same, each count of the petition would be deemed admitted and the Commissioner might decide the matter on a summary basis. No answer has been received from the respondent nor from any attorney purporting to represent respondent.

The Commissioner concluded that the allegations, which respondent has chosen not to deny, may be deemed admitted, pursuant to *N.J.A.C.* 6A:3-1.5(e), and are sufficient to justify an order that respondent provide petitioner's nephews with a free public education. Accordingly, summary decision was granted to petitioner; J.P. and B.P. shall remain enrolled in respondent's district, so long as there is no change in their status.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

July 14, 2008

AGENCY DKT. NO. 111-4/08

L.P. on behalf of minor children J.P. and B.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

Petitioner, Lesly Philippe, *Pro Se*

This matter was opened before the Commissioner of Education on April 16, 2008, by way of a verified petition against the respondent board of education. Petitioner alleged that respondent was challenging the right of his nephews, J.P. and B.P. – who are in petitioner's care and custody – to receive a free public education in Irvington.

By notice dated April 16, 2008, the Bureau of Controversies and Disputes (the Bureau) directed respondent, via telecopy and regular mail, to file an answer to the petition. On May 20, 2008, and then again on June 11, 2008, the Bureau directed respondent for a second and a third time – via both certified and regular mail – to file an answer to the petition. Neither the notices sent by regular mail nor the receipts for the certified notices were returned to the Commissioner. The postal system tracking site indicates that a notice of the first certified letter to respondent was delivered to the Board Secretary's address on May 21, 2008, and that the second certified letter was delivered on June 13, 2008.

The first communication from the Bureau clearly provided respondent with notice that, pursuant to *N.J.A.C.* 6A:3-1.5, an individual against whom a petition is filed shall have

20 days from receipt of the petition to file an answer. The second and third notices advised that if respondent did not file an answer within ten days of the receipt of same, each count of the petition would be deemed to have been admitted and the Commissioner might decide the matter on a summary basis. The Bureau has received neither an answer to the petition from the respondent nor from any attorney purporting to represent respondent.

The Commissioner concludes that the allegations, which respondent has chosen not to deny, may be deemed admitted, pursuant to *N.J.A.C.* 6A:3-1.5(e), and are sufficient to justify an order that respondent provide petitioner's nephews with a free public education.

Accordingly, summary decision shall be granted to petitioner and J.P. and B.P. shall remain enrolled in respondent's district, as long as there is no change in status.

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 7/14/08

Date of Mailing: 7/14/08

* This decision may be appealed to the Superior Court, Appellate Division, pursuant to P.L. 2008, c. 36.

A-6216-82T5

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION (Middlesex County)
Docket No. C.1715-83

JAMES DENBURG, et al.,

Plaintiffs,

vs.

EDUCATIONAL TESTING SERVICE, et al.,

Defendants.

Testimony of

Antonia M. Rosenbaum

FILED
APPELLATE DIVISION
OCT 17 1983
Clerk

Middlesex County Courthouse
New Brunswick, New Jersey
July 11, 1983

Before: Honorable Richard [illegible], J.S.C.

APPEARANCES:

Rosen, Gelman & Weiss, Esqs.,
By: George B. Gelman, Esq.,
-and-
Jill Haley, Esq.,
Attorneys for the Plaintiffs

Smith, Stratton, Wise, Heher & Brennan, Esqs.
By: William J. Brennan, III, Esq.,
-and-
Wilmer, Cutler & Pickering, Esqs.,
By: Howard P. Willens, Esq.,
Attorneys for ETS

PENGAD CO. BAYONNE, N.J. 07002 - FORM 2045

State of New Jersey

DEPARTMENT OF STATE
DIVISION OF
ARCHIVES AND RECORDS MANAGEMENT

TITLE TARGET

TITLE OF RECORDS: Docket Brief TRANSCRIPTS

FIRST RECORD: A-6216-82

LAST RECORD:

FILMED FOR (use name of agency): Judiciary Appellate Division

REDUCTION RATIO: 24x 27x FILM TYPE: 16mm X 35mm

TYPE CAMERA: MRD-2 CAMERA NUMBER: 6

ROLL # SF-11/18/87

SR-5390

307-08

OAL DKT. NO. EDU 11528-05
AGENCY DKT. NO. 200-8/05

PATERSON EDUCATION ASSOCIATION,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the parties' proposed Settlement Agreement and Release, and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon such review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/14/08
Date of Mailing: 7/15/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11528-05

AGENCY DKT. NO. 200-8/05

PATERSON EDUCATION ASSOCIATION,

Petitioner,

v.

STATE-OPERATED DISTRICT OF CITY OF PATERSON, PASSAIC COUNTY,

Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Joanne L. Butler, Esq., for respondent (Schenck, Price, Smith & King, L.L.P., attorneys)

Record Closed: May 23, 2007 Decided: June 17, 2008

BEFORE **LESLIE Z. CELENTANO,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on October 3, 2005, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

A hearing was scheduled on April 30 and May 7, 2007. On May 23, 2007, the parties settled the matter. The attached Stipulation of Settlement and Release was submitted on May 23, 2007, indicating the terms of agreement which are incorporated herein by reference.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

June 17, 2008
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency: 6-23-08

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUN 23 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

da

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN
150 West State Street
Trenton, New Jersey 08608
(609) 392-8172
Attorneys for Petitioners

PATERSON EDUCATION ASSOCIATION, On Behalf of Itself and On Behalf of the Following Members: HIPOLITO ANTUNEZ, JESSICA CAPPELINE, DOREEN CONLON, KRISTEN COOPER, MARY HARRIS, IVAN HECHT, LORENZO HOBBS, KIMBERLY KAMINSKI, LORI LOCASCIO, SANDRA MANN-RENNIE, REYNALDO MARTINEZ, DEBRA MILORDO, DAISY RAMOS, JULIE REYNA, MICHAEL RINALDI, ANA ROSARIO-RIVERA, SIVASORUPEE SINNATHAMBY, RICARDO TORRES-HENRIQUEZ, RANDEE WADRO, ALFREDA WARD, PEPUKAYI WEST, JOHN WETZEL, and KATHLEEN WILSON, and HIPOLITO ANTUNEZ, MARY HARRIS, LORENZO HOBBS, REYNALDO MARTINEZ, DEBRA MILORDO, DAISY RAMOS, and ALFREDA WARD, Individually, Petitioners, v. STATE OPERATED SCHOOL DISTRICT OF PATERSON, Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DKT. NO. EDUOR 11528-2005N AGENCY REF. NO. 200-8/05 **SETTLEMENT AGREEMENT AND RELEASE** **IVAN HECHT**

WHEREAS, Petitioners were employees of Respondent and have asserted certain claims pursuant to the New Jersey Education Statutes and Regulations challenging the Respondent's actions in relation to the content of its notices of non-renewal, in issuing Statements of Reasons for non-renewal, in scheduling *Donaldson* hearings, and in conducting *Donaldson* hearings,

which are asserted more particularly in the Petition of Appeal under Docket No.: EDUOR-11528-2005N; and

WHEREAS, said parties have reached an agreement to fully and finally settle and/or release all claims which were the subject of the petition of appeal.

THE PARTIES HEREIN AGREE AS FOLLOWS:

1. The above Recitals are made part of this Agreement.

2. Prospectively, Respondent will provide Statements of Reasons, as that term is used in the New Jersey Statutes and Regulations, regarding the non-renewal of teaching staff members' employment contracts, only after receiving a request for the Statement of Reasons from a non-tenured teaching staff employee who has received notification that his/her employment will not be renewed for the coming year.

3. For each Petitioner who received a letter setting forth the reason for the non-renewal of his or her employment, that letter will be withdrawn and deleted from the Petitioner's personnel file and from the District's files and records (except the District's file regarding this litigation), and a new letter will be issued stating only that Respondent determined not to renew the Petitioner's employment. In the event, however, that the reason for the non-renewal was budgetary, at the Petitioner's option, the new letter will state only that the non-renewal was for budgetary reasons.

4. Prospectively, Respondent will provide to a non-tenured teaching staff employee seeking a Statement of Reasons sufficient information to enable a reasonable person under the circumstances to understand why the teaching staff employee's employment contract was not renewed.

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PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

5. As to only those Petitioners who submitted letters of resignation before non-renewal notices were issued, those Petitioners who submitted letters of resignation between receiving non-renewal notices and their *Donaldson* hearings, and those petitioners who submitted letters shortly after their *Donaldson* hearings, meaning within thirty (30) days thereafter, if requested by the Petitioner, Respondent will amend those Petitioners' personnel records to reflect resignation rather than non-renewal, and the non-renewal notices, Statements of Reasons, and post-*Donaldson* letters will be removed from their personnel files.

6. For all Petitioners who had *Donaldson Hearings* and were issued formal decisions or letters with reasons for the non-renewal of their employment following their *Donaldson Hearing*, those decisions and letters will be withdrawn and deleted from the Petitioner's personnel file and from the district's files and records (except the district's file regarding this litigation), provided that the withdrawal and deletion of same will not entitle any Petitioner to a new *Donaldson* Hearing.

7. Any request made to Respondent about Petitioners by any prospective employer or other outside party shall be responded to by Respondent, its employees and agents, by providing only each Petitioner's job title and dates of service, unless the specific Petitioner requests the provision of additional information in writing, provided the disclosure of such additional information is acceptable to the District.

8. Each Petitioner hereby releases and forever discharges Respondent and its present and former affiliates, subsidiaries, officers, directors, agents, employees, and their successors and assigns, from any and all actions, causes of action, suits, claims, charges or complaints which Petitioners may have, or claim to have, which relate to, and only to, the subject matter of this

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PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

litigation and from all claims for compensatory and punitive damages and attorneys' fees, costs, or other expenses incurred by Petitioners in relation to the subject matter of this petition.

9. This Agreement does not constitute an admission by Respondent of any wrongful action or violation of any federal or state statute, or common law rights, including those relating to the provisions of any law or statute concerning employment actions, or of any other possible or claimed violation of law or rights.

10. By executing this Agreement, each Petitioner represents and acknowledges that the Petitioners do not rely, and have not relied upon, any representation or statement not set forth in this Agreement made by Respondent or its counsel with regard to the subject matter, basis, or effect of this Agreement or otherwise.

11. This Agreement shall be binding upon and inure to the benefit of the Petitioners, the Respondent and any of their respective heirs, legal or personal representatives, employees, officers, directors, successors or assigns.

12. This Agreement sets forth the entire Agreement between the parties and supersedes any and all prior agreements or understandings between the parties.

13. In the event of a breach of this Agreement, either party may seek relief, including damages, restitution and injunctive relief, at law or in equity, in a court of competent jurisdiction.

14. Any Petitioner, at his or her option, may, rather than be covered by this Settlement Agreement, withdraw the Petition of Appeal, or his or her participation therein, provided that a withdrawal shall be deemed to constitute a waiver of the claims, and only the claims, covered by the Petition of Appeal.

15. This Agreement shall be construed in accordance with, and all disputes hereunder shall be governed by, the laws of the State of New Jersey.

ZAZZALI, AGELLA, NOWAK, KLEINBAUM & FRIEDMAN
PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

16. Each Petitioner acknowledges that he or she has carefully read and fully understands all of the terms of this Agreement, including the general release contained herein, that he or she has had a reasonable period of time to consider the terms hereof, and that he or she enters into this Agreement voluntarily and with the advice of counsel.

17. This Agreement is effective upon its execution by all parties. This Agreement may be executed in multiple counterparts, each of which shall be considered an original but all of which shall constitute one Agreement.

ACCEPTANCE OF SETTLEMENT TERMS

IN WITNESS WHEREOF, and intending to be legally bound, the parties have executed this Agreement.

Juan Hecht
PETITIONER'S NAME

Juan Hecht
PETITIONER'S SIGNATURE
Date: 3/19/08

THE STATE OPERATED SCHOOL
DISTRICT OF PATERSON

By: Michael E. Glasser
Date: 5/14/08

WITHDRAWAL OF PETITION OR OF PARTICIPATION

I hereby withdraw my Petition of Appeal and/or my participation in this Petition of Appeal.

PETITIONER'S NAME

PETITIONER'S SIGNATURE
Date:

THE STATE OPERATED SCHOOL
DISTRICT OF PATERSON

By:_____
Date:

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PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

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(609) 392-8172
Attorneys for Petitioners

PATERSON EDUCATION ASSOCIATION, On Behalf of Itself and On Behalf of the Following Members: HIPOLITO ANTUNEZ, JESSICA CAPPELINE, DOREEN CONLON, KRISTEN COOPER, MARY HARRIS, IVAN HECHT, LORENZO HOBBS, KIMBERLY KAMINSKI, LORI LOCASCIO, SANDRA MANN-RENNIE, REYNALDO MARTINEZ, DEBRA MILORDO, DAISY RAMOS, JULIE REYNA, MICHAEL RINALDI, ANA ROSARIO-RIVERA, SIVASORUPEE SINNATHAMBY, RICARDO TORRES-HENRIQUEZ, RANDEE WADRO, ALFREDA WARD, PEPUKAYI WEST, JOHN WETZEL, and KATHLEEN WILSON, and HIPOLITO ANTUNEZ, MARY HARRIS, LORENZO HOBBS, REYNALDO MARTINEZ, DEBRA MILORDO, DAISY RAMOS, and ALFREDA WARD, Individually, Petitioners, v. STATE OPERATED SCHOOL DISTRICT OF PATERSON, Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DKT. NO. EDUOR 11528-2005N AGENCY REF. NO. 200-8/05 **SETTLEMENT AGREEMENT AND RELEASE**

WHEREAS, Petitioners were employees of Respondent and have asserted certain claims pursuant to the New Jersey Education Statutes and Regulations challenging the Respondent's actions in relation to the content of its notices of non-renewal, in issuing Statements of Reasons for non-renewal, in scheduling *Donaldson* hearings, and in conducting *Donaldson* hearings,

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which are asserted more particularly in the Petition of Appeal under Docket No.: EDUOR-11528-2005N; and

WHEREAS, said parties have reached an agreement to fully and finally settle and/or release all claims which were the subject of the petition of appeal, as expressed and detailed by the terms of and execution of this agreement.

THE PARTIES HEREIN AGREE AS FOLLOWS:

1. The above Recitals are made part of this Agreement.

2. Prospectively, Respondent will provide Statements of Reasons, as that term is used in the New Jersey Statutes and Regulations, regarding the non-renewal of teaching staff members' employment contracts, only after receiving a request for the Statement of Reasons from a non-tenured teaching staff employee who has received notification that his/her employment will not be renewed for the coming year.

3. For each Petitioner who received a letter setting forth the reason for the non-renewal of his or her employment, that letter will be withdrawn and deleted from the Petitioner's personnel file and from the District's files and records (except the District's file regarding this litigation), and a new letter will be issued stating only that Respondent determined not to renew the Petitioner's employment. In the event, however, that the reason for the non-renewal was budgetary, at the Petitioner's option, the new letter will state only that the non-renewal was for budgetary reasons.

4. Prospectively, Respondent will provide to a non-tenured teaching staff employee seeking a Statement of Reasons sufficient information to enable a reasonable person under the circumstances to understand why the teaching staff employee's employment contract was not renewed.

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

5. As to only those Petitioners who submitted letters of resignation before non-renewal notices were issued, those Petitioners who submitted letters of resignation between receiving non-renewal notices and their *Donaldson* hearings, and those petitioners who submitted letters shortly after their *Donaldson* hearings, meaning within thirty (30) days thereafter, if requested by the Petitioner, Respondent will amend those Petitioners' personnel records to reflect resignation rather than non-renewal, and the non-renewal notices, Statements of Reasons, and post-*Donaldson* letters will be removed from their personnel files.

6. For all Petitioners who had *Donaldson Hearings* and were issued formal decisions or letters with reasons for the non-renewal of their employment following their *Donaldson Hearing*, those decisions and letters will be withdrawn and deleted from the Petitioner's personnel file and from the district's files and records (except the district's file regarding this litigation), provided that the withdrawal and deletion of same will not entitle any Petitioner to a new *Donaldson* Hearing.

7. Any request made to Respondent about Petitioners by any prospective employer or other outside party shall be responded to by Respondent, its employees and agents, by providing only each Petitioner's job title and dates of service, unless the specific Petitioner requests the provision of additional information in writing, provided the disclosure of such additional information is acceptable to the District.

8. Each Petitioner hereby releases and forever discharges Respondent and its present and former affiliates, subsidiaries, officers, directors, agents, employees, and their successors and assigns, from any and all actions, causes of action, suits, claims, charges or complaints which Petitioners may have, or claim to have, which relate to, and only to, the subject matter of this

litigation and from all claims for compensatory and punitive damages and attorneys' fees, costs, or other expenses incurred by Petitioners in relation to the subject matter of this petition.

9. This Agreement does not constitute an admission by Respondent of any wrongful action or violation of any federal or state statute, or common law rights, including those relating to the provisions of any law or statute concerning employment actions, or of any other possible or claimed violation of law or rights.

10. By executing this Agreement, each Petitioner represents and acknowledges that the Petitioners do not rely, and have not relied upon, any representation or statement not set forth in this Agreement made by Respondent or its counsel with regard to the subject matter, basis, or effect of this Agreement or otherwise.

11. This Agreement shall be binding upon and inure to the benefit of the Petitioners, the Respondent and any of their respective heirs, legal or personal representatives, employees, officers, directors, successors or assigns.

12. This Agreement sets forth the entire Agreement between the parties and supersedes any and all prior agreements or understandings between the parties.

13. In the event of a breach of this Agreement, either party may seek relief, including damages, restitution and injunctive relief, at law or in equity, in a court of competent jurisdiction.

14. Any Petitioner, at his or her option, may, rather than be covered by this Settlement Agreement, withdraw the Petition of Appeal, or his or her participation therein, provided that a withdrawal shall be deemed to constitute a waiver of the claims, and only the claims, covered by the Petition of Appeal.

15. This Agreement shall be construed in accordance with, and all disputes hereunder shall be governed by, the laws of the State of New Jersey.

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

16. This Agreement is effective upon its execution by all parties or their counsel. This Agreement may be executed in multiple counterparts, each of which shall be considered an original but all of which shall constitute one Agreement.

ACCEPTANCE OF SETTLEMENT TERMS

The terms of this agreement are hereby accepted on behalf of Jessica Cappeline, Kristen Cooper, Mary Harris, Lorenzo Hobbs, Daisy Ramos, Sivasorupee Sinnathamby, Randee Wadro, Alfreda Brown-Ward, and Pepukay West.

By: Richard A. Friedman, Esq. for
Petitioners Jessica Cappeline, Kristen Cooper,
Mary Harris, Lorenzo Hobbs, Daisy Ramos,
Sivasorupee Sinnathamby, Randee Wadro,
Alfreda Brown-Ward, and Pepukay West

Dated: 3-25-08

THE STATE OPERATED SCHOOL
DISTRICT OF PATERSON

By: Michael E. Glascoe
Date: 5/14/08

WITHDRAWAL OF PETITION OR OF PARTICIPATION

The Petition of Appeal as it pertains to Sandra Mann-Rennie and Sandra Mann-Rennie only is hereby withdrawn.

By: Richard A. Friedman, Esq. for
Petitioner Sandra Mann-Rennie

Dated: 3-25-08

THE STATE OPERATED SCHOOL
DISTRICT OF PATERSON

By: Michael E. Glascoe
Date: 5/14/08

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

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Attorneys for Petitioners

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Petitioners,

v.

STATE OPERATED SCHOOL DISTRICT OF PATERSON,

Respondent.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDUOR 11528-2005N
AGENCY REF. NO. 200-8/05

SETTLEMENT AGREEMENT AND RELEASE

WHEREAS, Petitioners were employees of Respondent and have asserted certain claims pursuant to the New Jersey Education Statutes and Regulations challenging the Respondent's actions in relation to the content of its notices of non-renewal, in issuing Statements of Reasons for non-renewal, in scheduling *Donaldson* hearings, and in conducting *Donaldson* hearings,

ZAZZALI, AGELLA, NOWAK, KLEINBAUM & FRIEDMAN PROFESSIONAL CORPORATION ATTORNEYS AT LAW

which are asserted more particularly in the Petition of Appeal under Docket No.: EDUOR-11528-2005N; and

WHEREAS, said parties have reached an agreement to fully and finally settle and/or release all claims which were the subject of the petition of appeal.

THE PARTIES HEREIN AGREE AS FOLLOWS:

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3. For each Petitioner who received a letter setting forth the reason for the non-renewal of his or her employment, that letter will be withdrawn and deleted from the Petitioner's personnel file and from the District's files and records (except the District's file regarding this litigation), and a new letter will be issued stating only that Respondent determined not to renew the Petitioner's employment. In the event, however, that the reason for the non-renewal was budgetary, at the Petitioner's option, the new letter will state only that the non-renewal was for budgetary reasons.

4. Prospectively, Respondent will provide to a non-tenured teaching staff employee seeking a Statement of Reasons sufficient information to enable a reasonable person under the circumstances to understand why the teaching staff employee's employment contract was not renewed.

5. As to only those Petitioners who submitted letters of resignation before non-renewal notices were issued, those Petitioners who submitted letters of resignation between receiving non-renewal notices and their *Donaldson* hearings, and those petitioners who submitted letters shortly after their *Donaldson* hearings, meaning within thirty (30) days thereafter, if requested by the Petitioner, Respondent will amend those Petitioners' personnel records to reflect resignation rather than non-renewal, and the non-renewal notices, Statements of Reasons, and post-*Donaldson* letters will be removed from their personnel files.

6. For all Petitioners who had *Donaldson Hearings* and were issued formal decisions or letters with reasons for the non-renewal of their employment following their *Donaldson Hearing*, those decisions and letters will be withdrawn and deleted from the Petitioner's personnel file and from the district's files and records (except the district's file regarding this litigation), provided that the withdrawal and deletion of same will not entitle any Petitioner to a new *Donaldson* Hearing.

7. Any request made to Respondent about Petitioners by any prospective employer or other outside party shall be responded to by Respondent, its employees and agents, by providing only each Petitioner's job title and dates of service, unless the specific Petitioner requests the provision of additional information in writing, provided the disclosure of such additional information is acceptable to the District.

8. Each Petitioner hereby releases and forever discharges Respondent and its present and former affiliates, subsidiaries, officers, directors, agents, employees, and their successors and assigns, from any and all actions, causes of action, suits, claims, charges or complaints which Petitioners may have, or claim to have, which relate to, and only to, the subject matter of this

litigation and from all claims for compensatory and punitive damages and attorneys' fees, costs, or other expenses incurred by Petitioners in relation to the subject matter of this petition.

9. This Agreement does not constitute an admission by Respondent of any wrongful action or violation of any federal or state statute, or common law rights, including those relating to the provisions of any law or statute concerning employment actions, or of any other possible or claimed violation of law or rights.

10. By executing this Agreement, each Petitioner represents and acknowledges that the Petitioners do not rely, and have not relied upon, any representation or statement not set forth in this Agreement made by Respondent or its counsel with regard to the subject matter, basis, or effect of this Agreement or otherwise.

11. This Agreement shall be binding upon and inure to the benefit of the Petitioners, the Respondent and any of their respective heirs, legal or personal representatives, employees, officers, directors, successors or assigns.

12. This Agreement sets forth the entire Agreement between the parties and supersedes any and all prior agreements or understandings between the parties.

13. In the event of a breach of this Agreement, either party may seek relief, including damages, restitution and injunctive relief, at law or in equity, in a court of competent jurisdiction.

14. Any Petitioner, at his or her option, may, rather than be covered by this Settlement Agreement, withdraw the Petition of Appeal, or his or her participation therein, provided that a withdrawal shall be deemed to constitute a waiver of the claims, and only the claims, covered by the Petition of Appeal.

15. This Agreement shall be construed in accordance with, and all disputes hereunder shall be governed by, the laws of the State of New Jersey.

ZAZZALI, AGELLA, NOWAK, KLEINBAUM & FRIEDMAN
PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

16. Each Petitioner acknowledges that he or she has carefully read and fully understands all of the terms of this Agreement, including the general release contained herein, that he or she has had a reasonable period of time to consider the terms hereof, and that he or she enters into this Agreement voluntarily and with the advice of counsel.

17. This Agreement is effective upon its execution by all parties. This Agreement may be executed in multiple counterparts, each of which shall be considered an original but all of which shall constitute one Agreement.

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

ACCEPTANCE OF SETTLEMENT TERMS

IN WITNESS WHEREOF, and intending to be legally bound, the parties have executed this Agreement.

PETER A. TIRRI
PETITIONER'S NAME

PETITIONER'S SIGNATURE
Date:

THE STATE OPERATED SCHOOL
DISTRICT OF PATERSON

By: Michael E. Blanco
Date: 5/14/08

WITHDRAWAL OF PETITION OR OF PARTICIPATION

I hereby withdraw my Petition of Appeal and/or my participation in this Petition of Appeal.

PETITIONER'S NAME

PETITIONER'S SIGNATURE
Date:

THE STATE OPERATED SCHOOL
DISTRICT OF PATERSON

By:_____
Date:

ZAZZALI,
AGELLA, NOWAK,
KLEINBAUM
& FRIEDMAN
PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

ACCEPTANCE OF SETTLEMENT TERMS

IN WITNESS WHEREOF, and intending to be legally bound, the parties have executed this Agreement.

Ana L. Rivera
PETITIONER'S NAME

Ana L. Rivera
PETITIONER'S SIGNATURE
Date:

THE STATE OPERATED SCHOOL DISTRICT OF PATERSON

By: 3/4/08
Date: Michael E. Blazer 5/14/08

WITHDRAWAL OF PETITION OR OF PARTICIPATION

I hereby withdraw my Petition of Appeal and/or my participation in this Petition of Appeal.

PETITIONER'S NAME

PETITIONER'S SIGNATURE
Date:

THE STATE OPERATED SCHOOL DISTRICT OF PATERSON

By:_____
Date:

ZAZZALI, AGELLA, NOWAK, KLEINBAUM & FRIEDMAN
PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

ACCEPTANCE OF SETTLEMENT TERMS

IN WITNESS WHEREOF, and intending to be legally bound, the parties have executed this Agreement.

Lori LoCascio
PETITIONER'S NAME

PETITIONER'S SIGNATURE
Date:

THE STATE OPERATED SCHOOL
DISTRICT OF PATERSON

By: Michael E. Hlasse
Date: 5/14/08

WITHDRAWAL OF PETITION OR OF PARTICIPATION

I hereby withdraw my Petition of Appeal and/or my participation in this Petition of Appeal.

PETITIONER'S NAME

PETITIONER'S SIGNATURE
Date:

THE STATE OPERATED SCHOOL
DISTRICT OF PATERSON

By:_____
Date:

ZAZZALI,
AGELLA, NOWAK,
KLEINBAUM
& FRIEDMAN
PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

ACCEPTANCE OF SETTLEMENT TERMS

IN WITNESS WHEREOF, and intending to be legally bound, the parties have executed this Agreement.

Kimberly Kaminsk.
PETITIONER'S NAME

PETITIONER'S SIGNATURE
Date: 2-21-08

THE STATE OPERATED SCHOOL
DISTRICT OF PATERSON

By: Michael E. Hanko
Date: 5/14/08

WITHDRAWAL OF PETITION OR OF PARTICIPATION

I hereby withdraw my Petition of Appeal and/or my participation in this Petition of Appeal.

PETITIONER'S NAME

PETITIONER'S SIGNATURE
Date:

THE STATE OPERATED SCHOOL
DISTRICT OF PATERSON

By:_____
Date:

ZAZZALI, AGELLA, NOWAK, KLEINBAUM & FRIEDMAN
PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

ACCEPTANCE OF SETTLEMENT TERMS

IN WITNESS WHEREOF, and intending to be legally bound, the parties have executed this Agreement.

Kathleen Wilson
PETITIONER'S NAME

Kathleen L Wilson
PETITIONER'S SIGNATURE
Date: 2/20/2008

THE STATE OPERATED SCHOOL DISTRICT OF PATERSON

By: Michael E. Hanson
Date: 5/14/08

WITHDRAWAL OF PETITION OR OF PARTICIPATION

I hereby withdraw my Petition of Appeal and/or my participation in this Petition of Appeal.

PETITIONER'S NAME

PETITIONER'S SIGNATURE
Date:

THE STATE OPERATED SCHOOL DISTRICT OF PATERSON

By:_____
Date:

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

EDUOK 11528-2005 NL

ACCEPTANCE OF SETTLEMENT TERMS

IN WITNESS WHEREOF, and intending to be legally bound, the parties have executed this Agreement.

REYNALDO MARTINEZ
PETITIONER'S NAME

Reynaldo Martinez
PETITIONER'S SIGNATURE
Date: 2/18/08

THE STATE OPERATED SCHOOL
DISTRICT OF PATERSON

By: Michael E. Gonzalez
Date: 5/14/08

WITHDRAWAL OF PETITION OR OF PARTICIPATION

I hereby withdraw my Petition of Appeal and/or my participation in this Petition of Appeal.

_____
PETITIONER'S NAME

_____
PETITIONER'S SIGNATURE
Date:

THE STATE OPERATED SCHOOL
DISTRICT OF PATERSON

By:_____
Date:

ZAZZALI,
AGELLA, NOWAK,
KLEINBAUM
& FRIEDMAN
PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

ACCEPTANCE OF SETTLEMENT TERMS

IN WITNESS WHEREOF, and intending to be legally bound, the parties have executed this Agreement.

John T. Wetzel
PETITIONER'S NAME

John T. Wetzel
PETITIONER'S SIGNATURE
Date: 2/13/08

THE STATE OPERATED SCHOOL DISTRICT OF PATERSON

By: Michael E. Glass
Date: 5/14/08

WITHDRAWAL OF PETITION OR OF PARTICIPATION

I hereby withdraw my Petition of Appeal and/or my participation in this Petition of Appeal.

PETITIONER'S NAME

PETITIONER'S SIGNATURE
Date:

THE STATE OPERATED SCHOOL DISTRICT OF PATERSON

By: _____
Date:

ZAZZALI, AGELLA, NOWAK, KLEINBAUM & FRIEDMAN
PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

ACCEPTANCE OF SETTLEMENT TERMS

IN WITNESS WHEREOF, and intending to be legally bound, the parties have executed this Agreement.

Michael A. Rinaldi
PETITIONER'S NAME

Michael A. Rinaldi
PETITIONER'S SIGNATURE
Date: 2/11/2008
February 11, 2008

THE STATE OPERATED SCHOOL DISTRICT OF PATERSON

By: Michael E. Hanson
Date: 5/14/08

WITHDRAWAL OF PETITION OR OF PARTICIPATION

I hereby withdraw my Petition of Appeal and/or my participation in this Petition of Appeal.

PETITIONER'S NAME

PETITIONER'S SIGNATURE
Date:

THE STATE OPERATED SCHOOL DISTRICT OF PATERSON

By: _____
Date:

ZAZZALI, GELLA, NOWAK, KLEINBAUM & FRIEDMAN
PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

ACCEPTANCE OF SETTLEMENT TERMS

IN WITNESS WHEREOF, and intending to be legally bound, the parties have executed this Agreement.

JULIE REYNA
PETITIONER'S NAME

PETITIONER'S SIGNATURE
Date: 2/19/08

AS PER #5 ABOVE, I RESIGNED BEFORE RECEIVING A NON-RENEWAL NOTICE AND WISH TO HAVE MY FILE AMENDED ACCORDINGLY.

THE STATE OPERATED SCHOOL DISTRICT OF PATERSON

By: Michael E. Alonzo
Date: 5/14/08

WITHDRAWAL OF PETITION OR OF PARTICIPATION

I hereby withdraw my Petition of Appeal and/or my participation in this Petition of Appeal.

PETITIONER'S NAME

PETITIONER'S SIGNATURE
Date:

THE STATE OPERATED SCHOOL DISTRICT OF PATERSON

By:
Date:

ZAZZALI, AGELLA, NOWAK, KLEINBAUM & FRIEDMAN
PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

ACCEPTANCE OF SETTLEMENT TERMS

IN WITNESS WHEREOF, and intending to be legally bound, the parties have executed this Agreement.

Darren Conlon
PETITIONER'S NAME

PETITIONER'S SIGNATURE
Date: 3/12/08

THE STATE OPERATED SCHOOL
DISTRICT OF PATERSON

By: Michael E. Stanco
Date: 5/14/08

WITHDRAWAL OF PETITION OR OF PARTICIPATION

I hereby withdraw my Petition of Appeal and/or my participation in this Petition of Appeal.

PETITIONER'S NAME

PETITIONER'S SIGNATURE
Date:

THE STATE OPERATED SCHOOL
DISTRICT OF PATERSON

By:_____
Date:

ZAZZALI,
GELLA, NOWAK,
KLEINBAUM
& FRIEDMAN
PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

ACCEPTANCE OF SETTLEMENT TERMS

IN WITNESS WHEREOF, and intending to be legally bound, the parties have executed this Agreement.

Hipólito Antúnez
PETITIONER'S NAME

Hipólito Antúnez
PETITIONER'S SIGNATURE
Date: 3/13/08

THE STATE OPERATED SCHOOL
DISTRICT OF PATERSON

By: Michael E. Kaplan
Date: 5/14/08

WITHDRAWAL OF PETITION OR OF PARTICIPATION

I hereby withdraw my Petition of Appeal and/or my participation in this Petition of Appeal.

_____
PETITIONER'S NAME

_____
PETITIONER'S SIGNATURE
Date:

THE STATE OPERATED SCHOOL
DISTRICT OF PATERSON

By:_____
Date:

ZAZZALI,
GELLA, NOWAK,
KLEINBAUM
& FRIEDMAN
PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

ACCEPTANCE OF SETTLEMENT TERMS

IN WITNESS WHEREOF, and intending to be legally bound, the parties have executed this Agreement.

PETITIONER'S NAME

N/A

PETITIONER'S SIGNATURE
Date:

THE STATE OPERATED SCHOOL
DISTRICT OF PATERSON

By:_____
Date:

WITHDRAWAL OF PETITION OR OF PARTICIPATION

I hereby withdraw my Petition of Appeal and/or my participation in this Petition of Appeal.

Debra Milardo
PETITIONER'S NAME

Debra Milardo
PETITIONER'S SIGNATURE
Date: 3/22/2008

THE STATE OPERATED SCHOOL
DISTRICT OF PATERSON

By: Michael E. Gleason
Date: 5/14/08

ZAZZALI, AGELLA, NOWAK, KLEINBAUM & FRIEDMAN
PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

ACCEPTANCE OF SETTLEMENT TERMS

IN WITNESS WHEREOF, and intending to be legally bound, the parties have executed this Agreement.

RICARDO TORRES-HENRIQUEZ
PETITIONER'S NAME

Ricardo Torres
PETITIONER'S SIGNATURE
Date:

THE STATE OPERATED SCHOOL
DISTRICT OF PATERSON

By: 03-13-08
Date: Michael E. Hanson
5/14/08

WITHDRAWAL OF PETITION OR OF PARTICIPATION

I hereby withdraw my Petition of Appeal and/or my participation in this Petition of Appeal.

PETITIONER'S NAME

PETITIONER'S SIGNATURE
Date:

THE STATE OPERATED SCHOOL
DISTRICT OF PATERSON

By:_____
Date:

ZAZZALI,
GELLA, NOWAK,
KLEINBAUM
& FRIEDMAN
PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

312-08

312-08E

OAL DKT. NO. EDU 4848-08
AGENCY DKT. NO. 181-6/08

B.F.-H., on behalf of minor child, A.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF WOODBRIDGE TOWNSHIP, MIDDLESEX COUNTY.	:	DECISION ON
	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this emergent matter – which included an audiotape of the hearing conducted at the Office of Administrative Law on July 1, 2008 – along with the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner adopts the recommended Order denying emergent relief as she finds that petitioner has failed to satisfy the requirements necessary for the granting of such extraordinary relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), most notably – petitioner has not demonstrated that absent such relief she will suffer irreparable harm. The Commissioner, however, rejects the ALJ's determination that the matter of domicile is moot absent a hearing on the merits which more fully explores the concept of domicile and the concept of the legal validity of an agreement which purports to waive a statutorily conferred right.

Accordingly, the instant application for emergent relief is hereby denied. This matter shall proceed to plenary hearing on its merits on an expedited basis.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 7/18/08

Date of Mailing: Faxed 7/18/08

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON
EMERGENT RELIEF
OAL DKT. NO. EDU 4848-08
AGENCY DKT. 181-6/08

B.F.-H. O/B/O MINOR CHILD A.C.,
Petitioner,
v.
BOARD OF EDUCATION OF
WOODBRIDGE TOWNSHIP,
MIDDLESEX COUNTY,
Respondent.

Luretha M. Stribling, Esq., appearing for the petitioner

Eric I. Bueide, Esq., appearing for the respondent (Wilentz, Goldman & Spitzer, attorneys)

Record Closed: July 1, 2008 Decided: July 2, 2008

BEFORE **DENNIS P. BLAKE**, ALJ:

STATEMENT OF THE CASE

Petitioner seeks emergent relief in the form of an order requiring respondent, Board of Education of Woodbridge Township, to allow her granddaughter, A.C., to

attend summer high school basketball practice conducted by respondent. Petitioner also seeks an order requiring respondent to provide her granddaughter with summer employment. Respondent argues that this matter is moot since petitioner has already entered into an agreement to withdraw A.C. from Colonia High School and not to seek re-enrollment until her home, which was located within the school district, is rebuilt, or until she and her granddaughter otherwise become domiciled within the district. Respondent argues that this agreement resolved all issues between the parties. Alternatively, respondent argues that petitioners request has not met the regulatory requirements for emergent relief.

PROCEDURAL HISTORY

Petitioner filed its request for emergent relief with the Department of Education, Bureau of Controversies and Disputes on June 26, 2008. On that same date the matter was transmitted to the Office of Administrative Law for an emergent hearing. The matter was scheduled for an emergent hearing on July 1, 2008. The matter was heard on that date and the record closed.

FINDINGS OF FACT

Petitioner is the legal guardian for her granddaughter A.C.. A.C. has attended Colonia High School within the Woodbridge school district for her freshmen and sophomore years. Until November, 2006, petitioner lived in a residence at _ _ _ Wood Avenue, Colonia New Jersey. In November, 2006, the residence was demolished. That address remains a vacant lot at the present time. However, the petitioner argues that she and her granddaughter are still domiciled at that location since she has every intention of returning after the new home is completed on that lot.

Petitioner states that since the demolition of the home she and her granddaughter have lived in three separate locations in Edison and Linden. Each of the three locations are owned by family members.

Petitioner signed an Agreement and Acknowledgement dated May 15, 2008. (R-1). Prior to signing this agreement she obtained legal advice from several sources including her current attorney. The agreement reads as follows:

> "I, Barbara Flowers-Howard, am the legal guardian of [A.C.]. I agree to withdraw [A.] from the Woodbridge Township public schools on or before June 30, 2008. I will not seek to re-enroll [A.] in the Woodbridge Township public schools until (a) My house at _ _ _ Wood Avenue is built and I am residing in the home with [A.] or (b) we otherwise become domiciled in Woodbridge Township. (Ibid.)

The parties are in agreement that the only relief sought from this emergent hearing is the participation by A.C. in the summer basketball practices at Colonia High School and the placement of A.C. in a summer job by respondent.

CONCLUSIONS OF LAW

With respect to petitioner's request for summer employment, she has failed to show any entitlement that A.C. would have to such employment and fails to site any statute, regulation, directive and or notice that would require respondent to provide such summer employment. Thus, I **CONCLUDE**, that respondent has no obligation to provide any such employment to A.C.

Concerning the request for inclusion in the summer basketball practices, both parties agree that A.C. would have to qualify as a student with respondent prior to participating with the basketball team. Likewise, both parties agree that to be eligible for participation in such a school activity, A.C. would have to be domiciled within Woodbridge Township. The Agreement and Acknowledgement signed by petitioner on May 15, 2008, has resolved this issue prior to this hearing. In that agreement petitioner agrees to withdraw A.C. from Woodbridge public schools on or before June 30, 2008. More significantly, she agrees that she will not seek to re-enroll A.C. unless one of two

things happens: "the completion of the house at _ _ _ Wood Avenue" or, "we otherwise become domiciled in Woodbridge Township." (R- 1)

The language of this agreement is clear and unequivocal and can only be read as an acknowledgement by petitioner that on May 15, 2008, neither she nor her granddaughter were domiciled in Woodbridge Township. This agreement resolved the issue of domicile. As a result, petitioner agreed to withdraw A.C. from the districts public schools. Thus the issues that would qualify or disqualify A.C. from participation with the district's sports teams have already been resolved. The doctrine of mootness applies to the issues involved in a controversy and as a general rule requires that legal opinions, not be given considering issues which are no longer in existence because of changes in facts and circumstances that surround the case. A particular cause of action may be mooted by intervening events, which include actual changes in the law, administrative actions and settlement between the parties. It is well settled law in New Jersey, that issues that have become moot prior to adjudication are no longer actionable. Coviello v. Board of Education of the Borough of Fairlawn, 94 N.J.A.R. 2d (EDU) 486. In this matter the issues of domicile have already been resolved by way of the Agreement and Acknowledgement (R-1). This Agreement renders a decision in this matter hypothetical and academic. Thus, I **CONCLUDE** that, based upon the agreement and acknowledgment of May 15, 2008, petitioner has acknowledged that neither she nor her granddaughter are domiciled within the district and that this request for inclusion in the basketball team practices must be dismissed as moot.

Although my conclusion above does not require consideration of petitioner's qualification for emergent relief as found at N.J.A.C. 1:1-12.6, it will be addressed, since this issue was briefed and argued before me. N.J.A.C. 1:1-12.6(a) states:

> "Where authorized by law and where irreparable harm will result without an expedited decision granting or prohibiting some action or relief connected with a contested case, emergency relief pending a final decision on the whole

contested case may be ordered upon the application of a party."

In this matter, since I have previously concluded that A.C. has no entitlement to summer employment provided by the respondent, the only requested relief remaining is the inclusion of A.C. in Colonia's basketball practice. By the terms set forth in the agreement and acknowledgement of May 15, 2008 petitioner withdraw A.C. from Colonia. This agreement was signed before the end of the 2007/2008 school year. Thus, petitioner had adequate time to enroll A.C. in the high school where she was domiciled and make inquires as to the summer basketball schedule for that high school. That avenue is still available to petitioner and A.C.. Additionally, I can not conclude that by missing summer basketball practice at Colonia, the frequency of which has not been established, will have any significant affect on A.C.'s basketball career. The proliferation of youth summer basketball leagues and Amateur Athletic Union sponsored teams make it obvious that there are various alternative avenues available to A.C. to hone her skills. Thus, I **CONCLUDE**, that petitioner has not proven that irreparable harm will result if I do not grant the requested emergent relief.

ORDER

Based on the foregoing I hereby **ORDER** that petitioners request for emergent relief, the inclusion of A.C. in the Colonia summer basketball practice and the request for summer employment, is hereby **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

7-2-08
DATE

DENNIS P. BLAKE, ALJ

WITNESSES

For petitioner

B.F., grandmother of A.C.

For respondent

None

EXHIBITS

For petitioner

None

For respondent

R-1 Agreement and Acknowledgement, May 15, 2008

R-2 Correspondence dated May 8 and 9 between Ms. Stribling and Ms. Murphy

R-1
IW trip
7-1-08

AGREEMENT AND ACKNOWLEDGEMENT

I, Barbara Flowers-Howard, am the legal guardian of Altoinette Carothers. I agree to withdraw Altoinette from the Woodbridge Township Public Schools on or before June 30, 2008. I will not seek to re-enroll Altoinette in the Woodbridge Township Public Schools until (a) my house at 806 Wood Avenue in Colonia is built and I am residing in the home with Altoinette or (b) we otherwise become domiciled in Woodbridge Township.

Barbara Flowers-Howard
BARBARA FLOWERS-HOWARD

5/15/08
DATE

#3040092

R-2
(W&D)
1.1.08

To: Elizabeth Murphy, Esq.

From: Lurethia M. Stubling, Esq.

Re: Agreement Re: Alternate Contractors

Date: May 9, 2008

I have removed the Agreement with Ms. Flowers-Howard. We Request that the last sentence which is on the second page be removed from the Agreement. The Agreement After Revision will be Endorsed by Ms. Flowers-Howard today.

LM Stubling

WILENTZ
GOLDMAN
&SPITZER P.A.

ATTORNEYS AT LAW

90 Woodbridge Center Drive
Suite 900 Box 10
Woodbridge, NJ 07095-0958
(732) 636-8000
Fax (732) 855-6117

Meridian Center I
Two Industrial Way West
Eatontown, NJ 07724-2265
(732) 542-4500
Fax (732) 493-8387

110 William Street
26th Floor
New York, NY 10038-3901
(212) 267-3091
Fax (212) 267-3828

Two Penn Center Plaza
Suite 910
Philadelphia, PA 19102
(215) 940-4000
Fax (215) 636-3999

Park Building
355 Fifth Avenue
Suite 400
Pittsburgh, PA 15222
(412) 232-0808
Fax (412) 232-0773

website: www.wilentz.com

Please reply to:
Woodbridge
Direct Dial: (732) 855-6071
Direct Fax: (732) 726-6586

May 8, 2008

By Facsimile to 732-388-0596 and Regular Mail

Luretha M. Stribling, Esq.
133 Westfield Avenue
Suite 3
Clark, NJ 07066

Re: Altoinette Carothers / Colonia High School

Dear Ms. Stribling:

Thank you for sending me a copy of the Consent Order granting Barbara Flowers-Howard custody of Altoinette Carothers, a student enrolled at Colonia High School.

This letter will confirm the substance of our telephone conversation concerning Altoinette, Barbara Flowers-Howard, Altoinette's guardian, has agreed to disenroll Altoinette from the Woodbridge Township Public Schools on or before June 30, 2008. Ms. Flowers-Howard will not seek to re-enroll Altoinette in the Woodbridge Township Public Schools until the house at 806 Wood Avenue in Colonia is built and she is residing in the home with Altoinette or until she

WILENTZ
GOLDMAN
&SPITZER P.A.
ATTORNEYS AT LAW

otherwise becomes domiciled in Woodbridge Township. ~~Ms. Flowers-Howard acknowledges that she and Altoinette have resided in Linden, NJ, for over a year.~~

Please have Ms. Flowers-Howard sign the Agreement and Acknowledgment below and return it to me.

Thank you.

Very truly yours,

Elizabeth F Murphy
ELIZABETH FARLEY MURPHY

cc: Vincent S. Smith, Superintendent of Schools
Viola S. Lordi, Esq.

AGREEMENT AND ACKNOWLEDGEMENT

I have read this letter and agree to its accuracy. I agree to disenroll Altoinette Carothers from the Woodbridge Township Public Schools on or before June 30, 2008.

BARBARA FLOWERS-HOWARD DATE

313-08

OAL DKT. NO. EDU 9917-05
COMMISSIONER DECISION NO. 401-07
STATE BOARD DECISION NO. 30-07
COMMISSIONER DKT. ON APPEAL NO. 8-7/08A

LEON VARJIAN,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE BOROUGH OF MIDLAND PARK, BERGEN COUNTY,

RESPONDENT-RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

Petitioner's motion for clarification of the State Board of Education's (State Board) May 21, 2008 decision in the above referenced case has been reviewed by the Commissioner of Education (Commissioner) who, as a result of *P.L.* 2008, c.36, has authority to review proceedings that were pending when that legislation eliminated the appellate function of the State Board. Respondent's reply to petitioner's motion was untimely and consequently not considered.

The decision of the State Board informed the parties that it affirmed the Commissioner's decision, dated October 15, 2007, "for the reasons stated therein." Consequently, the facts upon which the State Board relied – and the legal principles which it applied – are set forth in the Commissioner's decision.

Accordingly, petitioner's motion for clarification is dismissed.

IT IS SO ORDERED.*

Lucille Edag

COMMISSIONER OF EDUCATION

Date of Decision: 7/22/08

Date of Mailing: 7/22/08

* This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36.

315-0

#315-08

K.L. and K.L. on behalf of minor children, M.L. and C.L. (Consolidated)	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF KINNELON, MORRIS COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioners purchased a single family home in Kinnelon in May 2007 and – in July 2007 – executed an "Affidavit" document that was prepared by the school district attesting to their anticipated move into the home by October or November 2007, upon completion of extensive renovations. The document further provided that petitioners' children could attend Kinnelon schools for five weeks tuition free, but if petitioners were not residents of the borough before the five weeks elapsed, they would be responsible for tuition until such time as they became residents. The respondent Board issued a notice in October informing petitioners that their five week grace period was about to expire, and that they would be charged tuition from October 15, 2007 forward, until a Certificate of Occupancy was obtained for their Kinnelon house. The petitioners filed the instant appeals and the Board subsequently filed a motion to dismiss; respondent alleged that petitioners are not residents of Kinnelon, and that the matter arose from a contract dispute, which is outside of the Commissioner's jurisdiction.

The ALJ found that the Commissioner has jurisdiction over this matter as arising under the school laws. She further determined that the matter is ripe for summary decision, and accordingly converted the motion to dismiss to a motion for summary decision. Finding that petitioners are not domiciled in Kinnelon, and that their children are therefore not entitled to a free public education in the district's schools, the ALJ granted summary decision to respondent and dismissed the petitioners' appeals.

Upon a full and independent review, the Commissioner adopted the Initial Decision as the final decision in this matter, addressed the petitioners' exceptions, and dismissed the petitions.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

July 22, 2008

OAL DKT. NOS. EDU 1191-08 & 1192-08
AGENCY DKT. NOS. 315-10/07 & 316-10/07

K.L. and K.L. on behalf of minor children, M.L. and C.L. (Consolidated)	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF KINNELON, MORRIS COUNTY,	:	
RESPONDENT.	:	

The record in this matter, the Initial Decision of the Office of Administrative Law (OAL), and the parties' exceptions have been reviewed. The Commissioner adopts the Initial Decision as the final decision in this case, for the reasons set forth therein.

For purposes of addressing petitioners' exceptions, the Commissioner offers the following abbreviated summary of the undisputed material facts, including those set forth in the verified petition and contained in the documents submitted and verified by both parties:

1. The petitioners bought a house in Kinnelon (4 S.) in May 2007, with the intent that it would be their domicile, but at the time of the OAL proceedings had never lived in it.

2. On July 3, 2007, petitioners lived in Butler, New Jersey, but sought to enroll their children – M.L. and C.L. – in the Kinnelon school district. Pursuant to the Kinnelon school district's Policy # 5111, petitioners signed an affidavit which stated that they planned to move into 4 S. in October or November 2007, and that they assumed liability for tuition assessed after five weeks of school if the children were not yet residents of Kinnelon.
   The affidavit further stated that petitioners submitted it to induce the respondent Kinnelon school district to accept enrollment of their children. The affidavit did not, as petitioners suggest on page 7 of their exceptions, include an agreement by respondent to provide M.L. and C.L. a free education for the 2007-2008 year. Rather, the language of the affidavit states that the children

were being enrolled pursuant to district Policy #5111, which requires tuition after a five week grace period for families awaiting the completion of construction on their homes.[1]

3. On October 8, 2007, respondent's business administrator sent petitioners a notice advising them that the five week grace period was about to expire and that they would be charged $998 for tuition beginning on October 15, 2007 and continuing until a Certificate of Occupancy was obtained for the house on 4 S.

4. Rather than instituting a challenge to the respondent board of education, petitioners filed appeals to the Commissioner on October 24, 2007. Paragraph 3 of the section of their petitions which demanded relief requested:

> an Order finding that M.L. [and C.L. had] been and continue[] to be domiciled in Respondent's school district, and thereby [have] been and continue[] to be eligible to receive [] public education[s] free of charge and that the Petitioners are not responsible for paying any monies for the cost of [their] education in the Respondent's school district retroactively or prospectively . . .

5. Petitioners articulated their reason for appealing to the Commissioner on page 14 of their brief in opposition to respondent's motion to dismiss the matter on jurisdictional grounds:

> By virtue of the letter dated October 8, 2007 from Respondent's school district to Petitioners, Respondent's school district is already denying these children their right to be educated in that district free of charge in violation of *N.J.S.A.* 18A:38-1 . . . . Clearly, Respondent's school district has made a determination that Petitioner's children are not domiciled in that district and, as such, are not entitled to an education free of charge, and all Petitioners want is their

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[1] The following is the relevant section of Policy #511:

> A nonresident child otherwise eligible for attendance whose parent(s) or legal guardian(s) anticipates district residency and has entered a contract [sic] to buy, build, or rent a residence in this district may be enrolled without payment of tuition for a period of time not greater than 5 weeks prior to the anticipated date of residency. If any such pupil does not become a resident of the district within 5 weeks after admission to school, the situation will be reviewed and the need to assess tuition will be determined. (Emphasis added.)

proverbial "day in court" to oppose that determination.

6. Petitioners did not receive approval from Kinnelon for their renovations to 4 S. until January 8, 2008.

7. At the time of the Initial Decision – April 24, 2008 - petitioners still did not occupy 4 S.

Multiple arguments are advanced in petitioners' exceptions. First, petitioners object that by determining that their children were not domiciled in Kinnelon, the ALJ granted relief not sought by respondent in its motion to dismiss. This objection cannot be dispositive of the instant controversy. As mentioned above, in their petition, K.L. and K.L. asked the Commissioner for a finding that M.L. and C.L. were domiciled in Kinnelon during the 2007-2008 school year. Thus, the Administrative Law Judge (ALJ) validly exercised her discretion to find that the material facts of the case did not support such domicile. In short, petitioners are estopped from complaining that the ALJ issued a determination when petitioners themselves requested the determination. Nor does the Commissioner see any reason to allow administrative resources to be wasted by sending this matter back to the district – simply because respondent requested it in its motion to dismiss.

Additionally, the ALJ did not abuse her discretion to dispose of this matter summarily. As will be discussed, there were sufficient undisputed, material facts before the ALJ to support her determination about domicile. It was thus proper in her Initial Decision to recommend summary disposition in the interests of administrative economy. While there may be no specific rule in the New Jersey Administrative Code addressing the conversion of motions-to-dismiss into motions for summary disposition, it is allowed in the New Jersey Rules of Court, *see, R.* 4:6-2. And *N.J.A.C.* 1:1-1.3(a) allows ALJs to follow court rules where no specific administrative rule addresses a particular issue.

Petitioners are also estopped from protesting the lack of a hearing before the respondent board. It was petitioners who chose to forego local appeals and bring the matter to the Commissioner. Moreover, the Commissioner agrees with the ALJ that the petitioners were adequately noticed of their responsibilities regarding tuition, both by the affidavit they signed on July 3, 2007 – which included a copy of respondent's relevant policy – and by the letter sent to them on October 8, 2007. [2] The ALJ's finding that petitioners' children are not domiciled in Kinnelon does not preclude further local action concerning the parameters of petitioners' liability for tuition.

As to the merits of the claim that they are domiciled in Kinnelon, the petitioners reiterate the facts that were before the ALJ and have added a few more: 1) their driver licenses showing the 4 S. address; 2) their voter registrations showing the Kinnelon address; 3) an invoice for their property taxes in Kinnelon; and 4) an advertisement for the sale of their Butler house. Even if the Commissioner were to incorporate these facts – not offered below – into her analysis of the controversy, it would not change the result. The foregoing are indicia of petitioners' intention to eventually live in Kinnelon, an intention which is conceded. As the ALJ determined, however, intention alone does not constitute domicile.

The elements of "domicile" were thoroughly discussed in the Initial Decision. As the ALJ noted, it is petitioners' burden to prove by a preponderance of the evidence that their children are domiciled in Kinnelon. Of the multiple factors that show domicile, a crucial one is abode. A person's domicile "is the place where a person dwells and which is the center of his domestic, social and civil life." *In re Unanue*, 255 *N.J. Super.* 362, 374 (Law Div. 1991), *aff'd,* 311 *N.J. Super.* 589 (App. Div.), *certif. denied*, 157 *N.J.* 541 (1998), *cert. denied*, 526 *U.S.* 1051,

[2] Petitioners were not told in the letter that they must remove their children from respondent's district, but rather were advised that they would be responsible for tuition. This was in accord with the July 3, 2007 affidavit and district policy #5111.

(1999) (citations omitted). Acquiring another residence does not result in a person having multiple domiciles. *Id.* at 375.

The ALJ correctly explained:

> Although the person's intent with respect to domicile is very important, there needs to be objective indicia that a particular residence is that person's domicile. *Id.* at 376. In order for a residence to qualify as a new domicile there must be 1) an actual and physical taking up of an abode; 2) the subject's intention to make his home there permanently or least indefinitely; and (3) the subject's intention to abandon his old domicile. "The court must evaluate all of the facts of the case to determine the place in which there is the necessary concurrence of physical presence and an intention to make that place one's home." *Ibid.* Also important where a person has more than one residence are the following factors: "the physical characteristics of each [place], the time spent and the things done in each place, the other persons found there, the person's mental attitude towards each place, and whether there is or is not an intention, when absent, to return." *Mercadante v. City of Paterson*, 111 *N.J. Super.* 35, 39-40 (Ch. Div. 1970), *aff'd*, 58 *N.J.* 112 (1971). Although petitioners may intend to make the residence in Kinnelon their permanent domicile, there has been no "actual and physical taking up of an abode." *Unanue, supra,* 255 *N.J. Super.* at 376. Petitioners have not eaten in, slept in, entertained in, or otherwise treated the Kinnelon residence as their domicile. Likewise, petitioners have not surrendered their current domicile outside of Kinnelon. Without demonstrating such objective indicia of domicile, petitioners cannot be said to reside in Kinnelon for the purposes of the children receiving a free public education. (Initial Decision at 8-9)

Petitioners' reliance on the Initial Decision in *A.P., Sr., on behalf of minor child D.K. v. Board of Education of the Bordentown Regional School District, Burlington County,* OAL Initial Decision December 5, 2006, Commissioner Decision January 18, 2007, is misplaced. In that case, the petitioner had purchased and lived in his house in the Bordentown school district before the time period at issue, and had moved out to stay with his mother due to extensive damage that was done to his house while he was on National Guard duty for a few weeks. There was some evidence that he and D.K. – his nephew and legal ward – moved back

into the dwelling about three months after the 2005-2006 school year began – while construction was ongoing – and there was unrebutted evidence supporting both his intent that the house be his permanent home and the expectation that the ongoing repairs to his home would be completed in the course of the 2005-2006 school year.

Thus, *A.P., Sr.,* is distinguishable from the present case by the fact that the petitioner had actually lived in his home before his domicile was challenged, and appeared to have moved back into the house to reside there – as his schedule would allow – within four months after the beginning of the 2005-2006 school year.[3] By way of contrast, petitioners in this case had never lived in Kinnelon before the 2007-2008 school year and do not appear to have lived in Kinnelon at any time during that school year. They lived in Butler and could have sent their children to the Butler public schools without payment of tuition. In short, the Commissioner finds petitioners' arguments concerning domicile to be unpersuasive.

In summary, the Commissioner concurs with the ALJ's decision to summarily decide the present controversy, and with her determination concerning domicile. The petition is hereby dismissed.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 7/22/08

Date of Mailing: 7/23/08

[3] The other case upon which petitioners rely, *Borden v. Lafferty,* 233 *N.J. Super.* 634 (Law Div. 1989), is also inapposite. In that case a judge decided that a Board of Commissioners candidate's domicile had been in Bordentown for a year, even though for the first three months of the year the candidate owned – but did not regularly inhabit – her home in Bordentown. That case was not governed by the school law statutes or the local policies which control this matter.

[4] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
CONSOLIDATED

K.L. AND K.L. ON BEHALF OF MINOR CHILD M.L.,
Petitioners,
v.
BOARD OF EDUCATION OF THE BOROUGH OF KINNELON, MORRIS COUNTY,
Respondent.

OAL DKT. NO. EDU 1191-08
AGENCY DKT. NO. 316-10/07

K.L. AND K.L. ON BEHALF OF MINOR CHILD C.L.,
Petitioners,
v.
BOARD OF EDUCATION OF THE BOROUGH OF KINNELON, MORRIS COUNTY,
Respondent.

OAL DKT. NO. EDU 1192-08
AGENCY DKT. NO. 315-10/07

George M. Holland, Esq., for petitioners K.L. and K.L. (Lentz & Gengaro, attorneys)

Linda Ganz Ott, Esq., for respondent Board of Education of the Borough of Kinnelon, Morris County (Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: March 13, 2008 Decided: April 24, 2008

BEFORE **LESLIE Z. CELENTANO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners K.L. and K.L. filed two Petitions for Due Process on October 23, 2007, challenging a residency determination by respondent Board of Education of the Borough of Kinnelon, Morris County, with regard to their minor children, M.L. and C.L. On November 9, 2007, respondent filed a motion to dismiss the petitions in lieu of an answer.

On January 11, 2008, the matters were transmitted to the Office of Administrative Law (OAL) for determination as contested cases. The matters were set down for hearing on July 18, 2008; however, the parties requested that the motion to dismiss be addressed prior to the date of hearing.

FACTUAL DISCUSSION

The facts in this matter are largely undisputed. Petitioners purchased a single-family home in May 2007 in Kinnelon, New Jersey. However, petitioners never moved into this home because it required extensive renovations. At all times during this controversy, petitioners have resided in their original home, which is located outside of the Kinnelon school district. On July 3, 2007, petitioners executed a document entitled "Affidavit" that was prepared by respondent school district. This affidavit, which was sworn to and notarized, attested to petitioners' anticipated move into the Kinnelon house by October or November 2007. The affidavit further provided that petitioners' children could attend Kinnelon schools for five weeks tuition free, but if petitioners were not residents of Kinnelon before the five weeks had elapsed, they would be responsible for tuition until such time as they became residents. Petitioners claim that they were required to sign the affidavit before they were permitted to enroll their children in the

Kinnelon schools. Petitioners' children commenced attending school in Kinnelon in September 2007.

By letter dated October 8, 2007, respondent requested an update on the status of petitioners' renovations. The letter reminded petitioners of the signed affidavit and notified them that beginning on October 15, 2007, they would be charged $998 per month per child until a certificate of occupancy for their Kinnelon home was issued. In response to this letter, petitioners filed two separate Petitions for Due Process on October 23, 2007. Respondent has not sought to remove petitioners' children from the school district and has not as of yet assessed any tuition against petitioners. Respondent alleges that petitioners are not residents of Kinnelon and thus the children are not entitled to a free education; that the instant matter arises from a contract dispute and is therefore outside the Commissioner of Education's jurisdiction; and that the matter is not ripe for adjudication. Respondent has moved to dismiss the petitions.

DISCUSSION AND CONCLUSIONS

I. Jurisdiction

The Commissioner of Education, and through the Commissioner the Office of Administrative Law, has jurisdiction over "all controversies and disputes arising under the school laws." N.J.S.A. 18A:6-9. Included within this jurisdiction is the ability to hear and decide cases arising out of "[d]enials of entitlement to attend school pursuant to N.J.S.A. 18A:38-1." N.J.A.C. 6A:3-1.1(b)(4).[1] Respondent argues that the Commissioner lacks jurisdiction over this matter since the Commissioner does not have jurisdiction over contract disputes. While respondent is correct in its assertion that the Commissioner does not have jurisdiction over contract disputes, this restriction is limited to when the dispute is one that does not arise out of the school laws and is typically only applied to teacher contract disputes. See S. Orange-Maplewood Educ. Ass'n v. Bd. of Educ. of the Sch. Dist. of S. Orange and Maplewood, 146 N.J. Super. 457 (App. Div. 1977). In fact, the existence of a contract does not by itself defeat the

Commissioner's jurisdiction. "The Commissioner has jurisdiction over certain disputes in the absence of an agreement or if the subject matter is not susceptible to binding agreement because it concerns major educational policy or because the issues are controlled by the school laws." Id. at 462. The determination that a valid contract exists between the parties would not defeat jurisdiction in this matter. Petitioners' claim is that they are residents of Kinnelon and that respondent has denied the children a free education as required by N.J.S.A. 18A:38-1(a). Petitioners also contend that respondent has failed to follow notice requirements mandated by N.J.A.C. 6A:22-4.2(b). Regardless of any alleged contract between the parties, the Commissioner has clear jurisdiction over claims of violations of the school laws.

Although there is no explicit authority for a public school district to contract with parents to enroll their children within the district, neither is there explicit authority that denies them this authority. Local boards do possess this authority since they are given a great deal of discretion in determining whether to enroll out-of-district students. "Any person not resident in a school district, if eligible except for residence, may be admitted to the schools of the district with the consent of the board of education upon such terms, and with or without payment of tuition, as the board may prescribe." N.J.S.A. 18A:38-3(a). The regulations concerning student residency provide: "Nothing in this chapter shall be construed to limit the discretion of a district board of education to admit nonresident students, or the ability of a nonresident student to attend school, with or without payment of tuition, with the consent of the district board of education." N.J.A.C. 6A:22-2.2.

Moreover, it is not clear that a binding contract exists here. Respondent argues that the document in question contains all of the elements of a binding contract and that the consideration given by the school district was the five-week grace period. The five-week grace period referenced in the document and provided to petitioners is the standing general policy of the Kinnelon School Board, known as Policy #5111. The relevant portion of the policy provides that

[1] "Public schools shall be free to the following persons over five and under 20 years of age: (a) Any person who is domiciled within the school district." N.J.S.A. 18A:38-1.

> [a] nonresident child otherwise eligible for attendance whose parent(s) or legal guardian(s) anticipates district residency and has entered a contract to buy, build, or rent a residence in this district may be enrolled without payment of tuition for a period of time not greater than 5 weeks prior to the anticipated date of residency. If any such pupil does not become a resident of the district within 5 weeks after admission to school, the situation will be reviewed and the need to assess tuition will be determined.
>
> [Exhibit A, Certif. of Linda Ganz Ott, November 8, 2007.]

Similar policies have been upheld as within the discretion of school boards. See M.M. and V.M. ex rel R.M. v. Bd. of Educ. of Hillsborough, EDU 6744-98, Initial Decision (Oct. 19, 1998), adopted, Comm'r (Oct. 29, 1998) <http://lawlibrary rutgers.edu/oal/search.html>. Respondent attempts to argue that Policy #5111 gives the Board the discretion to grant or withhold the five-week exemption, and that by granting it for petitioners there was consideration for the "contract." Respondent misreads the policy. The only discretion found in the policy belongs to the parents, whose children "may be enrolled without payment of tuition for a period of time not greater than 5 weeks." The document signed by petitioners only contains what amounts to a statement that they are aware of the board policy. The document itself is entitled "Affidavit," which is a "voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths." Black's Law Dictionary 58 (7th ed. 1999) (emphasis added). It should also be noted that the policy does not mandate the payment of tuition after five weeks, but states that "the situation will be reviewed."

II. Ripeness and Notice

Although the Commissioner has jurisdiction to hear all controversies arising under the school laws, "[i]mplicit in this jurisdiction is the notion that a controversy or dispute must be viable or ripe before it may be heard by the Commissioner," and "[a] mere assertation of future harm renders the claim premature." S.G. ex rel R.G. v. Fair Lawn Bd. of Educ., EDU 7469-99, Initial Decision (August 8, 2000) <http://lawlibrary.rutgers.edu/oal/search.html> (citations omitted). The criteria for

determining the ripeness of a controversy for judicial determination are "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Abbott Labs. v. Gardner, 387 U.S. 136, 149, 87 S. Ct. 1507, 1515, 18 L. Ed. 2d 681, 691 (1967). In assessing fitness, the court must determine if a legal question suitable for judicial resolution has crystallized and whether the ruling or action complained of is final. Ibid. For example, in Brodie v. Saddle Brook Township Board of Education, 93 N.J.A.R.2d (EDU) 694, 700, a challenge to the Saddle Brook Township board of education's decision to close a school was dismissed as not ripe since the Department of Education had not yet given final approval.

Normally petitioners' claim that respondent has denied their children a free education would be considered not ripe since respondent has not yet assessed tuition nor sought to remove the children from school. The October 8 letter may have indicated respondent's intention to charge for tuition, but an indication of intent does not equal a denial of a free education, as petitioners face no harm from respondent's intent alone. However, petitioners have the right to challenge any determination of the local school board that their children are ineligible to attend school in the district free of charge. N.J.A.C. 6A:22-5.1.[2] Essentially, petitioners argue that respondent has determined that their children are ineligible to attend Kinnelon schools and they contest that determination. Specifically, petitioners claim that respondent's letter failed to notify them "of what documentation was needed to establish proof of the children's domicile, as a condition of provisional eligibility for them to receive a public education free of charge," in violation of N.J.A.C. 6A:22-4.2. (Petitioners' Br., December 7, 2007, at 5). Respondent claims that no notice was required, as petitioners agreed that they were not residents of the district. Respondent further claims that the only notice that would be required would be pursuant to N.J.A.C. 6A:22-4.3, if and when respondent sought to remove petitioners' children from the district.

[2] Generally, in addition to the various notice requirements imposed on the school district, parents or guardians who seek to appeal a determination of ineligibility are subject to filing deadlines. N.J.S.A. 18A:38-1. However, any argument that could be made about petitioners not filing within the deadline for failing to challenge the initial determination that they were ineligible (as sworn to by petitioners in the affidavit) is moot since petitioners are not residents of Kinnelon. See Discussion Part III, infra.

Where an applicant for enrollment is found to be ineligible to attend a public school, the local school board is required to send written notification to the parents, setting forth the reasons for the determination of ineligibility, their right to appeal, and other information. N.J.A.C. 6A:22-4.2(a). This section also applies when the application is later found to be deficient because an applicant has provided incomplete, unclear or questionable information. Ibid.; N.J.A.C. 6A:22-4.1(c)(1). The district must notify students who are enrolled on a provisional basis what documentation is needed before their final eligibility status can be assessed. N.J.A.C. 6A:22-4.2(b)(2). When a student who is "enrolled and attending school in the district based on an initial determination of eligibility is later determined to be ineligible for continued attendance, the chief school administrator may apply to the district board of education for removal of the student." N.J.A.C. 6A:22-4.3(b). Before removal can be sought under this section, a notice of ineligibility pursuant to N.J.A.C. 6A:22-4.2 must be sent. N.J.A.C. 6A:22-4.3(b)(1).

It should be noted that although these notice requirements are mandated and must be followed by the local school district, there does not appear to be any penalty provision for violations of these requirements. Regardless, respondent has given petitioners sufficient notice as required by the regulations. Petitioners' children were "provisionally" enrolled tuition free for five weeks. In the October 8 letter, respondent informed petitioners that a certificate of occupancy would be necessary in order to retain enrollment tuition free, satisfying N.J.A.C. 6A:22-4.2(b)(2). Respondent also correctly notes that before removal of petitioners' children could be sought, official notice would have to be given pursuant to N.J.A.C. 6A:22-4.3(b)(1). Accordingly, petitioners' allegation that respondent violated the notice requirements of N.J.A.C. 6A:22-4.2 is without merit.

III. Residency

Attendance at public schools shall be free to any person who meets the requirements set forth in N.J.S.A. 18A:38-1. A child who is domiciled within the school district and satisfies other requirements may attend the public schools free of charge.

N.J.S.A. 18A:38-1(a). If the board of education denies admission to the child, the resident may contest that determination before the Commissioner of Education. In the proceeding before the Commissioner of Education, the parent has the burden of proof by a preponderance of the evidence to establish that the child meets the requirements for eligibility. If the evidence does not support the claim, the parent shall be assessed tuition for the student prorated to the time of the student's ineligible attendance within the district. N.J.S.A. 18A:38-1(b)(2).

A person may have many residences but only one domicile. Somerville Bd. of Educ. v. Manville Bd. of Educ., 332 N.J. Super. 6, 12 (App. Div. 2000), aff'd, 167 N.J. 55 (2001). A child's domicile is normally that of his or her parents. Ibid. The domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. In re Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991), aff'd, 311 N.J. Super. 589 (App. Div.), certif. denied, 157 N.J. 541 (1998), cert. denied, 526 U.S. 1051, 119 S. Ct. 1357, 143 L. Ed. 2d 518 (1999). Specifically, a person's domicile "is the place where a person dwells and which is the center of his domestic, social and civil life." Ibid. (citations omitted). Acquiring another residence does not result in a person having multiple domiciles. Id. at 375.

Although the person's intent with respect to domicile is very important, there needs to be objective indicia that a particular residence is that person's domicile. Id. at 376. In order for a residence to qualify as a new domicile there must be 1) an actual and physical taking up of an abode; 2) the subject's intention to make his home there permanently or least indefinitely; and (3) the subject's intention to abandon his old domicile. "The court must evaluate all of the facts of the case to determine the place in which there is the necessary concurrence of physical presence and an intention to make that place one's home." Ibid. Also important where a person has more than one residence are the following factors: "the physical characteristics of each [place], the time spent and the things done in each place, the other persons found there, the person's mental attitude towards each place, and whether there is or is not an intention when absent, to return." Mercadante v. City of Paterson, 111 N.J. Super. 35, 39-40

(Ch. Div. 1970), aff'd, 58 N.J. 112 (1971). Although petitioners may intend to make the residence in Kinnelon their permanent domicile, there has been no "actual and physical taking up of an abode." Unanue, supra, 255 N.J. Super. at 376. Petitioners have not eaten in, slept in, entertained in, or otherwise treated the Kinnelon residence as their domicile. Likewise, petitioners have not surrendered their current domicile outside of Kinnelon. Without demonstrating such objective indicia of domicile, petitioners cannot be said to reside in Kinnelon for the purposes of the children receiving a free public education. See K.L. and C.L. ex rel N.L. v. Bd. of Educ. of Freehold, EDU 441-01, Initial Decision (June 26, 2001), adopted, Comm'r (August, 13, 2001) <http://lawlibrary.rutgers.edu/oal/search.html> (new-home construction site not a domicile).

IV. Conversion to a Motion for Summary Decision

An issue arose as to whether an administrative law judge (ALJ) may convert a motion to dismiss to a motion for summary decision. Ordinarily, parties must move for summary decision. N.J.A.C. 1:1-12.5 provides:

> (a) At any time after a case is determined to be contested, a party may move for summary decision upon all or any of the substantive issues therein.
>
> (b) The motion for summary decision shall be served with briefs and with or without supporting affidavits. The decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding.

Thus, based on the summary decision rules in the Uniform Administrative Procedure Rules, it appears that only parties may move for summary decision.

However, the Uniform Administrative Procedure Rules provide the ALJ with broad discretion to employ a variety of procedural mechanisms to assist in the efficient disposition of cases. For example, if required in individual cases, the judge at any time of the proceeding may convert any form of proceeding into another, whether more or less formal or whether in-person or by telephone. N.J.A.C. 1:1-14.6(d). The ALJ may also render any ruling or order necessary to decide any matter presented to him or her which is within the jurisdiction of the transmitting agency or the agency conducting the hearing. N.J.A.C. 1:1-14.6(h). Finally, the Uniform Administrative Procedure Rules also provide a "catch-all" provision:

> The judge may take such other actions as are necessary for the proper, expeditious and fair conduct of the hearing or other proceeding, development of the record and rendering of a decision.
>
> [N.J.A.C. 1:1-14.6(p).]

ALJs have utilized these rules in a variety of ways to speed along the resolution of cases. For instance, an ALJ may ask questions of a witness at a hearing sua sponte, that is, of his or her own volition. Medeiros v. Sch. Dist. of Jersey City, 97 N.J.A.R.2d (EDU) 276, 277. Periodically, an ALJ may act sua sponte to consolidate docket numbers, H.M. v. South Brunswick Board of Education, EDS 8972-98, Final Decision (February 16, 1999) <http://lawlibrary.rutgers.edu/oal/search.html>, and Brennan v. Township of Teaneck, CSV 1687-97, Initial Decision (January 20, 1999), adopted, Comm'r (March 23, 1999) <http://lawlibrary.rutgers.edu/oal/search.html>; to add parties, Sooy v. Mainland Regional High School District, 97 N.J.A.R.2d (EDU) 295, 296; or to convert one type of hearing into another type of hearing, D.D. ex rel J.V.R. v. Brick Township Board of Education, EDS 0158-03, Final Decision (February 10, 2003) <http://lawlibrary.rutgers.edu/oal/search.html> (where an ALJ converted an emergent relief hearing into a final decision).

Important to this matter are procedural actions taken by ALJs sua sponte that convert the pleadings. In fact, ALJs have raised motions for summary decision from other types of pleadings. In Kingston Convalescent Center v. Mid-State Health

Advisory Corp., 94 N.J.A.R.2d (HLT) 1, 9, the ALJ, citing N.J.A.C. 1:1-14.6(h), deemed the respondents' responsive papers to be a cross-motion for summary decision where the petitioners moved for summary decision and the ALJ denied the motion and found no genuine issues to be in dispute. In Fuller v. DEP, 97 N.J.A.R.2d (CSV) 688, the appellant sought to vacate a settlement agreement whereby he would resign from his State position. The ALJ converted the appointing authority's motion to enforce the settlement agreement into a motion for summary decision sua sponte and granted the motion. In Bureau of Housing Inspection, Department of Community Affairs v. Taylor, 92 N.J.A.R.2d (CAF) 63, 64, where the respondent moved to dismiss the action, and the ALJ ruled that neither the petitioner nor the respondent raised any genuine issues of material fact, the ALJ moved sua sponte for a motion for summary decision in favor of the petitioner.

Likewise, in Nissman v. Board of Education of Long Beach Island, 92 N.J.A.R.2d (EDU) 71, 72, the respondent board moved to dismiss the petitioner's claim that she had achieved tenure and had been wrongfully terminated. Since the ALJ determined that whether tenure was achieved was the sole issue to be determined, and the petitioner did not cross-move to dismiss, the board's motion to dismiss was converted into a motion for summary decision sua sponte. The board appealed the decision on the procedural basis that the sua sponte motion for summary decision was improper, and on the substantive issue that the ninety-day rule applied. The Commissioner adopted the ALJ's ruling, and ordered reinstatement. In doing so, the Commissioner noted the board's exception to the procedural issue of the sua sponte motion and dismissed the claim without merit. The Commissioner stated that the summary decision was appropriate because all facts necessary were uncontested and further briefing would be unnecessary and irrelevant.[3]

Here, respondent has moved for dismissal. I **FIND** this matter ripe for summary decision, and accordingly, convert the motion to dismiss to a motion for summary

[3] The State Board of Education reversed, finding that the ninety-day rule applied. 92 N.J.A.R.2d (EDU) 621, aff'd, 272 N.J. Super. 373 (App. Div.), cert. denied, 137 N.J. 315 (1994). However, the Final Decision stated that the propriety of the sua sponte motion need not be addressed since tenure could be denied on other grounds, specifically, the ninety-day rule. 92 N.J.A.R.2d (EDU) at 622, n. 1. The Appellate Division did not address the procedural issue in affirming the State Board's reversal

decision, sua sponte, N.J.A.C. 1:1-14.6(h), in accordance with the objective of the Uniform Administrative Procedure Rules to ensure the expeditious development of the record and rendering of a decision.

Summary decision may be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). The OAL summary decision rule is essentially the same as the summary judgment rule under the New Jersey Court Rules, which states:

> The judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.
>
> [R. 4:46-2(c).]

The New Jersey Supreme Court has modified and clarified the analysis required when considering a motion for summary decision/judgment. In Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995), the Court adopted the summary judgment standard utilized by federal courts:

> Under this new standard, a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." [Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986).] . . . If there exists

> a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of Rule 4:46-2. Liberty Lobby, supra, 477 U.S. at 250, 106 S. Ct. at 2511, 91 L. Ed. 2d at 213. The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law," Liberty Lobby, supra, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214, the trial court should not hesitate to grant summary judgment.

The burden is on the moving party to exclude all reasonable doubt as to the existence of any genuine issue of material fact, and all inferences of doubt are drawn against the moving party and in favor of the non-moving party. Saldana v. DiMedio, 275 N.J. Super. 488, 494 (App. Div. 1994). The critical question therefore is "whether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one-sided that one party must prevail as a matter of law." Brill, supra, 142 N.J. at 533 (citation omitted). If the non-moving party's evidence is merely colorable, or is not significantly probative, summary judgment should not be denied. See Bowles v. City of Camden, 993 F. Supp. 255, 261 (D.N.J. 1998).

Based upon all of the foregoing, I **CONCLUDE** that the Commissioner has jurisdiction over this matter as arising under the school laws. I further **CONCLUDE** that petitioners are not domiciled within the Kinnelon school district. and the children are therefore not entitled to a free public education at Kinnelon district schools. I further **CONCLUDE** that the matter is appropriate for conversion, sua sponte, from a motion to dismiss into a motion for summary decision, and that summary decision should be entered on behalf of respondent as there are no material facts in dispute.

ORDER

It is hereby **ORDERED** that summary decision be **ENTERED** on behalf of respondent and the appeals of K.L. and K.L. are **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 24, 2008
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency: 4/24/08

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APR 25 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

sej

316-08

N.V. on behalf of minor children N.V.V. and V.N.V.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner contested respondent Board's determination that her children, N.V.V. and V.N.V., were ineligible to attend Ewing Township schools. Petitioner asserted that the children lived in Ewing, but spent time in Morrisville, Pennsylvania, at her boyfriend's apartment. Respondent Board alleged that N.V.V. and V.N.V. lived in Morrisville with petitioner, and were dropped off in Ewing before the start of school each day. Respondent sought tuition reimbursement for the period of N.V.V. and V.N.V.'s ineligible attendance.

The ALJ found the results of the respondent Board's surveillance of petitioner and her children to be credible, and the testimony of the Board's witnesses to be straightforward and direct. He further found the petitioner not credible in that she offered no rebuttal to the results of the Board's surveillance and simply contended that she had lived at the Ewing address in question her whole life, despite the fact that she and the children – during the period at issue – slept at an apartment in Morrisville which was leased in petitioner's name. The ALJ concluded that the children are not entitled to a free public education in Ewing, and ordered petitioner to pay respondent tuition in the amount of $14,352 for their period of ineligible attendance.

Upon a full and independent review, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

July 23, 2008

OAL DKT. NO. EDU 874-08
AGENCY DKT. NO. 46-2/08

N.V. on behalf of minor children N.V.V. and V.N.V.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	
RESPONDENT.	:	

The record of this matter – including the parties' exhibits and the Initial Decision of the Office of Administrative Law (OAL) – have been reviewed. No exceptions were filed. Based upon the credibility findings and the largely unrebutted proofs presented by respondent, the Commissioner accepts the finding of the Administrative Law Judge (ALJ) that petitioner was not domiciled in Ewing from April 2007 through November 1, 2007, and from February 28, 2008 through a date in June 2008. She is thus liable to respondent for tuition.

Respondent's residency officer certified that the per diem tuition rate per elementary school child in Ewing for the period of time relevant to this case was $55.20, and that the amount of days between April 2007 and April 28, 2008 that petitioner's daughters had attended school in Ewing was 116. There is nothing in the record to rebut this. At the time of the Initial Decision, the days of attendance had increased to 130 – according to the ALJ – and petitioner has not challenged this figure in exceptions or by any other means. The Commissioner

consequently adopts the ALJ's findings concerning the amount of tuition due from petitioner to respondent.

In sum, the Initial Decision is adopted as the final decision in this case. Petitioner's minor children were not eligible for a free public education in Ewing during the time period in question. The sum of $14,352.00 is due respondent. The petition is dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 7/23/08

Date of Mailing: 7/23/08

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 874-08
AGENCY DKT. NO. 46-2/08

N.V., ON BEHALF OF MINOR CHILDREN,
N.V.V. and V.N.V.,
Petitioner,
v.
BOARD OF EDUCATION OF
THE TOWNSHIP OF EWING,
MERCER COUNTY,
Respondent,

N.V., on behalf of N.V.V. and V.N.V., petitioner, pro se

Jeffrey F. Belz, Esq., for respondent

Record Closed: June 3, 2008 Decided: June 9, 2008

BEFORE **DONALD J. STEIN**, ALJ:

STATEMENT OF THE CASE

N.V., mother of N.V.V. and V.N.V. (petitioner), challenges the determination made by the Ewing Township Board of Education (District) that she did not reside in Ewing. The District alleges that the petitioner was residing in Morrisville, PA, and dropping her children off in Ewing before the start of the school day.

PROCEDURAL HISTORY

On October 15, 2007, the District notified the petitioner that her children were being disenrolled based on non-residency. On January 13, 2008, petitioner appealed the decision. On February 28, 2008, the case was transmitted to the Office of Administrative Law (OAL). On May 16, 2008, the matter was scheduled and heard in the OAL, Trenton (Hamilton Township). The parties requested the record stay open for fourteen days to attempt to resolve the matter. On June 3, 2008, I was advised that settlement discussions were unsuccessful and the record closed on that date.

STATEMENT OF FACTS

David Mikalauskas

David Mikalauskas has been employed by the Ewing Board of Education as an attendance and residence officer for 19 years. His responsibilities include insuring that every student attending Ewing schools reside in the Township of Ewing. He became familiar with N.V. and her minor children, N.V.V. and V.N.V., when the school received a complaint that these two students were not residing in the Township of Ewing. Based on this complaint, he assigned Peter Manetto as an investigator to conduct surveillance.

The surveillance revealed that the children were dropped off at 13 New Trent Street in Ewing in the morning before school, which is the address at which they claim to live. The investigation further revealed the children came from an apartment in Morrisville, Pennsylvania. The children are in second grade and kindergarten. The surveillance began in April 2007 and continued until October 2007.

On October 15, 2007, based on the investigation, a disenrollment letter was sent to the petitioner (R-1). The petitioner did not appeal the decision and removed the children from the district on November 1, 2007

On February 28, 2008, the petitioner met with Mr. Mikalauskas. The petitioner requested to re-enroll her children, but was denied. She was told that an appeal would

have to be made as to the disenrollment decision. The petitioner said that she and the children were living at the New Trent Street address and did not know that she could appeal the decision. The Board is seeking reimbursement of tuition, which is calculated at a per diem rate of $55.20 per day. As of the date of the hearing, the two children attended the Ewing School for 130 days while allegedly living in another town and the reimbursement would be $7,176.00 per child for a total of $14,352.00 for both children.

Peter Manetto

Peter Manetto is employed by the Ewing Board of Education as a residency investigator and was assigned to investigate the residency of the two children. He conducted eighteen surveillances between April 24, 2007, and October 11, 2007.

Only on the first day of surveillance, April 24, 2007, he observed the two children leave the address at 13 New Trent Street to go to the school bus. It should be noted that the surveillance began at 7:00 a.m. on this date. On April 25, 2007, May 10, 2007, June 12, 2007, June 13, 2007, June 19, 2007, June 21, 2007, and September 12, 2007, the surveillance revealed a vehicle registered to N.V. arrive at the 13 New Trent Street address with the children, who exited the vehicle and then either went in the house or to the school bus, depending on the time of arrival.

On September 12, 2007, surveillance also followed the vehicle owned by N.V. to 490-91 Plaza Boulevard in Morrisville, Pennsylvania, which is an apartment complex. On September 14, 2007, September 20, 2007, September 21, 2007, September 25, 2007, September 27, 2007, October 2, 2007, and October 4, 2007, surveillance began at 490-91 Plaza Boulevard and the two children, along with N.V., exited the rear of the apartment building and entered the vehicle owned by N.V. In a short period, the vehicle was followed and arrived at the 13 New Trent Street address and the children either entered the 13 New Trent Street home or went to the school bus, depending on the time. On October 9, 2007, surveillance was initiated at the 13 New Trent Street address and the vehicle owned by N.V. was observed traveling on Calhoun Street and

then pulling on to New Trent Street. The vehicle did not stop but continued to the school bus stop where the children exited to go on the bus.

In preparation for this litigation, surveillance was initiated on May 14, 2008, and May 15, 2008, and surveillance began at approximately 6:30 a.m. The subject vehicle was not seen or located and the children exited the New Trent Street address to go to the school bus.

He reiterated that April 24, 2007 was the only time prior to May 2008 that he saw the children come out of the New Trent Street address without exiting a vehicle. He explained that after the date, he arrived earlier in the morning and saw the petitioner arrive in her vehicle with the children.

N.V. (Petitioner)

The petitioner testified that she slept over her boyfriend's house with the children and brought them to school, but that she has lived at the New Trent Street address her whole life. She did not testify who owns the New Trent Street property. She admitted she signed an apartment lease for her boyfriend.

On cross-examination, she admitted that the apartment in Morrisville, Pennsylvania, was rented in her name. In February 2008, when her children were taken out of the Ewing school, they went to public school in Morrisville. She did not dispute the results the surveillance as testified to by Mr. Manetto.

FINDING OF FACTS

The surveillance from April 24, 2007, to October 9, 2007, clearly revealed that the petitioner was staying in Morrisville, Pennsylvania with her children and dropping her children off in Ewing for school. Petitioner admitted that she signed a lease for the Morrisville apartment with her boyfriend and that she slept at that address with her children. She did not dispute the results of the surveillance. After receiving the

disenrollment letter, she enrolled the children in Morrisville schools. Petitioner's only explanation was that she lived at the Ewing address her whole life.

I **FIND** the results of the surveillance to be credible. Mr. Mikalauskas and Mr. Manetto were straightforward and directly answered all questions. The petitioner was not credible. She offered no explanation of how she could be living in Ewing, sign for an apartment in Morrisville, send the children to a Morrisville school, and constantly be seen over a six month period dropping her children off in the morning in Ewing.

Therefore, I **FIND** that N.V.V. and V.N.V. were not living in Ewing school district

CONCLUSIONS OF LAW

A person who meets age requirements and is domiciled within a school district may attend its public schools free of charge. N.J.S.A. 18A:38-1(a). A person may have many residences but only one domicile. Somerville Bd. v. Manville Bd., 332 N.J. Super. 6, 12 (App. Div. 2000), aff'd, 167 N.J. 55 (2001). A child's domicile is normally that of his or her parents. Ibid. The domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. Matter of Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991), aff'd, 311 N.J. Super. 589 (App. Div. 1998), certif. denied, 157 N.J. 541 (1998), cert. denied, 526 U.S. 1051, 119 S.Ct. 1357, 143 L. Ed.2d 518 (1999).

The acts, statements and conduct of the individual, as viewed in light of all circumstances, determine a person's true intent. Collins v. Yancey, 55 N.J. Super. 514, 521 (Law Div. 1959). The parent has the burden of proof by a preponderance of the evidence. N.J.S.A. 18A:38-1(b)2.

Where a person has more than one residence, the following factors are useful in determining his domicile: the physical characteristics of each place, the time spent and the things done in each place, the other persons found there, the person's mental attitude towards each place, and whether there is or is not an intention, when absent, to

return. Mercadante v. City of Paterson, 111 N.J. Super. 35, 39-40 (Ch. Div. 1970), aff'd, 58 N.J. 112 (1971). A choice of domicile by a person, irrespective of his motive, will be honored by the court, provided there are sufficient objective indicia, by way of proofs, supporting the actual existence of that domicile." In re Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991).

The Unanue court identified three elements which must be considered when trying to ascertain if a change of domicile has occurred; (1) whether there had been an actual and physical taking up of an abode in a particular state; (2) whether the subject had an intention to make his home there permanently or at least indefinitely; and (3) whether the subject had an intention to abandon his old domicile. (Unanue, supra at 376).

It is undisputed that the petitioner stayed in the Morrisville apartment extensively during the period of time in question. Petitioner signed a lease for the premises. The District's investigator observed petitioner's vehicle at the Morrisville address in the early morning hours during the period in question.

Based upon the circumstances surrounding this matter, I **CONCLUDE** that the petitioner failed to carry her burden of proof that N.V.V. and V.N.V were entitled to a free public education in the Township of Ewing during the relevant time periods. Accordingly, I **CONCLUDE** that N.V. is liable to the District for the tuition prorated to the period of N.V.V. and V.N.V.'s ineligible attendance and the District may immediately remove N.V.V. and V.N.V from the District schools pursuant to N.J.S.A. 18A:38-b(2).

In this case, the District seeks tuition for N.V.V. and V.N.V 's attendance in the Ewing School District for one hundred and thirty days per child. The per diem tuition rate for the 2007-2008 school year was $55.20. The District seeks tuition of $7,176.00 for this period of ineligible attendance for N.V.V and $7,176.00 for V.N.V. The total amount for both children is $14,352.00.

I **FIND** that these amounts are consistent with the Board-approved school calendars for the school years in question and they are further consistent with its

estimated tuition rates for these years. Therefore, I **CONCLUDE** that petitioner owes the District the total tuition of $14,352.00 for the ineligible attendance of N.V.V and V.N.V in the District during the 2007-2008 year.

DECISION AND ORDER

It is, therefore, **ORDERED** that N.V. pay respondent tuition in the total amount of $14,352.00 for unauthorized attendance in the District schools for the periods stated above. It is further **ORDERED** that, without proof of current domicile/residency, N.V.V and V.N.V may be excluded from further attending the Ewing public schools, at the discretion of the District, unless tuition is paid for this continued attendance.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 9, 2008
DATE

DONALD J. STEIN, ALJ

Date Received at Agency: June 9, 2008

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUN 11 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

/cs/bdt

EXHIBITS

For petitioner:

P-1 W-2 Form

P-2 Health history of V.V.

P-3 Health history of N.V.

P-4 Tax form

P-5 Driver's license

P-6 Marriage license

P-7 Marriage certification

For respondent:

R-1 Disenrollment letter, dated October 15, 2007

R-2 Certification of David Mikalauskas

R-3 Surveillance report

WITNESSES

For petitioner:

N.V., parent of minor children, N.V.V. and V.N.V.

For respondent:

David Mikalauskas

Peter Manetto

317-08

317-08 SEC

IN THE MATTER OF RICHARD E. FILIPEK, :
SADDLE BROOK BOARD OF EDUCATION, :
BERGEN COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

The School Ethics Commission (Commission) found that respondent – a member of the Saddle Brook Board of Education – violated *N.J.S.A.* 18A:12-24.1(c) of the Code of Ethics for School Board Members of the School Ethics Act (the Act) by being present in his capacity as president of the Board and running two closed session meetings of the Board where the tenure appointment of the middle/high school principal, the immediate supervisor of his wife, was discussed. The Commission issued a probable cause determination and accorded the respondent 30 days to submit a written statement setting forth reasons why he should not be found in violation of the Act, but received no response. The Commission subsequently found that respondent violated *N.J.S.A.* 18A:12-24.1(c), and recommended the penalty of censure in this matter.

The Commissioner – whose jurisdiction is limited to reviewing the Commission's recommended sanction – adopted the Commission's recommendation that respondent be censured, finding that the Commission fairly considered the nature and circumstances of respondent's violations in determining the appropriate penalty in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

July 23, 2008

AGENCY DKT. NO. 180-6/08

IN THE MATTER OF RICHARD E. FILIPEK, SADDLE BROOK BOARD OF EDUCATION, BERGEN COUNTY.	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the decision of the School Ethics Commission ("Commission"), including the recommended penalty of censure, have been reviewed.

This matter comes before the Commissioner to impose a sanction upon Respondent Richard Filipek, member of the Saddle Brook Board of Education, based upon findings of fact and conclusions of law by the Commission that he violated *N.J.S.A.* 18A:12-24.1(c) of the School Ethics Act by being present in his capacity as president of the Board and running two closed session meetings of the Board where the tenure appointment of the middle/high school principal – the immediate supervisor of his wife, who is employed in the district – was discussed.

Upon issuance of the decision of the Commission, respondent was provided 13 days from the mailing of such decision to file written comments on the recommended penalty for the Commissioner's consideration. No comments were submitted by or on behalf of Mr. Filipek.

Initially, it must be emphasized that – pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1 – the determination of the Commission as to violation of the School Ethics Act is **not reviewable by the Commissioner** unless a notice of appeal is filed pursuant to P.L. 2008, c. 36 and *N.J.A.C.* 6A:4. The Commissioner's jurisdiction at this time is limited to

reviewing the sanction to be imposed following a finding of a violation by the Commission. Therefore, this decision is restricted solely to a review of the Commission's recommended penalty.

Upon a thorough review of the record, the Commissioner accepts the Commission's recommendation that censure is the appropriate penalty in this matter. As clearly stated in its decision, the Commission recommended the more stringent penalty of censure because "the respondent admitted that he knew he had a conflict in relation to employment matters involving the middle/high school principal." Moreover, the Commission also noted that "the respondent did more than sit in on the closed session discussions; he ran the closed session as president of the Board." The Commission further reasoned "[g]iven that the respondent knew he had a conflict of the type where the Commission has, in over a decade of caselaw, consistently maintained that recusal is necessary and noting that, rather than recuse himself from the discussions, he ran the closed sessions in his role as president of the board, the Commission believes that a censure is the appropriate penalty." (Commission Decision at 4-5) As such, the Commissioner finds no cause to disturb the Commission's recommended penalty in this matter.

Accordingly, IT IS hereby ORDERED that Richard E. Filipek be censured as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 7/23/08

Date of Mailing: 7/23/08

*If respondent wishes to appeal the Commission's determination of violation, he may file a notice of appeal with the Commissioner pursuant to P.L. 2008, c. 36 and *N.J.A.C.* 6A:4 within 30 days of the date of mailing of this decision. If such a notice is filed, the decision concerning penalty will be reconsidered with the appeal.

IN THE MATTER OF RICHARD E. FILIPEK	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**Docket No. C18-07**
SADDLE BROOK BOARD OF EDUCATION *BERGEN COUNTY*	:	**DECISION**

This matter arises from a complaint filed on May 1, 2007 by Larry Ratajczak against Richard A. Filipek, a member of the Saddle Brook Board of Education (Board). The complainant did not specify which provisions of the Act he believed were violated by the respondent's conduct. In its acknowledgement letter to the complainant, the complainant was notified that, unless the Commission heard otherwise from him, it would presume that the complaint was based upon *Advisory Opinion A07-06* (July 31, 2006) and *Advisory Opinion A23-06* (November 15, 2006). Both of those advisory opinions were analyzed under N.J.S.A. 18A:12-24(c). The complainant did not respond to the Commission's letter. The respondent filed a timely answer. The parties were invited to appear at the Commission's April 1, 2008 meeting to present testimony. Commission Chairperson, Paul C. Garbarini recused himself from discussing and voting on this matter, but appointed a sub-committee consisting of Commission members Robert Bender, Randy Beverly, Mark Finkelstein and Rosalind Frisch to hear testimony. The complainant did not attend the meeting. The respondent attended the meeting and presented testimony. Commission members Robert Copeland and Margarita Gesualdo Roig, who were absent from the April 1, 2008 meeting, reviewed audio tapes of the testimony together with all documents submitted prior to the April 22, 2008 meeting, at which the Commission found probable cause to credit the complainant's allegation in count two that the respondent violated N.J.S.A. 18A:12-24(c) and found no probable cause to credit the allegations that the respondent violated N.J.S.A. 18A:12-24(c) in counts one, three and four and dismissed those allegations.

The Commission issued its probable cause determination on April 25, 2008 and accorded the respondent 30 days to submit a written statement setting forth the reasons why he should not be found in violation of the Act. The respondent did not respond to the Commission's probable cause determination. At its May 27, 2008 meeting, the Commission voted to find that the respondent violated N.J.S.A. 18A:12-24(c), and voted to recommend the penalty of censure.

THE PLEADINGS

In the second count, the complainant alleges that the respondent conducted and sat in on closed session meetings of the Board regarding the tenure of the principal when the respondent's spouse works under the principal. (Complaint at paragraph 2)

In the respondents answer to the second count, the respondent admitted that at the special meeting of the Board on April 4, 2007, at the Board's caucus meeting on April

16, 2007 and at the Board's regular meeting on April 18, 2007 he was present as Board president to run the meetings. The respondent avers that he did not enter into any discussions, offer opinions, ask questions or vote on issues concerning the tenure appointment of the principal prior to, during or after those meetings, "knowing that if I did I would violate N.J.S.A. 18A:12-24(c)." (Respondent's Answer at page 2) The respondent includes copies of Board minutes from these Board meetings to demonstrate that he did not vote on the tenure appointment "under advice of counsel." (Id.)

EVIDENCE BEFORE THE COMMISSION

The respondent appeared before the Commission and testified. The respondent admitted that he was present during closed session discussions regarding the tenure appointment of the principal. However, he testified that he did not participate in any discussions or entertain or make comments. The respondent testified that he was only present at the closed sessions as president of the Board to run the meetings. He further testified that he did not vote at the public meeting. He testified that he was aware that he had a conflict under the Act, but upon review of the Act did not find anything to indicate that he would be in violation by staying during the discussion. In response to questions from a Commission member, the respondent admitted that he voted to hold the April 4, 2007 special meeting of the Board during which the tenure of the principal was to be discussed.

FACTS

The Commission was able to discern the following facts based on the pleadings, documents submitted and testimony of the respondent.

1. At all times relevant to the allegations in this complaint, the respondent was president of the Board.

2. The respondent's spouse is employed in the district and her immediate supervisor is the middle/high school principal.

3. The respondent was aware that he had a conflict under the Act with regards to matters related to the middle/high school principal.

4. The respondent voted to hold the April 4, 2007 special meeting of the Board.

5. As president of the Board, the respondent was present and ran a special meeting of the Board on April 4, 2007 to question the middle/high school principal in order to clarify issues and letters concerning him related to his tenure appointment. The respondent did not enter into discussions, offer opinions, ask questions or vote on issues related to the middle/high school principal at any time prior to, during or after the meeting.

6. As president of the Board, the respondent was present and ran the Board's caucus meeting on April 16, 2007 during which there was a discussion and vote regarding the middle/high school principal. The respondent did not enter into discussions, offer opinions, ask questions or vote on issues related to the middle/high school principal at any time prior to, during or after the meeting.

7. As president of the Board, the respondent was present and ran the Board's regular meeting on April 18, 2007 when the Board voted on the tenure appointment of the middle/high school principal. The respondent did not enter into discussions, offer opinions, ask questions or vote on the tenure appointment of the middle/high school principal at any time prior to, during or after the meeting.

ANALYSIS

It is alleged that the respondent violated N.J.S.A. 18A:12-24(c), which provides:

> No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. No school official shall act in his official capacity in any matter where he or a member of his immediate family has a personal involvement that is or creates some benefit to the school official or member of his immediate family;

The respondent's spouse is employed in the district and her direct supervisor is the middle/high school principal. Since the respondent's spouse falls within the definition of immediate family member in N.J.S.A. 18A:12-23, the Commission finds that the respondent has a direct financial involvement in the tenure appointment of the middle/ high school principal that would reasonably be expected to impair his objectivity or independence of judgment. The respondent has admitted that he was present in his capacity as president of the Board and ran two closed session meetings of the Board when the tenure appointment of the middle/high school principal was discussed. While he also admits that he was aware that he had a conflict under the Act related to matters involving the middle/high school principal, he contends that he did not violate N.J.S.A. 18A:12-24(c), because he did not enter into discussions, offer opinions, ask questions or vote on the tenure appointment of the middle/high school principal at any time prior, during or after the meetings.

Previously in SEC v. Michael Kilmurray, C12-94 (January 27, 1998), the Commission found that a board member violated N.J.S.A. 18A:12-24(c) when he sat in on a private session of the Board when the appointment of his sister-in-law was being discussed. In Kilmurray, the Commission reasoned that "when a school official has a conflict of interest of which the public is aware, and that school official goes behind closed doors when that item is discussed, the situation creates a justifiable impression among the public that their trust is being violated." (Id., at page 3) In Kilmurray, the

Commission noted that the public may believe that a board member who sits in on a private session discussion regarding his sister-in-law is actively participating in the discussion behind closed doors, that the board member will tell his relative what was said, or at least, that the other board members will be inhibited in their discussion of the matter because of his presence. Such an impression can be created merely by the board member's presence in the meeting; this is especially so where, as in this matter, the board member is the president of the Board. By staying in the room and running the meeting as president of the Board while the tenure appointment of the supervisor of his spouse was being discussed, the respondent was acting in his official capacity on a matter where he had a direct financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. It would be reasonable for the public to believe that the other board members would have been inhibited in their discussion of the tenure appointment of the middle/high school principal because of the presence of the respondent as president of the Board running the discussions. Therefore, the Commission finds that the respondent violated N.J.A.C. 18A:12-24(c) when he sat in and ran the April 4, 2007 and April 16, 2007 closed session meetings of the Board.[1] The Commission advises that in the future, when the respondent has to recuse himself from a matter held in a closed session of the Board, he must leave the room.

DECISION

For the reasons expressed above, the Commission finds that Dr. Richard E. Filipek violated N.J.S.A. 18A:12-24(c).

PENALTY

The Commission recommends that the Commissioner of Education impose the penalty of a censure. In so doing, the Commission finds instructive the matter entitled I/M/O Robert Wilgus, C35-95 & C37-95 (June 18, 1996). Therein a board member, whose spouse was employed as secretary to the board and was a member of the local bargaining unit, attended a closed session of the Board during which the parameters for negotiations of the local bargaining unit was discussed in violation of N.J.S.A. 18A:12-24(c). The Commission recommended a reprimand. However, the Commissioner found censure was the appropriate penalty in that the respondent had been given a copy of *Advisory Opinion A33-95*, (March 29, 1995), which specifically addresses the issue of the attendance of conflicted board members in closed sessions to discuss negotiation strategy. (*I/M/O Robert A. Wilgus, Kingsway Regional High School Board of Education, Gloucester County*, Commissioner Decision No. 423-96 decided on September 30, 1996) While the respondent in this matter had not been given a copy of an Advisory Opinion or a Commission decision specific to his sitting in on and running closed session meetings where the tenure of the middle/high school principal was being discussed, the respondent admitted that he knew he had a conflict in relation to employment matters involving the

[1] The Commission notes that the April 18, 2007 meeting was a public meeting of the Board, as such, any actions taken at that time were subject to public scrutiny. Sine the respondent did not take part in any discussions and he abstained from voting on the tenure appointment of the middle/high school principal, the Commission finds no cause to address this meeting in its analysis.

middle/high school principal. The Commission also takes note that the respondent did more than sit in on the closed session discussions; he ran the closed session as president of the Board. Given that the respondent knew he had a conflict of the type where the Commission has, in over a decade of caselaw, consistently maintained that recusal is necessary and noting that, rather than recuse himself from the discussions, he ran the closed sessions in his role as president of the board, the Commission believes that a censure is the appropriate penalty. Thus, the Commission recommends the penalty of censure to the Commissioner.

This decision has been adopted by a formal resolution of the School Ethics Commission. This matter shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation **for sanction only**, pursuant to N.J.S.A. 18A:12-29. Within 13 days from the date on which the Commission's decision was mailed to the parties, Mr. Filipek may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Rosalind R. Frisch/jb

Rosalind R. Frisch
Acting Chairperson

Date Mailed: June, 25, 2008

Resolution Adopting Decision – C18-07

Whereas, the School Ethics Commission has considered the pleadings filed by the parties, the documents submitted in support thereof and the testimony of the parties; and

Whereas, at its meeting of May 27, 2008, the Commission found that Richard E. Filipek violated N.J.S.A. 18A:12-24(c) and recommended that the Commissioner of Education impose a sanction of censure; and

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Rosalind R. Frisch/ljb

Rosalind R. Frisch, Acting Chairperson

I hereby certify that the Resolution was duly adopted by the School Ethics Commission at its public meeting on June 24, 2008.*

Joanne Boyle
Executive Director

PCG/LJB/MET/ethics/decisions/C18-07

* Chairperson, Paul C. Garbarini recused himself from discussing and voting on this matter.

#318-08

OAL DKT. NO. EDU 4717-06
AGENCY DKT. NO. 204-6/06

JAMIE GOLDBERG,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1(a) and (b), have been reviewed.

Upon such review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/24/08

Date of Mailing: 7/25/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4717-06
AGENCY DKT. NO. 204-6/06

JAMIE GOLDBERG,
Petitioner,
v.
BOARD OF EDUCATION OF EGG HARBOR TOWNSHIP, ATLANTIC COUNTY,
Respondent.

Richard L. Press, Esq., for petitioner (Press and Taglialatella, attorneys)

Amy Houck, Esq., for respondent (Cooper Levenson, attorneys)

Record Closed: June 17, 2008 Decided: June 17, 2008

BEFORE **BRUCE M. GORMAN,** ALJ:

This matter was transmitted to the Office of Administrative Law on July 11, 2006, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures and as placed on the record on June 17, 2008.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

June 17, 2008
DATE

BRUCE M. GORMAN, ALJ

Date Received at Agency:

JUN 20 2008

DATE

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

/sd

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT (hereinafter referred to as the "Agreement") is made effective as of the 17th day of June, 2008 by and between the Egg Harbor Township Board of Education, Atlantic County, New Jersey (hereinafter referred to as the "Board") and Jamie Goldberg (hereinafter referred to as "Ms. Goldberg")(collectively " the parties").

WHEREAS, the Board is a body politic of the State of New Jersey, and is charged with the statutory responsibilities for the management and administration of the Egg Harbor Township School District in Atlantic County, New Jersey; and

WHEREAS, Ms. Goldberg is not presently employed by the Board; and

WHEREAS, Ms. Goldberg and the Board discussed a possible settlement of this matter, without either party admitting to any wrongdoing but rather to effectuate a full and complete separation of any rights, responsibilities or obligations individually or with each other; and

WHEREAS, the parties wish to settle all controversies among and between them, including the charges contained in the Petition filed by Ms. Goldberg against the Board and any and all related or unrelated claims, known or unknown, which could have been asserted by the Board or Ms. Goldberg; and

WHEREAS, the parties acknowledge that the merits of the controversy are in dispute and that neither the Board nor Ms. Goldberg admits any liability to either, but both have reasons to desire a resolution of the matter; and

NOW THEREFORE, in consideration of the agreements, promises, covenants and conditions contained herein, the adequacy and sufficiency of which are expressly acknowledged by the parties hereto, the parties agree as follows:

1. DISMISSAL OF ACTION.

(1) Ms. Goldberg would be working as a full time permanent secretary, most likely in facilities or transportation. There would not be a probationary period.

(2) Ms. Goldberg would not have guaranteed tenure, Ms. Goldberg would have to perform appropriately on evaluations just like every other secretary. If Ms. Goldberg's evaluation indicated she needed significant improvement, a Personal Improvement Plan would be created that must be followed, otherwise appropriate discipline would occur. Just like any other secretary.

(3) Ms.Goldberg would not receive any back pay/benefits or the like.

(4) Ms. Goldberg would release and waive any and all claims up to and including this litigation.

(5) Ms. Goldberg would start September 1, 2008 and be required to work the full statutory term for tenure.

(6) Ms Goldberg would be a ten month employee.

(7) Ms. Goldberg will be receiving $20, 298 for the 2008-2009 school year pursuant to the negotiated agreement.

(8) Ms. Surace, Director of Human Resources from Egg Harbor Township will be contacting Ms. Goldberg at 609-641-4923 or 609-442-0600 regarding her employment hours and start date.

2. Release of Claims. The Parties agree that this settlement disposes of and serves as a release of all known claims and issues which have been raised in connection with the Petition filed against the Board by Ms. Goldberg.

In addition, Ms. Goldberg, personally and for her assignee, estate and/or heirs, waives, releases and gives up any and all other claims, demands, obligations, damages, liabilities, causes of action and rights, in law or in equity, known and unknown, that he may have against the Board and any and all of its officers, directors, agents, representatives and employees (present and former) and their respective successors and assigns, heirs, executors and legal or personal representatives, based upon any act, event or omission occurring before the execution of this Agreement including, but not limited to, any events related to, arising from or in connection with Ms. Goldberg's prior employment with the Board. Ms. Goldberg specifically waives, releases and gives up any and all claims arising from or relating to her employment and/or association with the Board based upon any act, event or omission occurring before the execution of this Agreement including, but not limited to, such claims for wrongful discharge, breach of contract, either express of implied, interference with contract, emotional distress, fraud, misrepresentation, defamation, claims arising under the Civil Rights Acts of 1964 and 1991 as amended, the Americans With Disabilities Act ("ADA"), the Age Discrimination in Employment Act ("ADEA"), the National Labor Relations Act ("NLRA"), the Fair Labor Standards Act, the Employee Retirement Income Security Act of 1974 ("ERISA"), the Family and Medical Leave Act ("FMLA"), the New Jersey Family Leave Act ("NJ FLA"), the New Jersey Law Against Discrimination ("NJ LAD") and any claim that was asserted or could have been asserted under any federal or state statutes, regulations, or common law or Board policies or regulations.

Furthermore, the Parties specifically agree that this settlement serves as a release by the Board of all of its claims and issues regarding Ms. Goldberg raised in her Petition. The Board waives, releases and gives up any and all claims arising from or relating to Ms. Goldberg's prior employment and/or association with the Board based upon any act, event or omission occurring before the execution of this Agreement, including but not limited to, any claim that was asserted or could have been asserted under any federal or state statutes, regulations or common law or Board policies or regulations.

3. ATTORNEY'S FEES. Each party agrees that each party will bear its own costs and attorney's fees which have been incurred in connection with the within matter and in conjunction with the negotiation and preparation of this Agreement.

4. NO ADMISSION OF LIABILITY. It is expressly understood that neither the execution of this Agreement, nor any other action taken by Ms. Goldberg in conjunction with the Board's claims or this settlement, constitute admission by Ms. Goldberg of any violation of any law, duty

or obligation. It is also understood that the acceptance of this settlement does not constitute any representation by the Board as to the merits of its claims or the lack thereof.

5. ENTIRE AGREEMENT. This Agreement contains the sole and entire Agreement between the parties hereto. Each party represents and acknowledges that prior to executing this Agreement, they consulted with or had an opportunity to consult with counsel, has had ample time to do so and that no party relied upon any representation or statement not set forth in this Agreement made by any other party hereto, or their counsel or representatives, with regard to the subject matter of this Agreement. No other promises or agreements shall be binding unless in writing, signed by the parties hereto, and expressly stated to represent an amendment to this Agreement.

6. BOARD RESOLUTION. Attached hereto as Exhibit B is a true copy of a Resolution of the Board, adopted in compliance with the laws of the State of New Jersey, including the Open Public Meetings Act.

7. NON DISCLOSURE. Except as may be otherwise required of the Board pursuant to the *Open Public Records Act* and /or *Open Public Meetings Act*, as such obligations may be modified by federal or state statutory or administrative provisions as to the privacy of personnel records, no party will broadcast or publicize financial or other elements of this settlement to any third party. The parties are free to respond to inquiries made of them by indicating that the matter has been amicably resolved or satisfactorily settled, and recognize that the Board may disclose the substantive details of this settlement pursuant to a lawful request by providing a lawful request with a copy of this Settlement Agreement. Ms. Goldberg is free to discuss this settlement with immediate family, counsel and court if ordered.

8. MISCELLANEOUS. This Agreement shall be construed and interpreted in accordance with the law of the State of New Jersey without reference to its choice of law provisions. If any provision of this Agreement or any portion of this Agreement is declared null or void or unenforceable by any court having jurisdiction, the parties agree, in advance, to reform the agreement in good faith to provide each party with the full benefit of each and every portion of the Agreement.

IN WITNESS WHEREOF, the parties have set their hands and seals as of the day and year first written.

EGG HARBOR TOWNSHIP
BOARD OF EDUCATION

BY: Amy Houck
AMY HOUCK, BOARD SOLICITOR

DATED: 6/17/08

BY: R Press
RICHARD PRESS, ATTORNEY FOR PETITIONER

DATED: 6/17/08

BY: Jamie Goldberg
MS. GOLDBERG

DATED: 6/17/08

#319-08

319-08

OAL DKT. NO. EDU 324-08
AGENCY DKT. NO. 24-1/08

J.B. and D.B., on behalf of minor children,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF WASHINGTON TOWNSHIP, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Settlement Agreement and Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.[1]

Upon such review, the Commissioner observes that the Director of Student/Staff Services and Community Outreach signed the Stipulation of Settlement on behalf of the Board. In that neither the file nor the settlement agreement contains a copy of the Board's resolution approving the settlement and designating this individual to sign the agreement on its behalf, nor, in the alternative, is the agreement signed by the Board attorney, who is the Board's duly authorized representative in litigation, the Commissioner cannot approve the within settlement agreement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Settlement Agreement consistent with the concerns set forth above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.[2]

Lucille Davy

COMMISSIONER OF EDUCATION

Date of Decision: 7/24/08
Date of Mailing: 7/25/08

[1] It is noted that the Initial Decision identifies J.B. and D.B. as appearing *pro se* in this matter and Gregory Lomax, Esq. as counsel for the Board. The record establishes that Mr. Lomax is counsel for J.B. and D.B. and Michael E. Heston, Esq. represents the Board.

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 324-08

AGENCY DKT. NO. 24-1/08

J.B. AND D.B. O/B/O MINOR CHILDREN,

Petitioners,

v.

BOARD OF EDUCATION OF THE WASHINGTON TOWNSHIP, GLOUCESTER COUNTY,

Respondent.

J.B. and D.B., petitioners, pro se

Gregory Lomax, Esq., for respondent (Wolf Block, attorneys)

Record Closed: June 5, 2008 Decided: June 23, 2008

BEFORE **ANA C. VISCOMI**, ALJ:

This matter, involving the petitioner's challenge of the Board of Education's residency determination, was transmitted to the Office of Administrative Law on February 1, 2008, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. At the June 5, 2008 hearing, the parties agreed to

a settlement and prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

June 23, 2008

DATE

ANA C. VISCOMI, ALJ

Date Received at Agency:

JUN 25 2008

DATE

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

/lam

Settlement Agreement: J.B and D.B on behalf of minor children vs. BOE of Washington Township Gloucester County, OAL Docket No. EDUOS 00324-2008S

Tuition: Petitioners consent to judgment for tuition in the amount of $7068.75 for the 2007/2008 school year.

Waiver of further claims: Respondent shall not seek further tuition reimbursement for the 2007/2008 school year from the Petitioners. Respondent reserves the right to pursue other potentially responsible parties for tuition reimbursement, but not seek to recover anything further from the Petitioners.

2007/2008 School Year: Respondent agrees that the Petitioners' children may stay enrolled in the Washington Township School District for the remainder of the 2007/2008 school year.

Petitioners acknowledge that they were residents of the Township of Mantua from early November, 2007 until at least March, 2008, during which time period the Petitioners' children attended the Washington Township Schools.

Ana C. Viscomi, ALJ

Dated: June 5, 2008

We hereby consent and agree to the terms set forth above.

[redacted]

D[redacted] B[redacted], Petitioner

BOE of Washington Township

By Charles Moore

Charles Moore, Director of Student/Staff Services and Community Outreach

#320-08R

OAL DKT. NO. EDU 11404-07
(EDU 10844 ON REMAND)
AGENCY DKT. NO. 280-8/06

JAMES BONNER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter, the parties' proposed Stipulation of Settlement and Release, and the Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/24/08

Date of Mailing: 7/25/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11404-07
AGENCY DKT. NO. 280-8/06
ON REMAND
OAL DKT. NO. EDU 10844-06
AGENCY DKT. NO. 280-8/06

JAMES BONNER,
Petitioner,
v.
IRVINGTON BOARD OF EDUCATION,
Respondent.

Timothy R. Smith, Esq., for petitioner (Timothy R. Smith & Associates, LLC, attorneys)

Ronald L. Hamlin, Esq., for respondent (Hamlin, Hunt & Ridley, attorneys)

Record Closed: June 9, 2008 Decided: June 26, 2008

BEFORE **JOSEPH A. PAONE**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on October 27, 2006, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

A hearing was scheduled on June 11, 2007. Prior to the hearing the parties settled the matter and a Settlement Agreement was prepared and executed. The President of the Irvington Board of Education signed the agreement on behalf of the Board. In an Initial Decision dated August 17, 2007, I approved the settlement and ordered that the parties comply with its terms. Upon review of the Initial Decision, the Commissioner observed that neither the agreement, nor the file, contained a copy of the Board's resolution approving the settlement, nor was the agreement signed by the Board's attorney. Therefore, the Commissioner remanded the matter in order to satisfy these deficits. On June 9, 2008, I received a copy of the Board's resolution approving the settlement and a copy of the original settlement agreement executed by the Board's attorney. Copies of both documents are attached herewith. I **CONCLUDE** that the Board has approved the settlement in this matter and the Board's counsel properly executed the Settlement Agreement. Accordingly, I again approve the settlement and **ORDER** that the parties comply with its terms.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

June 26, 2008
DATE

JOSEPH A. PAONE, ALJ

Date Received at Agency:

6-30-08

Mailed to Parties:

JUN 30 2008
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lr

Jennifer Borja. Esq.
Timothy R. Smith & Associates, L.L.C.
76 South Orange Avenue, Suite 201
South Orange, NJ 07079
Attorney for James Bonner

JAMES BONNER vs. IRVINGTON BOARD OF EDUCATION	Cross reference: State v. Bonner Summons No.: S-2005-004203 OAL Docket No.: EDUOR 10844-2006 **STIPULATION OF SETTLEMENT AND RELEASE**

This Stipulation of Settlement and Release is made by and between the Irvington Board of Education (the "Board") with administrative offices located at 1 University Place, Fourth Floor, Irvington, New Jersey 07111 and James Bonner ("Bonner"), whose address is 21 Acken Drive, Clark, New Jersey 07066. In consideration of mutual promises and undertakings contained in this Stipulation of Settlement and Release and for good and valuable consideration the receipt of which is hereby acknowledge, the undersigned parties state:

WHEREAS, on December 12th, 2005, Bonner was employed as a teacher by the Board; and

WHEREAS, on that date, Bonner was charged with a criminal action for certain acts alleged to have occurred while Bonner was in the employ of the Board; and

WHEREAS, on May 18th, 2006, the criminal complaint against Bonner was dismissed by the Irvington Municipal Court; and

WHEREAS, pursuant to N.J.S.A. 18A:16-6.1, Bonner's defense counsel forwarded a demand letter to the Board, on or about June 20th, 2006, seeking reimbursement from the Board

for Bonner's attorney's fees and cost associated with the legal defense of the criminal action with which Bonner was charged; and

WHEREAS, on or about August 10th, 2006, Bonner's defense counsel filed a Petition for Reimbursement of Legal Fees, which is currently being transmitted to the Office of Administrative Law; and

WHEREAS, the parties have determined that it is in their respective best interests to enter into this Stipulation of Settlement and Release to avoid the need for further litigation;

NOW, THEREFORE, in consideration of the mutual promises and covenants, the parties agree as follows:

1. The Board will pay to Bonner the sum of Four Thousand Three Hundred Dollars ($4,300.00) in full and complete satisfaction of the amount Bonner is claiming to be due and owing to him from the Board for Bonner' attorneys' fees and costs.
2. This settlement amount will be paid directly to the trust account of Bonner's legal counsel, Timothy R. Smith Esq. of Timothy R. Smith & Associates L.L.C., 76 South Orange Avenue, Suite 201, South Orange, New Jersey, 07079, following the approval of this Stipulation of Settlement and Release by the Commissioner of Education.
3. Bonner. in consideration of this Agreement, hereby release the Board, individually and collectively, and its agents, servants and employees from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings, and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought, or could be brought, arising under or relating in any way to the subject matter set forth in the demand for reimbursement, now and forever, except to enforce the terms of this Stipulation of Settlement and Release.

4. Bonner acknowledges that he has reviewed this Stipulation of Settlement and Release with his own independent legal counsel and that he enters into it without duress, and of his own free will and volition. He further acknowledges that he fully understands the terms of this Stipulation of Settlement and Release and the duties and obligations enumerated herein.

5. Bonner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of this matter hereby agrees to withdraw with prejudice the above referenced Petition for Reimbursement before the Commissioner of Education.

6. Nothing contained in this Stipulation of Settlement and Release should be construed as an admission of wrongdoing by either party, and neither party shall be considered a prevailing party for any reason.

7. This Stipulation of Settlement and Release is conditioned upon approval of the Board.

8. The Board's President is authorized to execute this Stipulation of Settlement and Release on behalf of the Board.

9. This Stipulation of Settlement and Release contains the entire agreement between the parties, and no other representations, whether verbal or in writing shall be binding upon them.

10. All terms of this Stipulation of Settlement and Release are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

11. This Stipulation of Settlement and Release is an agreement which is to be construed in accordance with the laws of the State of New Jersey.

IN WITNESS WHEREOF, the parties, or their duly authorized representatives, do set forth their hands and seal as of the dates(s) set forth below.

FOR THE IRVINGTON BOARD OF EDUCATION:

By: Blue Burgess
, Board President

Date: 8-3-07

By: Corey Logan
, Witness

Raymond L. Hamlin,
Board Counsel

FOR JAMES BONNER:

By: James Bonner
James Bonner

Date: 6/25/07

Sworn and subscribed to before me this
25 day of June, 2007

Judith Lois Wentlandt
Notary Public

JUDITH LOIS WENTLANDT
NOTATY PUBLIC OF NEW JERSEY
MY COMMISION EXPIRES 2/9/2012

SPECIAL BOARD OF EDUCATION JUNE 28, 2007
FINANCE: (continued)

40. RESOLUTION TO APPROVE THE SETTLEMENT – JAMES BONNER V. IRVINGTON BOARD OF EDUCATION – DOCKET NUMBER: EDU-10844-2006

WHEREAS, James Bonner, a former employee of the Irvington Board of Education was charged with the offense of Simple Assault, as a result of an alleged incident which occurred on December 6, 2004; and

WHEREAS, all of the charges against Mr. Bonner were dismissed on or about May 18, 2006; and

WHEREAS, pursuant to N.J.S.A.18A:16-6.1, any employee who is charged with a criminal offense and receives a favorable disposition shall be entitled to reimbursement for all reasonable attorneys fees and cost related to the defense of same; and

WHEREAS, pursuant to N.J.S.A.18A:16-6.1, Mr. Bonner filed a petition of appeal seeking reimbursement in the amount of $14,303.08 on or about August 15, 2006; and

WHEREAS, the Irvington Board of Education through counsel objected to said fee as being unreasonable; and

WHEREAS, the parties appeared before the Honorable Joseph Paone, A.L.J., on June 11, 2007 for purposes of a hearing and agreed to resolve the within dispute;

NOW THEREFORE BE IT RESOLVED, that the Irvington Board of Education agrees to resolve the matter entitled James Bonner v. Irvington Board of Education pursuant to Docket Number: EDU-10844-2006 in the amount of $4,300.00, Account # 11-000-230-820-0000-00-31

ACTION:
Motion by: Norma Carty, Seconded by: Paul Inman
Roll Call: (7) Ayes - Burgess, Vauss, Carty, Derisse, Inman, Scott, Williams
(1) Abstention - Vann-Dupree

As Certified by:

Reggie Lamptey
Reggie Lamptey
Assistant Superintendent for Business/Board Secretary

/vp

REGULAR BOARD MEETING **OCTOBER 17, 2007**
WALK ON

RESOLUTION TO APPROVE LANGUAGE IN THE SETTLEMENT ENTITLED IRVINGTON BOARD OF EDUCATION V. JAMES BONNER, OAL DOCKET NO.:EDU-07579-2007N (OAL DOCKET NO.: EDU-03522-2006N ON REMAND) AGENCY REFERENCE NO.:80-2/06, IN ACCORDANCE WITHIN RE: CARDONICK, 1990 SLD842 AND NJAC 6A:3-56 NO CHANGE IN SETTLEMENT TERMS.

ACTION:
Motion by: Norma Carty, Seconded by: Paul Inman
Roll Call: Unanimously approved on a roll call vote

As Certified by:

Reggie Lamptey
Reggie Lamptey
Assistant Superintendent for Business/Board Secretary

/vp

321-08

PATRICIA MILANO,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, SOMERSET COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner – a certified pre-school teacher employed in respondent's district – was originally hired by Franklin Township Schools in September 2001 when the district initiated an Early Childhood Education Program. Shortly thereafter, the district entered into a contract with the Hunterdon County Educational Services Commission (HCESC) to operate its early childhood program, with the district providing the facility. Petitioner claims that respondent Board advised her that if she wanted to continue to work, she had to resign and take the HCESC job, and that she was assured that she would be retained by HCESC at the same salary and benefits. Petitioner resigned, and then was employed by HCESC – working at the Franklin Township worksite – through June 2005. Respondent Board did not renew its contract with HCESC for 2005-06, and reinstated the Early Childhood Education Program directly through the district; petitioner was re-appointed by the Board in July 2005 as a preschool teacher. Petitioner argues that she has taught continually at Kingston School in Franklin Township since 2001; that HCESC was merely a conduit for respondent Board to employ petitioner; and that she has complied with the requirements of *N.J.S.A.* 18A:28-5 and has achieved tenure. The petition sought a declaration that Milano has achieved tenure. Respondent Board contended, *inter alia*, that the petition was untimely.

The ALJ rejected respondent's arguments, finding that: the appeal was timely filed; the actions of the Board constituted a takeover of the Early Childhood Program pursuant to *N.J.S.A.* 18A:28-17; and that the petitioner did acquire tenure in respondent's district, in September of 2004. The ALJ granted petitioner's motion for summary decision and ordered that petitioner acquired tenure on September 2, 2004.

The Commissioner found that neither the petition's timeliness nor the merits of the parties' respective positions are appropriately before the Commissioner at this time. The petitioner requested no relief beyond a declaration that she had acquired tenure, and the appeal was transmitted to the OAL with the express instruction that the ripeness of petitioner's claim be considered as a threshold issue. This not having been done, the Commissioner remanded the matter to the OAL for determination of whether petitioner has, in fact, raised a cause of action that is ripe for Commissioner adjudication.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

July 24, 2008

OAL DKT. NO. EDU 6797-06
AGENCY DKT. NO. 286-8/06

PATRICIA MILANO,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, SOMERSET COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have exceptions by the Board of Education (Board) and petitioner's reply thereto, both duly filed pursuant to *N.J.A.C.* 1:1-18.4.

On exception, the Board argues that the Administrative Law Judge (ALJ) erred in finding that the petition of appeal in this matter was timely filed based on the Board's lack of formal notice to petitioner that it did not deem her tenured. Citing prior decisional law for the proposition that formal notice is not required where sufficient information has been communicated to enable the affected party to make the claim at issue, the Board renews its contention that petitioner's own communication of January 11, 2006 (Exhibit P-3) reflects her clear understanding of the Board's position at that point – yet she did not file her petition until August, well beyond the 90 days permitted by *N.J.A.C.* 6A:3-1.3(d). (Board's Exceptions at 1-4) The Board also takes exception to the ALJ's counting of petitioner's years of service with the Hunterdon County Educational

Services Commission (the ESC) toward acquisition of tenure in the Board's district, reiterating its stance that the Board did not take over the ESC's preschool program, as is plainly required by the statute and case law relied upon by petitioner. (*Id.* at 4-5)

In reply, petitioner – in addition to asserting that, for the reasons expressed by the ALJ, her petition was, in fact, timely filed – objects to the Board pressing a claim of untimeliness at this point in proceedings. Citing state and federal decisional law precluding the raising of a statute of limitations defense at the end stage of litigation, petitioner contends that – although untimely filing was raised as an affirmative defense in the answer to the petition of appeal – the Board cannot now seek to enforce a claim it did nothing to pursue during the nearly one-and-a-half years this matter proceeded through in-person and telephone conferences among counsel and the court, exchange of discovery, and settlement discussions. (Petitioner's Reply at 1-5) Petitioner also urges rejection of the Board's stance with respect to her acquisition of tenure, relying by reference on her prior submission to the ALJ. (*Id.* at 5-6)

Upon review, the Commissioner finds that – notwithstanding the arguments of the parties and the findings and conclusions of the Initial Decision – neither the petition's timeliness nor the merits of the parties' respective positions are appropriately before the Commissioner at this time. It has long been held that the rights flowing from claimed or actual tenured status remain inchoate until an employee suffers an adverse action in alleged violation of such rights;[1] here, however, petitioner seeks no relief beyond a declaration that

[1] See, for example, *Edison Township Education Association v. Board of Education of the Township of Edison*, 1984 *S.L.D.* 1073, 1083, aff'd by the State Board of Education, 1984 *S.L.D.* 1085, aff'd, Docket #A-2030-84T7 (App. Div. 1986); *Ellen Francey v. Board of Education of the City of Salem, Salem County*, 92 *N.J.A.R.*2d (EDU) 449, aff'd with modification by the State Board of Education, 96 *N.J.A.R.*2d (EDU) 347, aff'd 286 *N.J. Super.* 354 (App. Div. 1996); and *Doreen Barca v. Board of Education of the Township of Holmdel, Monmouth County,* Commissioner's Decision No. 200-01, decided June 22, 2001.

she has acquired tenure in the respondent's district – alleging no loss of pay, reduction in employment or deprivation of other specific benefit as a result of the facts pleaded.[2] For this reason, petitioner's appeal was transmitted to the OAL with the express instruction that the ripeness of her claim be considered as a threshold issue;[3] the Initial Decision, however, makes no findings or recommendation in this respect, nor is there any indication on record that the issue was considered by the ALJ and parties during the course of proceedings at the OAL.

Accordingly – not being satisfied that the matter is appropriately before her at this time and being loath to render what would be tantamount to an unauthorized advisory opinion – for the reasons expressed herein, the Commissioner declines to reach the findings and conclusions of the Initial Decision and remands this matter to the OAL for the requested determination of whether petitioner has, in fact, raised a cause of action that is ripe for Commissioner adjudication.

IT IS SO ORDERED.[4]

Lucille T Davy
COMMISSIONER OF EDUCATION

Date of Decision: 7/24/08
Date of Mailing: 7/25/08

[2] Although petitioner's brief in support of her motion for summary decision (at 6) indicates that she seeks an order crediting her with accrued sick leave and reimbursing her for certain health insurance costs in addition to declaring her tenured, no amendment was made to the petition either requesting such relief or stating the factual and legal basis for it.

[3] The agency transmittal form states in pertinent part: "Request threshold consideration of whether petitioner's cause of action is ripe for adjudication, since petition does not allege suffering of any loss of pay, employment or other specific benefit."

[4] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING SUMMARY DECISION
OAL DKT. NO. EDU 6797-06
AGENCY DKT. NO. 286-8/06

PATRICIA MILANO,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, SOMERSET COUNTY,
Respondent.

Stephen E. Klausner, Esq., for petitioner

Rita F. Barone, **Esq**., for respondent (Purcell, Ries, Shannon, Mulcahy & O'Neill, attorneys)

Record Closed: June 3, 2008 Decided: June 9, 2008

BEFORE **DONALD J. STEIN**, ALJ:

STATEMENT OF THE CASE

In this matter, Patricia Milano (Petitioner) alleges that she has acquired tenure for the years she has taught under contracts with Township of Franklin Board of Education (Franklin) and the Hunterdon County Educational Service Commission (HCESC).

PROCEDURAL HISTORY

On August 16, 2006, petitioner filed a Verified Petition with the Commissioner of the Department of Education (Department) alleging that she has acquired tenure. On September 12, 2006, Franklin filed an Answer to Petition. On September 22, 2006, the case was transmitted to the Office of Administrative Law where it was filed as a contested case.

The parties agreed that there were no facts in issue. After numerous extensions by both parties, petitioner filed a motion for summary decision, and Franklin filed a response and cross-motion for summary decision. On June 3, 2008, the motion was argued at the OAL (Hamilton).

STATEMENT OF FACTS

In 1989, the petitioner was certified by the Board of Examiners as a teacher, and has endorsements in elementary school and Pre-K (P-1). In September 2001, Franklin initiated an Early Childhood Education Program for the 2001-2002 academic year, and hired the petitioner (P-2). In November 15, 2001, Franklin executed a contract with HCESC to operate their early education program beginning November 19, 2001. Franklin provided the facility and paid HCESC to provide a teacher, nurse, transportation, and administrative services.

In November 2001, Franklin claims that the petitioner was advised that her job was being terminated and that she become employed with HCESC from Dec. 1, 2001, to June, 2005. Petitioner claims that Franklin advised her that if she wanted to continue to work, she had to resign and take the HCESC job, and that she was assured that she would be retained by HCESC at the same salary and benefits.

On December 1, 2001, petitioner began teaching as a pre-school teacher through the Early Childhood Education program administered by HCESC under contract with Franklin for the academic year 2001 - 2002. Petitioner was assured that she would be performing the identical duties and continue to work at the Franklin Township work site until the completion of the new Franklin Township High School.

In June 2002 through June 2005, petitioner was renewed as a preschool teacher, and Franklin renewed their contract with HCESC for the academic years 2002-2003, 2003-2004, and 2004-2005. Pursuant to the contract, petitioner followed the Franklin, not the HCESC calendar for holidays and scheduling. She was observed and or evaluated by the Franklin Director of Early Childhood Education at least once a year.

In the Spring 2005, Franklin did not renew their contract with HCESC to administer the Early Education Program for the 2005-2006 academic year, and then reinstated the Early Education Program directly through the School District. On July 12, 2005, the petitioner was appointed by Franklin to the position of pre-school teacher for the Early Education Program for the 2005-2006 academic year.

In December 2005, petitioner inquired about tenure and was advised by the Director of Personnel that her past employer was HCESC, not Franklin. On January 11, 2006, the petitioner wrote to the Superintendent requesting a meeting to discuss the denial of her tenure (P-3).

Petitioner asserts that Franklin ignored her request for a meeting, and therefore she did not receive notice of a final decision from Franklin. Franklin asserts that petitioner was sent a letter dated January 11, 2006, from the director of the personnel department. However, the exhibit attached is not a letter to the petitioner, but the letter from petitioner (P-3).

On August 14th, 2006, petitioner filed the petition seeking the declaration of (1) her tenure rights, (2) credit for sick leave, and (3) reimbursement for the difference between an individual and a family plan for health insurance.

CONCLUSIONS OF LAW

The facts involving this motion are not in dispute. Therefore, pursuant to N.J.A.C. 1:12.5(b) and Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 523 (1995), I **FIND** that there are no genuine issues of material fact and that this matter is ripe for summary decision.

TIMELINESS OF PETITION

N.J.A.C. 6A:3-1.3(i) requires that a petition be filed within 90 days "from the date of receipt of notice of final order, ruling, or other action by the District Board of Education." Petitioner's letter dated January 11, 2006, clearly requested a meeting to discuss the tenure issue. The record is devoid of any written notice from Franklin to petitioner. There is no evidence that Franklin responded in writing to the letter. The only evidence presented was a verbal discussion by the Director of Personnel before the January 11, 2006, letter.

The oral communication by the Director Of Personnel is not sufficient. Written notice from the Board of Education is required. In North Plainfield Education Association v. Board of Education, 96 N.J. 587 (1984), a signed document drafted by the Board of Education was required for notice. In Riley v. Hunterdon Central High School Board of Education, 173 N.J. Super. 109 (App. Div. 1980), and Kaprow v. Board of Education of Berkeley Township, 131 N.J. 572 (1992), notice began upon receipt of a letter from the Board. In Nissman v. Board of Educ. of the Twp. of Long Beach, 272 N.J. Super. 373 (App Div. 1994), notice began upon receipt by petitioner of the school board resolution that petitioner's contract not be renewed and that she not be offered a new contract or granted tenure.

Therefore the motion for summary decision by the Township of Franklin Board of Education is **DENIED**.

TENURE RIGHTS

The basic tenure statute, N.J.S.A. 18A:28-5, is intended to confer tenure rights on teachers when they teach for three years and one day under the same appropriate certificate, in a position which requires a teaching certificate.

Petitioner argues since she taught in the school under HCESC from Fall 2001, and was retained by Franklin to teach that school when it operated under the control of Franklin starting in the 2005-2006 school year, Franklin is required recognize and preserve her tenure rights.

N.J.S.A. 18A:28-17 states that:

> Whenever the local board of education of any school district in this State shall undertake the operation of any school previously operated by an Educational Services Commission, a Jointure Commission, the Commissioner of Education, the State Board of Education, the board of trustees of any State college, or any officer, board or commission under his, its or their authority, all accumulated sick leave, tenure and pension rights of all teaching staff members in said school, shall be recognized and preserved by the board assuming operational control of the school, and any periods of prior employment, by said Educational Services Commission, Jointure Commission, Commissioner of Education, State Board of Education or board of trustees of any State college, or any officer, board or commission under his, its or their authority, shall count toward the acquisition of tenure to the same extent as if all of such employment had been in such school district.

Franklin argues that it did not take over the program since HCESC is still in operation with other programs.

Franklin also argues that since the school program was not a special education program, the program in question is not a school. Franklin's argument hinges on the meanings of "undertake the operation of," and "school."

Before addressing these issues, the Educational Services Commission should be discussed. An Educational Services Commission is a creature of statute, N.J.S.A. 18A:6-51 to -70. Whenever five or more boards of education deem it advisable to do so, they petition the State Board of Education to establish a commission to provide educational and administrative services. N.J.S.A. 18A:6-52(a).

These commissions are usually established as a cost-saving mechanism for school boards. For example, in the case of special education students, while the board has an obligation to provide a special education program, the cost can be prohibitive. The students requiring the special education are a fraction of the entire student body, but they require certain extra expenditures. By pooling together, five or more boards of education can take advantage of economies of scale by having one centralized facility provide the educational and administrative services special to these students.

In this way, an Educational Services Commission is similar to a county special services district. County special services school districts were first authorized in 1971 by statute. Under N.J.S.A. 18A:46-29 to -46, a county's board of chosen freeholders may establish a special district for the education and treatment of special education students. Because an Educational Services Commission works on programs for a large number of school districts, when a school district undertakes the operation of one of the programs, as in the present case, the Educational Services Commission still retains and operates other programs for the other districts.

Shelko v. Mercer County Special Services School District, 97 N.J. 414 (1984), appears to address the issue presented in this matter, and involved a teacher who worked for two years in a local school district special education program. The program was taken over by a county special services district. The Court held that her tenure rights were preserved despite this transfer. The statute at issue in that case, N.J.S.A. 18A:28-16, states that:

> Whenever an Educational Services Commission, a Jointure Commission, the Commissioner of Education, the State Board of Education, the board of trustees of any State college, or any officer, board or commission under

> his, its or their authority shall undertake the operation of any school previously operated by a school district in this State, all accumulated sick leave, tenure and pension rights of all teaching staff members in said school shall be recognized and preserved by the agency assuming operational control of the school, and any periods of prior employment in such school district shall count toward the acquisition of tenure to the same extent as if all of such employment had been under the Educational Services Commission, Jointure Commission, the Commissioner of Education, the State Board of Education, or the board of trustees of any State college, as the case may be.

Shelko rejected the argument that the statute is not applicable because the petitioner was not teaching in a special education program because this "would read all practical meaning out of the statute, because by definition the special services school districts never take over the entire operation of a school but are limited to providing educational services for the disabled."

Shelko cited Stuermer v. Board of Educ. of the Special Services School Dist. of Bergen Cty. 1978 S.L.D. 628, the Commissioner of Education, which explained that "since Jointure Commissions were created only for the purpose of special education classes, 'school' as referenced in N.J.S.A. 18A:28-16 must mean special education classes." The Court did not intend for their holding to support the proposition that the only program that would be covered by the statute would be a special education program provided for by a county special services district. Such an interpretation would read words into the statute that the legislature did not write.

The school board in Shelko had argued that N.J.S.A. 18A:28-16 should not apply when the county special services district took over the special education program of the school district, but not an entire school. The Court rejected that argument pointing out that, "the special services school districts never take over the entire operation of a school but are limited to providing educational services for the disabled." Shelko, supra, 97 N.J. at 422-423. In the same way, a school board like Franklin can not undertake the entire operation of an Educational Services Commission like HCESC.

The court in Shelko held that N.J.S.A. 18A:28-16 applied because the entire school program, not the entire school, was taken over, and concluded:

> Our overwhelming sense of the reality of the situation is that this is precisely the kind of takeover the Legislature contemplated. It is conceded that before and after the transition we are essentially looking at the same teachers, the same students, the same curriculum, and the same classroom. When a transition from local to district control of such a program looks, sounds, and acts like a takeover, we should treat it as a takeover. [Shelko, supra, 97 N.J. at 420]

In the present case, when Franklin implemented the program they had previously operated through a contract with HCESC, they retained the same teacher (petitioner) for the same pre-school teaching position that required the appropriate certification with a pre-K endorsement. The curriculum was the same curriculum and was designed to achieve the Early Childhood Program Expectations: Standards of Quality appropriate for participation in the Early Childhood Program. Franklin has not claimed or produced any evidence that the programs were different. Therefore, I **CONCLUDE** that the actions of Franklin constitute a takeover of the Early Childhood Program.

Franklin further argues that the Early Childhood Education Program is not a school. The argument must also be rejected. The program was led by a teacher who was required to have appropriate credentials, certification, and endorsement. The program took place in schoolrooms in school buildings leased from the Franklin Township School District. The children were transported to and from the program. The program took place daily on a normal school schedule. Snacks were provided. The program had a curriculum which conformed to the Early Childhood Educational Program Expectations: Standards of Quality.

These elements are important in consideration of what is a school. No elements that make up a school experience are missing. Because the early education program was funded by a state grant, Early Childhood Program Aid, Franklin and HCESC were required to run the program according to the "requirements for early childhood education programs," N.J.A.C. 6A:8-3.4, which include the regulated program

expectations, and monitoring by the county superintendent. Petitioner has provided direct educational services to students on a regular daily basis in a school setting. And when the program was discontinued with HCESC and implemented by Franklin, no part of the program remained under the control of HCESC.

Because of its remedial purpose, the Tenure Act should be liberally construed to achieve its purpose. Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 74 (1982). The purpose of the statute in question, N.J.S.A. 18A:28-17, is not to carve out an exception to the granting of tenure rights to teachers. The purpose of the statute is to extend the protection of teachers' tenure rights to teachers working for Educational Service Commissions when the administration of the program is implemented directly by a school board. The preferred reading of a statute with a purpose of extending rights is not a reading that would deny rights. Where the meaning of "undertake the operation of any school" is purported to be ambiguous, the meaning consistent with the principal design of the statute, to extend tenure rights to a teacher, is the only meaning consistent with basic principles of statutory construction.

Therefore, I **CONCLUDE** that the petitioner acquired tenure.

It must now be determined when the petitioner acquired tenure. N.J.S.A. 18A:28-5, calculates the time required for tenure as follows:

> (a) Three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
>
> (b) Three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
>
> (c) The equivalent of more than three academic years within a period of any four consecutive academic years.

Because Milano's contracts were for academic years, from September 1-June 30, condition N.J.S.A. 18A:28-5(a), which refers to calendar years, is irrelevant.

Petitioner's contract of employment began on October 2, 2001, but she did not actually begin teaching in the classroom until December 1, 2001, when HCESC

completely implemented the program. Nevertheless, it is a fact that the first academic year of the pre-school program commenced during the 2001-2002 academic year.

Therefore, petitioner acquired tenure on September 2, 2004, after she had begun her fourth academic year.

CONCLUSION

Petitioner had no written notice of a final action by the school board, her 90-day period for filing a petition had not yet commenced. Therefore her petition filed on August 14, 2006, was timely.

Petitioner acquired tenure rights while teaching in the Franklin Township School District in a program administered through a contract between the Franklin Township Board of Education and the HCESC Educational Services Commission. The Franklin Township Board of Education undertook the operation of the program from the HCESC Educational Services Commission, and hired petitioner, all tenure rights she had acquired are to be recognized and preserved by the Franklin Township Board of Education.

Petitioner acquired tenure no later than September 2, 2004, the date she had worked the equivalent of three full academic years and the beginning of her fourth academic year employed as a teacher with a certificate in a position that required a certificate.

DECISION AND ORDER

The Petitioner's motion for summary decision is **GRANTED**, and the Township of Franklin Board of Education's motion for summary decision is **DENIED.** Therefore, it is **ORDERED** that petitioner acquired tenure on September 2, 2004.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 9, 2008
DATE

DONALD J. STEIN, ALJ

Date Received at Agency:

June 9, 2008

Mailed to Parties:

JUN 11 2008
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW
OFFICE OF ADMINISTRATIVE LAW

/cs/bdt

EXHIBITS

For Petitioner:

P-1 Instructional certificate

P-2 Petitioner's contract with Franklin

P-3 Letter from petitioner

For Respondent:

None

Joint exhibits:

J-1 Joint Stipulation of Facts and attachments

322-0

#322-08L

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

JON S. CORZINE
Governor

LUCILLE E. DAVY
Commissioner

July 25, 2008

Martin M. Barger, Esq.
Reussille, Mausner, Carotenuto,
Barger, Kenny & Steel, LLC
P.O. Box 580
Red Bank, NJ 07701

Sookie Bae, DAG
NJ Department of Law & Public Safety
Division of Law, Education Section
P.O. Box 112
Trenton, NJ 08625-0112

Cherie L. Adams, Esq.
Adams, Stern, Gutierrez & Lattiboudere, LLC
744 Broad Street
Suite 1600
Newark, NJ 07102

Dear Counsel:

I have reviewed the record in conjunction with respondents' respective motions for reconsideration of my June 17, 2008 decision in the matter entitled *Board of Education of the Borough of Tinton Falls, Monmouth County v. Commissioner and New Jersey State Department of Education, Monmouth County Superintendent of Schools, and Board of Education of the Township of Colts Neck, Monmouth County,* Agency Dkt. No. 165-6/08.

In their separate motions, respondents each seek reconsideration of this decision because they believe it to hold the Superior Court, rather than the Commissioner of Education, to be the proper venue for adjudication of petitioner's claim that *N.J.S.A.* 18A:38-7.8 does not require it to educate students who reside within the boundaries of Naval Weapons Station Earle (NWS Earle) but are not the dependent children of Navy personnel. Respondents contend that the issue raised by petitioner is fundamentally a school law dispute, and that any potential contractual issues suggested

by the contracts and settlements accompanying the petition are tangential to the central question of proper construction of *N.J.S.A.* 18A:38-7.8. According to respondents, the outcome of this question – notwithstanding any contractual claims that may be implicated thereby – is ultimately controlled by legislative intent, and the entire controversy must be addressed in the first instance by the Commissioner of Education in light of her plenary authority over the school laws. (State Respondents' Brief at 5-9; Colts Neck Board of Education's Brief at 4-6)[1] Petitioner, in turn, concedes that the central question herein is, indeed, one of school law and that the proper venue for its adjudication would ordinarily be the Commissioner rather than the court, but urges that the normal process cannot apply in this instance because the Commissioner is a named respondent and is thus foreclosed from determining the matter due to conflict of interest. (Petitioner's Reply at 1-2)

Upon review, I have determined to reconsider my prior decision to the extent, and for the reasons, set forth below.

Initially, I stress that my decision of June 17, 2008 was intended to be final with respect to my denial of petitioner's request for a declaratory ruling, but exploratory with respect to the question of Commissioner jurisdiction – which I assumed petitioner was seeking to invoke – over the issue raised in the petition; it was for this reason that my comments regarding venue were made as a suggestion, with briefing requested from the parties and the possibility contemplated that the court – given that petitioner had filed its claim there as well – would find that jurisdiction properly rested with the Commissioner. However, it is now clear from the parties' submissions on motion for reconsideration that petitioner did not, in fact, want a hearing before the Commissioner and, consequently, the manner in which briefing was requested in my decision allowed it to be read as an effective rejection of Commissioner jurisdiction rather than a request for argument upon which I would subsequently render a determination, assuming the court did not itself direct that the matter be heard by me. Thus, my June 17, 2008 decision in this regard may appropriately be viewed as the result of a mistake warranting reconsideration pursuant to *N.J.A.C.* 6A:3-1.15(b).

Further, I find that the parties' papers on motion have effectively set forth the jurisdictional argument I had anticipated in response to my June 17, 2008 decision, so that I may now appropriately consider the question I had previously deferred. Finally, I note that on June 19, 2008, prior to receipt of my June 17th decision, DAG Bae had written to contend that the named State respondents were not proper parties to petitioner's action since the relief sought in the petition pertained solely to the Colts Neck Township Board of Education; and, indeed, upon review of petitioner's pleading, I find

[1] The Colts Neck Board of Education also argues (at 7-8) that the petition in this matter is untimely filed; that argument, however, is inappropriate in the context of the present motion and is, consequently, not considered herein.

that no allegations have been made against me personally notwithstanding that petitioner has named me as an individual respondent.

Accordingly, I have determined that the petition in this matter is appropriately construed as initiating a school law dispute pursuant to *N.J.S.A.* 18A:6-9, and I ORDER that the matter may thus proceed as a contested case before the Commissioner of Education in accordance with applicable rule. Consistent with this holding, I am: construing DAG Bae's aforementioned letter of June 19, 2008, pursuant to *N.J.A.C.* 6A:3-1.5(g), as a motion to dismiss in lieu of answer as to the State respondents; directing that an answer to the petition be filed by the Colts Neck Township Board of Education within 20 days of the filing date of this decision; and advising that, upon receipt of the Board's answer, this matter will be transmitted to the Office of Administrative Law for further proceedings with the instruction that the DAG's motion be determined by the Administrative Law Judge as a threshold issue prior to any consideration of petitioner's claims on the merits.[2]

Sincerely,

Lucille E. Davy
Commissioner

c: County Superintendent
State Law Library

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

#323-08

OAL DKT. NO. EDU 5022-08
AGENCY DKT. NO. 81-3/08

IN THE MATTER OF THE TENURE	:	
HEARING OF YMA ROSENTHAL,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
LINDEN, UNION COUNTY.	:	

The record of this matter, the parties' Settlement Agreement and General Release, and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon such review, the Commissioner concurs with the ALJ that – for the reasons set forth with particularity in the record – the proposed settlement is consistent with established standards governing settlement of tenure matters. *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846. In so concurring, however, the Commissioner stresses that – notwithstanding any impression created by paragraph 19 of the agreement to the contrary – records of all contested case hearings are open for public inspection pursuant to *N.J.A.C.* 1:1-14.1(a), unless, for good cause shown, the Administrative Law Judge orders sealing of the record, or any part thereof, and the Board is at all times obliged to comply with the requirements of New Jersey's Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq.* with respect to information concerning this matter.*

* Although the parties themselves recognize the requirements of law regarding public disclosure – as clearly represented by the Board Attorney in his letter to the ALJ dated June 11, 2008 – the Commissioner reiterates this point because the parties' understanding is not evident on the face of the Settlement Agreement.

Accordingly, the settlement is hereby approved and the tenure matter dismissed, subject to compliance with the terms of the settlement and applicable law regarding public disclosure. A copy of this decision shall be forwarded to the State Board of Examiners for action against respondent's certificate(s) as that body deems appropriate.

IT IS SO ORDERED.

Lucille Wong

COMMISSIONER OF EDUCATION

Date of Decision: 7/25/08

Date of Mailing: 7/28/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 05022-08
AGENCY DKT. NO. 81-3/08

IN THE MATTER OF THE TENURE HEARING OF YMA ROSENTHAL, SCHOOL DISTRICT OF THE CITY OF LINDEN, UNION COUNTY

Mark A. Tabakin, Esq., for petitioner (Weiner Lesniak, attorneys)

Richard J. Kaplow Esq., for respondent

Record Closed: June 24, 2008 Decided: June 24, 2008

BEFORE **J. HOWARD SOLOMON,** ALJ:

This matter involves tenure charges of conduct unbecoming, incompetence, insubordination and/or other just cause certified by the School District of Linden (District) against Yma Rosenthal (Rosenthal) under the Tenure Employees' Hearing Law, N.J.S.A. 18A:6-10 to -18.1.

Rosenthal is a tenured teaching staff member employed by the District. The District accused Rosenthal of engaging in a non-curriculum and unauthorized discussion about HIV, sexually transmitted diseases and oral, anal and vaginal sex.

On March 20, 2008, the District filed its written charges with the Commissioner of Education (Commissioner). Rosenthal filed her answer on March 31, 2008. Subsequently, the matter was referred by the Commissioner to the Office of Administrative Law (OAL) where it was received on April 7, 2008 for a hearing as a contested case.

On June 4, 2008, the date scheduled for hearing, both parties agreed to a proposed settlement subject to approval by the Commissioner, the basic terms of which were placed on the record. In accordance with the decision of the State Board of Education in In re Cardonick, State Board decision of April 6, 1983 [1990 School Law Decisions (S.L.D.) 842, 846] and as codified by N.J.A.C. 6A:3-5.6, the record of any proposed settlement must include:

> . . . the nature of the charges, the length of the teacher's employment, circumstances justifying the settlement, consent or authorization by the Board of Education and the teacher to the proposed agreement, the administrative law judge's finding that the teacher entered into the agreement with a full understanding of his or her rights and [a finding] that the agreement is consistent with the public interests.

On June 12, 2008, the OAL held a public hearing on the issue of whether or not the proposed settlement agreement, which had since June 4, 2008 been memorialized into a more formal written agreement, should be accepted. Counsel for both parties set forth on the record the reasons why settlement would be in the public interest. Rosenthal testified that she fully understood and voluntarily agreed to the terms of the settlement. In addition, and as noted above, the parties prepared a Settlement Agreement and General Release, which is attached to and fully incorporated in this decision. By resolution dated June 18, 2008, the Board approved the settlement.

Based upon my review of the record and the testimony at the hearing, I **FIND** that the proposed settlement is consistent with the public interests for the following reasons:

1. Rosenthal has been employed as a teacher in the Linden school system since September 2003.

2. It is anticipated that the hearing in this matter would be protracted and costly.

3. If a hearing becomes necessary, the District has identified school personnel who are potential witnesses.

4. Litigation of the charges would lead to the disruption of the District's educational program due to the great amount of time lost by administrators and other personnel who would be required to testify to the incidence which led to the filing of the tenure charges.

5. Under the proposed settlement, Rosenthal has submitted her resignation effective June 30, 2008.

6. Under the best of circumstances, the hearing needs to be conducted and then the administrative law judge would have forty-five days to prepare an initial decision and the Commissioner would have an additional forty-five days for review and issuance of a final decision.

7. If the tenure matter proceeds to hearing, both parties would incur costs of paying their attorneys for a likely lengthy hearing.

8. From the District's viewpoint, the outcome under the settlement would be as good as or better than could be achieved if the District were to prevail after a lengthy or costly tenure battle. Money spent on litigation costs would be put to better use for the benefit of the children of Linden.

9. Before entering into this agreement, Rosenthal fully understood her rights and had adequate opportunity to consult with legal counsel.

10. In particular, Rosenthal acknowledged her understanding that the Commissioner is required under N.J.A.C. 6A:9-17.4 to refer this matter to the State Board of Examiners for whatever action it deems appropriate.

11. The settlement fully disposes of all issues in controversy.

Based upon the foregoing, I **CONCLUDE** that the terms of settlement are in the public interest.

It is **ORDERED** that the parties comply with the terms of settlement and that these proceedings are hereby concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

6-24-08
DATE

J. HOWARD SOLOMON, ALJ

Date Received at Agency: 6-26-08

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUN 26 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

pb

2008 JUN 23 A 7:47
OFFICE OF ADMIN LAW

4. Approve the following resolution:

WHEREAS, on March 5, 2008, the Linden Board of Education certified Sworn Charges of Unbecoming Conduct, Incompetence, Insubordination and Other Just Cause against Employee #6-07/08, finding that there was probable cause to credit the evidence in support of said charges and that the charges were sufficient, if credited, to warrant the dismissal and/or reduction of salary of Employee #6-07/08; and

WHEREAS, the charges were filed with the Commissioner of Education and transmitted to the Office of Administrative for a hearing; and

WHEREAS, the parties met and negotiated in good faith in an effort to amicably resolve the charges; and

WHEREAS, the Superintendent and Counsel for the Board of Education recommend that this matter be settled in accordance with the terms set forth in the Settlement Agreement and General Release;

NOW THEREFORE, BE IT RESOLVED, that the Linden Board of Education hereby approves the Settlement Agreement and General Release; and

BE IT FURTHER RESOLVED, that the Board President and Board Secretary are directed to execute the Settlement Agreement and General Release and take such action as is necessary to effectuate the terms of the Agreement.

I CERTIFY THE FOREGOING TO BE A TRUE COPY OF THE RESOLUTION ADOPTED BY THE BOARD OF EDUCATION OF LINDEN IN THE COUNTY OF NEW JERSEY, AT A MEETING HELD ON JUNE 16, 2008.

Kathleen A. Gaylord
Business Administrator/Board Secretary

6/18/08
Date

SETTLEMENT AGREEMENT and GENERAL RELEASE

This Settlement Agreement ("Agreement") is made and entered into between the **Board of Education of the City of Linden** (the "Board") and **Yma Rosenthal** ("Rosenthal"), collectively, "the Parties".

2008 JUN 23 A 11:41
OFFICE OF ADMIN LAW

WHEREAS, on March 20, 2008, the Board filed Certified Sworn Charges of Unbecoming Conduct, Incompetence, Insubordination and Other Just Cause together with a Sworn Statement of Evidence in support of the Charges against Rosenthal with the Commissioner of Education, OAL Docket Number EDU 2055-08, Agency Reference Number 81-3/08 (the "Charges"); and

WHEREAS, Rosenthal filed Opposition to the Charges on or about March 28, 2008; and

WHEREAS, the parties are now mutually desirous of settling the Charges in lieu of conducting a hearing before the Office of Administrative Law, so as to avoid expending further resources and to eliminate the uncertainties of litigation; and

WHEREAS, the Board and Rosenthal deem it to be in their best interests to set forth in a formal written agreement their respective rights, duties and obligations regarding the settlement of the Charge; and

WHEREAS, all parties have been afforded the opportunity to consider the terms of this Agreement with advice of counsel and/or a representative of their choice;

NOW, THEREFORE, in consideration of the promises and the mutual covenants herein contained, and for other good and valuable considerations, the parties hereby agree as follows:

1. The **"Board",** as used herein, shall at all times mean the Board of Education of the City of Linden, its affiliates, predecessors, successors and assigns of any and all of them, their present and former directors, officials, officers, representatives, associates, partners, servants, employees, agents, attorneys, and successors, whether in their individual or official capacities, and all other persons, firms, corporations, associations, partnerships or any other entity connected therewith.
2. **"Rosenthal",** as used herein, shall mean Yma Rosenthal her heirs, representatives, privies, executors, administrators, assigns, successors-in-interest and predecessors-in-interest.
3. There is no admission of wrongdoing by either party because reasonable minds can differ as to the efficacy of the educational modalities used in the delivery of educational services by Rosenthal at issue in this dispute.
4. In consideration of the Board's covenants set forth in Paragraph 4, Rosenthal hereby resigns her position as a tenured teacher, effective June 30, 2008. This resignation shall be deemed accepted by the Board upon execution of this Agreement. Rosenthal expressly agrees and understands that her resignation is final and irrevocable no matter what and regardless of whether or not any application for other employment is successful. In consideration of the mutual promises and exchanges

made herein, Rosenthal agrees to never seek reemployment with the Board at any time in the future in any capacity and waives any claim that she may have to tenure status with the Board.

5. Rosenthal further agrees that for the period of April 7, 2008, through June 30, 2008, Rosenthal shall be deemed to be on a paid administrative leave. During this period of time, Rosenthal shall continue to receive her regular salary payments, through the Board's payroll system at her current 2007-2008 school year rate of pay, including all appropriate deductions and contributions. Additionally, upon submission by Rosenthal of proof of her COBRA payments, the Board shall reimburse that out-of-pocket expense to Rosenthal.

6. The Board shall, upon receipt of any inquiry related to Rosenthal's employment, supply a neutral letter of reference setting forth her salary, service dates, positions held and a statement that her annual evaluations were satisfactory.

7. In consideration of the promises and covenants set forth in this Agreement, the Board shall pay Rosenthal the equivalent of six (6) month's salary, at her current 2007-2008 school year rate of pay. The Board shall issue a Form 1099 evidencing this payment. Rosenthal shall be solely liable for and agrees to pay any amount that may be determined to be due and owing as taxes, interest and penalties arising out of such payments. Any and all tax liabilities arising from the payments set forth herein are the sole and exclusive responsibility of Rosenthal and she

hereby indemnifies and holds harmless the Board from any and all tax liabilities arising therefrom.

8. The parties agree that the payments set forth in Paragraphs 6 and 8 shall not be made until and unless the Commissioner of Education approves this Agreement as settlement of the Charges.

9. In considerations of the promises set forth in Paragraphs 4 through 8, the parties further agree and understand that this Agreement is a compromise settlement of all claims asserted and unasserted in connection with Rosenthal's separation of employment. By entering into this agreement, none of the parties admits that it has violated Title 18A, state or federal law or any contractual provisions that might exist.

10. The parties acknowledge and agree that the payments set forth in this Agreement are in full and complete settlement of any and all claims that had been asserted or can be asserted or may be asserted or could be asserted by either party against the other for compensatory damages, pain, suffering, emotional distress, stress, humiliation, embarrassment, mental anguish, medical expenses, punitive damages, interests, attorneys fees, costs of suit, loss of sick time, loss of vacation time, loss of benefits, consequential damage, reputation damage, breach of express or implied contract, interference in any contract, economic opportunity or prospective economic advantage which arose out of or could arise out of Rosenthal's employment with the Board.

11. As an inducement for the parties to enter into this Agreement, each party does hereby remise, release and forever discharge all other parties from any and all debts, obligations, suits, actions, causes of action, claims or demands, in law or in equity, which any one party now has or hereafter may assert against the others arising out of Rosenthal's employment by the Board including, but not limited to, all claims, liabilities, costs and attorneys' fees under: (1) the New Jersey tenure laws and regulations; (2) the Civil Rights Acts of 1964, as amended (42 U.S.C. 2000(e) et seq.); (3) the Americans with Disabilities Act; (4) the New Jersey Law Against Discrimination (N.J.S.A. 10:5-1, et seq.); (5) any collective negotiations agreement; (6) Title 18A and its rules and regulations; (7) the Constitution of the United States; (8) the Constitution of New Jersey; (9) wage and hour laws, federal and state; (10) any other federal or state statute or common law; (11) the New Jersey Tort Claims Act N.J.S.A. Title 59; (12) the Fourth and Fourteenth Amendments to the United States Constitution; and/or (13) other causes of action whether enumerated herein specifically or not. Further, Rosenthal hereby waives any and all relief not explicitly provided for in this Agreement.

12. Rosenthal and the Board expressly understand and agree that the payments set forth in this Agreement include any and all amounts that may be claimed by Rosenthal or on her behalf, or by her attorneys, heirs, successors or assigns, against the Board.

13. The parties agree that in consideration of the promises set forth in this Agreement that neither party shall file: (a) any and all appeals before the Commissioner of Education seeking any type of relief whatsoever; (b) any grievances or arbitrations relative to Rosenthal's employment or termination; and (c) any type of judicial or administrative action of any type or nature in connection with Rosenthal's employment, termination or payments made under this Agreement. Rosenthal agrees not only to release, acquit and forever discharge the Board from any and all claims which arose from the incidents set forth and in any way related thereto to the tenure charge certified by the Board that Rosenthal could make on her own behalf, but also those which have been or may be made against the Board by any other person or organization on her behalf. Rosenthal specifically waives any right to become, and promises not to become, a member of any class in any case in which any claim is asserted against the Board, involving any event that has occurred on or before the date of this Settlement Agreement and General Release. The Board affirms that, as of the date of execution of this Settlement Agreement and General Release, they have no knowledge of any pending class action against it to which Rosenthal could be a potential class member.

14. Rosenthal specifically acknowledges that the payments referred to in Paragraphs 6 and 8 hereof constitutes any and all additional consideration otherwise owed to her for this Settlement Agreement and

General Release or arising from a collective negotiations agreement, policy or regulation.

15. The parties hereby acknowledge and agree that they further expressly waives and assumes the risk of any and all claims or damages which exist as of this date for which the Board and Rosenthal do not know of or suspect to exist, whether through ignorance, oversight, error, negligence, or otherwise and which, if known, would materially effect their decision to enter into this Settlement Agreement and General Release.

16. Rosenthal specifically acknowledges that the Commissioner of Education must approve the terms of this Agreement and has the authority, at her discretion, to refer this matter to the Department of Education's Office of Licensure and Credentials for review.

17. Rosenthal and the Board shall bear all costs and expenses arising from the actions of their own counsel in connection with the Settlement Agreement and General Release. As further consideration for this Settlement Agreement and General Release, Rosenthal and her attorney agree that the sums set forth in Paragraphs 6 and 8 represent all of the monies which the Board has agreed and will ever agree to pay to Rosenthal and her attorneys and that any additional attorneys' fees which may arise from the actions of Rosenthal's attorneys in connection with the incidents set forth and any incidents related thereto to the tenure charge certified by the Board are to be borne by Rosenthal.

18. Unless directed to do so by Court Order or lawfully issued subpoena with notification to the Board at the time the lawfully issued subpoena was issued, Rosenthal agrees that she will not give testimony or evidence against the Board in any proceeding with respect to the incidents giving rise to the tenure charges certified by the Board and/or with respect to the terms and conditions of this Agreement.

19. The parties and their attorney(s) agree and promise that they will not disclose, either directly or indirectly, in any manner whatsoever, any information regarding either: (a) the substance or existence of Rosenthal's tenure charges and/or her actions giving rise to the tenure charges; or, (b) the existence, terms or contents of this Settlement Agreement and General Release, to any person or organization, including, but not limited to, any governmental agency, members of the press and media, present and former officers, employees and agents of the Board and other members of the public. This paragraph shall not preclude the parties or their attorney(s) from disclosing the existence or terms of this Settlement Agreement and General Release to governmental authorities that require such information. The parties may only state, without elaboration, as follows: "Rosenthal elected to resign."

20. This Settlement Agreement and General Release shall be construed and interpreted in accordance with the laws of the State of New Jersey.

21. The waiver by Rosenthal and/or the Board of a breach of any provision hereof shall not operate or be construed as a waiver of that breach by the other, or as a waiver of any subsequent breach by the other.

22. If any term, provision or condition of this Settlement Agreement and General Release is held invalid or unenforceable by a court of competent jurisdiction, such holding shall be without effect upon the validity or enforceability of any other provision, term or condition of this Settlement Agreement and General Release.

23. Rosenthal and the Board agree to cooperate fully and execute any and all supplementary documents and to take all additional actions which may be necessary or appropriate to get full force and effect of the basic terms and interest of this Settlement Agreement and General Release.

24. This Settlement Agreement and General Release may be executed in counterparts but shall be enforceable only if executed by Rosenthal and the Board.

25. This Settlement Agreement and General Release contains the entire Agreement between Rosenthal and the Board with regard to the matters set forth in it, and shall be binding upon and inure to the benefit of their officials, officers, directors, attorneys, representatives, employees, associates, partners, agents, servants, executors, administrators, personal representatives, heirs, successors and assigns of each, and all other persons, firms, corporations, associations or partnerships or any

other entity or persons connected therewith, except as set forth herein or as may be agreed to in writing between the parties.

26. In entering into this Settlement Agreement and General Release, Rosenthal has relied upon the legal advice of her attorney, who is the attorney of her own choice, as to the terms of this Settlement Agreement and General Release which have been completely read and explained by her attorney and those terms are fully understood and voluntarily accepted as being reasonable.

27. In any action commenced against a party to enforce the provisions of this Agreement, the moving party, if it is the prevailing party, shall be entitled to recover its reasonable attorneys' fees, costs and disbursements incurred in prosecuting the action.

28. This Settlement Agreement and General Release shall become effective immediately following execution by Rosenthal and the Board but shall be contingent on and subject to approval and ratification by the Board.

Attest:

Kathleen A. Gaylord
Board Secretary

Dated: 6/16/08

BOARD OF EDUCATION OF THE CITY OF LINDEN

BY: _____
Bryan Russell
Board President

Dated: 6/16/08

YMA ROSENTHAL

BY: _____
Yma Rosenthal
Dated: 6/10/08

Dated: June 10, 2008

STATE OF NEW JERSEY, COUNTY OF UNION
SS.:

I CERTIFY that on this 10th day of June ,2008

YMA ROSENTHAL personally came before me and acknowledged under oath, to my satisfaction, that she is the person

a) named in and personally signed this document; and
b) signed, sealed and delivered this document as her act and deed.

Richard J. Kaplan
Attorney at Law of New Jersey

#334-08

334-C

OAL DKT. NO. EDU 12160-06
AGENCY DKT. NO. 393-10/06

MURPHY BUS SERVICE, INC.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
MONMOUTH-OCEAN COUNTY EDUCATIONAL SERVICES COMMISSION, MONMOUTH COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the parties' fully executed Stipulation of Settlement – erroneously returned to this agency by the Office of Administrative Law (OAL) as a withdrawal pursuant to *N.J.A.C.* 1:1-19.2 – have been reviewed in accordance with *N.J.A.C.* 1:1-19.1, together with the revised Stipulation of Settlement submitted by the parties in response to the Department's request for clarification.[1]

Upon such review, the Commissioner accepts the proposed form of agreement to be used between the respondent Educational Services Commission (ESC) and the local district boards of education contracting with it for coordinated transportation services (Exhibit A,

[1] By telephone conference call on June 9, 2008 and again by letter dated June 30, 2008, the Director of the Bureau of Controversies and Disputes advised the parties that the stipulation of settlement included within the file returned by the OAL could not be reviewed in accordance with *N.J.A.C.* 1:1-19.1 because the meaning of the phrase "...Respondent having agreed to modify its contract formats which it intends to utilize with Boards of Education seeking transportation and form of contract which is dictated by the State of New Jersey Department of Education..." was unclear and could be read to mean that respondent intended to "modify...form of contract which is dictated by the State...," which was presumably not the parties' intent. The parties were, therefore, directed to submit either: 1) a Stipulation of Dismissal reciting that they had amicably resolved the issues in dispute between them, so that the matter could proceed as a withdrawal; or 2) if they wished to have the terms of their agreement reviewed and approved by the Commissioner, a revised agreement clarifying their intentions and verifying that the agreement was in compliance with *N.J.A.C.* 6A:27-10.1(f). On July 16, 2008, an executed revised agreement was duly submitted for the Commissioner's review.

Agreement for Coordinated Transportation), with the understanding that it is to be applied consistent with the provisions of *N.J.A.C.* 6A:27-10.2(c); however, the Commissioner cannot agree to the parties' modification (Exhibit A, Addendum to Student Transportation Contract) of the standard form of contract prescribed by the Commissioner for contracts between public school entities and transportation service providers pursuant to *N.J.A.C.* 6A:27-9.9(b).[2] The very purpose of standard contracts with transportation service providers – to ensure uniformity and consistency statewide – would be defeated if individual parties could alter the prescribed forms at will; moreover, the parties' purpose herein – to ensure that the service provider is protected in the event a board breaches its agreement with the ESC – is sufficiently addressed by the agreement for coordinated transportation proposed for use by the ESC and its contracting boards.

Accordingly, *subject to the exclusion set forth above*, the Commissioner approves the parties' settlement and adopts the revised Stipulation of Settlement as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement as modified herein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8/04/08
Date of Mailing: 8/04/08

[2] See http://www.state.nj.us/education/finance/transportation/contracts/0809/.

McOMBER & McOMBER, P.C.
54 Shrewsbury Avenue
Red Bank, NJ 07701
(732) 842-6500
Attorneys for Respondent
Monmouth-Ocean Educational Services Commission

MURPHY BUS SERVICE, INC. Petitioner, -vs- MONMOUTH-OCEAN EDUCATIONAL SERVICES COMMISSION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY AGENCY DOCKET NO. 393-10/06 OAL DOCKET NO. EDUOT 12160-06 Civil Action **STIPULATION OF SETTLEMENT**

This Agreement, made this ____ day of July, 2008, by and between the Petitioner, Murphy Bus Transportation, Inc. and Respondent, Monmouth-Ocean Educational Services Commission.

RECITALS

A. The Respondent provides coordinated transportation services pursuant to *N.J.A.C.* 6A:27-10.1 for member boards of education in Monmouth and Ocean Counties.

B. As part of the coordinated transportation services provided for member boards of education, bids are obtained from the transportation service providers to transport students traveling for purposes of special education, vocational schools, etc.

C. Based on bids received for such purposes, Respondent awards contracts to low bidders for any such routes so as to satisfy the purposes of *N.J.A.C.* 6A:27-10.1.

D. Petitioner and Respondent were involved in one particular route for a participating board of education, which board of education cancelled the route choosing instead less expensive methods and did so after the agreements had been executed by the Board of Education, the Respondent and Petitioner.

E. As a result, Petitioner complained that terminating an agreement, once bid, awarded and executed, solely for purposes of economy and not a student's change of residency, placement or other justifiable reason, constituted a breach and cost Petitioner losses.

F. Respondent has also observed that member boards of education sometimes unintentionally utilize Respondent's services solely to obtain cost information without any true intention of entering into transportation contracts to the low bidder.

G. As a result of the lost time and money associated with such abuses, Respondent and Petitioner agreed to resolve the dispute addressed by the Petition and Answer through the modification of the contracts between Petitioner and Respondent and between Respondent and member board of education.

H. Both Petitioner and Respondent understand that this settlement is contingent upon the approval of the Commissioner.

NOW, THEREFORE, in consideration of the mutual covenants herein contained, the Petitioner and Respondent agree as follows:

1. The Recitals set forth above are incorporated herein.

2. Petitioner and Respondent agree to modify the contract formats to be utilized pursuant to *N.J.A.C.* 6A:27-10.1 to be used between Respondent and transportation providers and between Respondent and its member boards of education, which contract formats are attached hereto and made a part hereof as Exhibit "A".

3. As a result of this Settlement Agreement, all disputes, issues and claims exchanged between Petitioner and Respondent are resolved with prejudice.

4. This settlement is contingent upon the approval of the Commissioner of Education.

5. By entering into this Settlement Agreement, each party releases and discharges the other with respect to all claims or rights that either party may have against the other. This includes all claims, including those of which either party is not aware and those not mentioned herein. The releases of each party apply to all claims resulting or anything that has happened up now, specifically includes all claims made by Petitioner in this matter.

6. This settlement constitutes the full agreement between the Petitioner and Respondent.

7. The undersigned representatives of the parties hereby acknowledge that

they have been duly authorized by the respective parties to sign this Settlement Agreeme and bind their principals to its terms.

8. This Settlement Agreement is intended to comply with any legal requirements applicable to coordinated transportation services and are subject thereto including, but not limited to, *N.J.A.C.* 6A:27-10.1.

HIMELMAN & HIMELMAN
Attorneys for Petitioner
Murphy Bus Service, Inc.

By:_____
DANIEL J. HIMELMAN

McOMBER & McOMBER, P.C.
Attorneys for Respondent
Monmouth-Ocean Educational Services Commission

By:_____
J. PETER SOKOL

c:\my documents\MOESC\stipulation of settlement for moesc and murphy bus 7-08 (dcg) 7/1/08

AGREEMENT FOR COORDINATED TRANSPORTATION

This Agreement, made this ____ day of _____, 2008, by and between:

Monmouth-Ocean Educational Services Commission, with offices at 23 Christopher Way, Suite 101, Eatontown, New Jersey 07724 (hereinafter referred to as the "MOESC"),

and

_____, with offices at _____, New Jersey 08618 (hereinafter referred to as "Board of Education").

RECITALS

A. The Board of Education desires to transport special education, non-public, public and/or vocational school students to specific destinations.

B. The MOESC offers coordinated transportation services.

C. The MOESC will organize and schedule routes to achieve the maximum cost effectiveness.

NOW, THEREFORE, it is agreed that in consideration of the prorated contract costs calculated by the billing formula adopted by the MOESC, plus an administrative fee of five percent (5%), the Board of Education shall pay the MOESC for transportation services rendered. Said formula shall be based on the number of students and a per pupil mile ratio encumbering any special requirements specified by participating districts.

1. The MOESC will provide the following services:

EXHIBIT A

a. routes coordinated with other districts, whenever possible, to achieve a maximum cost reduction while maintaining a realistic capacity and travel time;

b. an estimated fee for all routes based on a ratio of the number of students and student mileage. It is understood that initial transportation charges are estimates based on initial mileage and ridership and thereby subject to changes as the number of students and/or mileage increases and/or decreases;

c. monthly billing and invoices;

d. computer printouts of student lists for all routes coordinated by MOESC;

e. all necessary interaction and communication between the sending district, receiving school, and respective transportation contractors;

f. constant review and revision of routes;

g. provide transportation within three (3) days or sooner after receipt of the formal written request.

2. It is further agreed that the Board of Education will provide the MOESC with the following:

a. requests for special transportation on approved forms to be provided by the MOESC, completed in full and signed by authorized district personnel;

b. subject to Paragraph 3 herein, withdrawal for any transportation **must be provided in writing** and signed by authorized district personnel; no billing adjustments will

be made without this completed form and will become effective on the date the form is received;

c. Additional Cost - All additional costs generated by unique requests such as mid-day runs or early dismissals will be borne by the district making the request. All such costs must first be approved by the Board of Education.

d. Length of Agreement - This Agreement and obligations and requirements therein shall be in effect between July 1, ____ and June 30, _____,

e. Entire Agreement - This Agreement constitutes the entire and only agreement between the parties and may be amended by an instrument in writing over authorized signature.

3. It is further agreed by the Board of Education to the following:

a. Upon the execution of this Agreement, it is agreed that MOESC's school bus contractor, selected pursuant to the public bidding law, shall exclusively provide pupil transportation services for the identified student during the term of the contract.

b. The Board of Education may terminate this contract only for good cause. Good cause shall not be defined to include a lesser transportation cost alternative available to the Board of Education during the term of the Contract. Good cause includes, but shall not be limited to the following: (1) the student's parent electing to provide transportation for the student for the entire contract term; (2) the student no longer requires the transportation services because the student does not need to travel to the transportation contract's destination because the student's education plan has changed, the school assignment is

changed for education-based reasons, the student has moved from the school district, the student's pupil transportation is merged with other route(s) to reduce cost, or for other good cause shown.

c. The parties to this Agreement acknowledge that the school bus contractor, who is providing or to be providing pupil transportation services as contemplated in this Agreement, is an "intended third-party beneficiary" of the within contract between MOESC and the Board of Education. In the event that the Board of Education should breach this Agreement, the school bus contractor shall have the right to commence legal action against the Board of Education as a result of such breach and may seek compensatory damages, or any other relief that may be appropriate.

MOESC Board President	Date	DISTRICT Board President	Date
MOESC Board Secretary	Date	DISTRICT Board Secretary	Date
COUNTY SUPERINTENDENT	Date		

BOARD PRESIDENT AND BOARD SECRETARY MUST SIGN ALL THREE COPIES AND RETURN TO MOESC WITH A CERTIFIED COPY OF THE MINUTE EXTRACT APPROVING THIS RESOLUTION.

MOESC WILL RETURN A FULLY EXECUTED COPY FOR YOUR RECORDS FOLLOWING SIGNING BY COUNTY SUPERINTENDENT.

STUDENT TRANSPORTATION CONTRACT - Single Route

TO BE ADDED:

15. The parties to this Agreement acknowledge that the transportation contractor who provides pupil transportation services as described in this Agreement is an "intended third-party beneficiary" of the contract between Monmouth-Ocean Educational Services Commission ("MOESC") and the Board of Education. In the event that the Board of Education should breach its Agreement for transportation with the MOESC, the transportation contractor shall have the right to commence legal action against the Board of Education as a result of such breach and may seek compensatory damages, or any other relief that may be appropriate.

#336-08E

336-08

OAL DKT. NO. EDU 8073-08
AGENCY DKT. NO. 162-6/08

R.W. ON BEHALF OF MINOR CHILD, A.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, GLOUCESTER COUNTY,	:	DECISION ON APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this matter – including the sound recording of proceedings at the Office of Administrative Law (OAL) – and the recommended order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner concurs with the ALJ that there has been no change in circumstances that would permit petitioner to seek re-adjudication of her claims, which arose out of the Board's December 11, 2007 decision regarding an incident that occurred in October 2007 and had previously been dismissed as moot[1] due to petitioner's decision to disenroll A.W. from the district and provide him with home schooling rather than have him attend alternative school as directed by the Board.[2]

Moreover, even if petitioner's appeal were properly before the Commissioner, the ALJ is entirely correct that petitioner has failed to meet the requisite standards for the

[1] Commissioner's Decision No. 123-08, decided March 18, 2008, adopting the recommendation of the ALJ (OAL Dkt. No. 98-08).

[2] The present matter was docketed and transmitted to the OAL based on petitioner's representation that she had re-enrolled A.W. in the district; however, it was established during proceedings at the OAL that this was not, in fact, the case, and that petitioner's willingness to enroll A.W. in the district remains contingent on the Board's placing him in the regular high school program.

granting of emergent relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) and *N.J.A.C.* 6A:3-1.6. Initially, the Commissioner concurs, for the reasons clearly set forth in the OAL order (at 5-6), that petitioner has failed to show that A.W. will suffer irreparable harm if the requested relief is not granted.[3] The Commissioner further notes that applicants for emergent relief must also demonstrate a likelihood of success on the merits of the underlying appeal and show that the balance of interests and equities under the circumstances rests in their favor – neither of which petitioner can be found to have done where her factual allegations against the Board are vigorously disputed and the Board has a legitimate interest in seeking to maintain a safe, orderly school environment by removing disruptive students from the regular school setting.

Accordingly, the Order of the ALJ – DENYING petitioner's application for relief – is adopted as the final decision in this emergent matter, which shall be returned to the OAL for such proceedings as are necessary to bring it to closure.

IT IS SO ORDERED.[4]

Lucille E Day

COMMISSIONER OF EDUCATION

Date of Decision: 8/05/08

Date of Mailing: 8/06/08

[3] It is also noted that, contrary to petitioner's representation, the Board was willing to consider allowing A.W. to return to the regular school program for the 2008-09 school year upon review, at the end of the 2007-08 school year, of his academic and disciplinary record at the alternative school. (Board's letter of December 11, 2007, notifying petitioner and her husband of the result of A.W.'s disciplinary hearing)

[4] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

EMERGENCY ORDER
OAL DKT. NO. EDU 08073-08
AGENCY DKT. NO. 162-6/08

R.W. ON BEHALF OF MINOR CHILD, A.W.,
Petitioner,
v.
WASHINGTON TOWNSHIP BOARD OF EDUCATION, GLOUCESTER COUNTY,
Respondent.

R.W., petitioner, pro se

Michael E. Heston, Esq., for respondent (Capehart & Scatchard, attorneys)

BEFORE **LISA JAMES-BEAVERS**, ALJ:

STATEMENT OF THE CASE

Petitioner R.W. on behalf of A.W., a minor child, has petitioned the Commissioner of Education (Commissioner), pursuant to N.J.A.C. 6A:3-1.1 et seq., for an order (1) that A.W. be returned to Washington Township High School; and (2) that A.W. receive tutoring so that he retains his standing. She alleges that the Board's placement of A.W. in an alternative school is due to racism, retaliation and other improper motives.

PROCEDURAL HISTORY

On July 2, 2008, petitioner R.W. on behalf of minor child A.W. filed a petition with the Commissioner seeking emergent relief. On July 22, 2008, the director of the Bureau of Controversies and Disputes of the New Jersey Department of Education transmitted the matter to the Office of Administrative Law (OAL), where it was filed on July 23, 2008, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13 for determination as a contested case. I heard the application for emergent relief on July 28, 2008.

DISCUSSION

N.J.A.C. 6A:3-1.6 sets forth the standard for emergent relief as follows:

> (b) A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief pursuant to Crowe v. De Gioia, 90 N.J. 126 (1982):
>
> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying petitioner's claim is settled;
>
> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
>
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

I have heard the arguments of the parties and read their submissions.

In her Motion for Emergent Relief, petitioner contends:

1. A.W. was a tenth-grade student at the Washington Township High School, Sewell, New Jersey.

2. The allegation that A.W. assaulted another student on October 19, 2007, is false and grounded in racism and bias.

3. There is a pattern of racial profiling in the school district regarding discipline of students.

4. A.W. never should have been expelled when he was only playing around with his friends. The incident was exaggerated.

R.W. appeals the December 11, 2007, decision of the Board to remove A.W. from the high school and requests an order setting forth that A.W. may return to the regular school setting for the 2008-2009 school year.

Counsel for the Board has responded with several arguments that will be discussed in turn. First, the Board argues that the present petition is identical to the one filed by R.W. in January 2008 also appealing the Board's decision of December 11, 2007, removing A.W. from the high school and placing him the Gloucester County Alternative School for the remainder of the 2007-2008 school year. This petition was dismissed by Israel Dubin, ALJ, on February 4, 2008, and the dismissal was adopted by the Commissioner of Education by decision dated March 18, 2008. Thus, the Board argues that this matter is res judicata, that is, already disposed of and unable to be revisited.

Second, the Board argues that, in the event the petition is not determined to be res judicata, the petition is out of time because the action R.W. is seeking to appeal occurred in December 2007. The present petition was filed with the Bureau of Controversies and Disputes on July 2, 2008, which is well beyond the 90-day limitations period set forth by N.J.A.C. 6A:3-1.3(i). The Board further notes that the petition was

not even filed within 90 days of the Commissioner's decision adopting the Initial Decision dismissing the January petition.

Last, the Board argues that petitioner cannot prove the four criteria for emergent relief set forth above. Further, the Board held a hearing that R.W. was informed of and for which she and A.W. were present, but chose to leave.

R.W.'s Petition is Res Judicata

While the petition filed by R.W. in January and the current petition are not identical, they certainly appeal the same board action that occurred in December 2007 finding A.W. guilty of assault, removing him from the high school and offering him placement in the Gloucester County Alternative School. Judge Dubin, who heard the appeal, found that R.W.'s complaint that the decision to place A.W. was borne of institutional racism was an academic question because she had withdrawn A.W. from the district. Thus, he concluded that the relief could not be granted. However, he still analyzed the case under the above factors for emergent relief and concluded that R.W. could not sustain her burden of proving that irreparable harm would occur if A.W. were not placed in the high school. Therefore, it appears that ALJ Dubin already decided the issue of A.W.'s ability return to school by dismissing the petition. The Commissioner of Education, on the other hand, based her decision on the fact that A.W. had withdrawn from the school district when the appeal was filed. Therefore, the Commissioner did not actually render a decision, but summarily dismissed the complaint on the grounds that the ALJ did not have jurisdictional authority to render a decision.

When asked how this petition differed from the one she filed in January 2007, R.W. stated that 1) her son needs a hearing because the case was determined to be moot before; 2) her son needs to be placed somewhere other than in an alternative school; and 3) her complaints of prejudice and racism were never heard. These are not real differences. Judge Dubin did hear the case as an emergent matter. R.W. waived her opportunity to present witnesses at the hearing below when she walked out with her son. In her January 2008 complaint, she claimed that A.W. should not be placed in an alternative school and asked that an expert on racism be in attendance at the hearing.

This petition has already been decided. Even if res judicata did not apply because the Commissioner did not apply the standard for emergent relief and decide the case on the merits, I would have to conclude that A.W.'s situation still has not changed. He is still not enrolled in the district and, therefore, I also lack jurisdictional authority to decide this case and the within petition must be dismissed.

R.W.'s Petition is out of Time

Although this issue does not need to be addressed in light of the foregoing, counsel is correct that, at the very latest, the within petition should have been brought within 90 days of the Commissioner's decision dated March 18, 2007. At that point, it was clear that R.W.'s petition was not going to be addressed unless A.W. was enrolled in the Gloucester County Alternative School, where he was placed. R.W. could have continued fighting to get him back in the high school from that point, but she never enrolled A.W. The reason she gave is that she was fighting the Superior Court juvenile delinquency action and then the District did not make it easy for her to enroll her son in the alternative school. She stated that by the time she could enroll him it was the end of May, so, since it was so close to the end of the school year, they went on vacation. N.J.A.C. 6A:3-1.3(i) provides 90 days in which to file a petition appealing the action of a board. There is no event that took place within 90 days of July 2, 2008, that would allow the filing of R.W.'s petition to be timely. The true action being appealed is the Board's action of December 11, 2007. However, the date of the Commissioner's decision or receipt thereof arguably could have been accepted. Because the petition was out of time, it must be dismissed.

R.W. Cannot Meet the Standards Set Forth in Crowe v. De Gioia

Based on the two conclusions above, the question of whether R.W. met the standard for emergent relief does not need to be reached. Nevertheless, to ensure that this petition is not brought again, it bears noting that the standards have not been met. With regard to whether petitioner has met the first standard of demonstrating irreparable harm, R.W. contends that her son suffered immense harm in social status, educational

status with the loss of credits, and his ability to obtain scholarships for sports. She states that her son wanted to play basketball, but had to leave before the start of the season. The harm that A.W. has suffered has come from R.W.'s decision not to enroll him at the Gloucester County Alternative School and to home school him instead. First, loss in social status does not constitute irreparable harm. Second, A.W.'s educational status would have continued fairly uninterrupted if R.W. had enrolled him in the alternative school. Third, he was never placed on a high school basketball team, so it is impossible to conclude that his sports career or ability to obtain an athletic scholarship was irreparably harmed by his placement in the alternative school. I therefore must **CONCLUDE** that petitioner has failed to establish irreparable harm. Because all four standards have to be met, I **CONCLUDE** that R.W. does not meet the standard for emergent relief and her complaint must be dismissed.

CONCLUSIONS OF LAW

Based on the foregoing, I **CONCLUDE** that R.W.'s petition was decided by the Commissioner of Education's decision dated March 18, 2008, and A.W.'s status within the school district has not changed to provide this court with jurisdiction to hear this petition. Further, because R.W.'s petition was filed more than 90 days after the Commissioner's decision dismissing the January petition, it is out of time. Last, R.W. has not demonstrated the irreparable harm to her son that will occur by his placement in the Gloucester County Alternative School. Therefore, she does not satisfy the Crowe v. De Gioia standards and the petition for emergent relief must be denied.

ORDER

It is hereby **ORDERED** that petitioner's application for emergent relief is **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the Commissioner of the Department of Education does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

July 29, 2008

DATE

LISA JAMES-BEAVERS, ALJ

jh

#339-08

339-08

IN THE MATTER OF THE TENURE :

HEARING OF MARIA PARISE, : COMMISSIONER OF EDUCATION

SCHOOL DISTRICT OF THE BOROUGH : DECISION

OF BUTLER, MORRIS COUNTY. :

:

SYNOPSIS

In April 2003, the Board certified tenure charges of inefficiency, conduct unbecoming, insubordination and other just cause against respondent – a tenured social worker in the district. The tenure charges allege that respondent produced incomplete and/or incorrect work, falsified her timesheets, was unable to communicate with other Child Study Team members, disposed of school property without permission, and refused to follow directions of her superiors and written procedures. The Board suspended respondent without pay for lack of work performance and insubordination, and subsequently eliminated her full time position as part of a reduction in force for the 2003-2004 school year. The matter was put in abeyance at the direction of the Superior Court, which was hearing a related matter.

The ALJ found, *inter alia,* that: there is sufficient credible and legally competent evidence to conclude that respondent engaged in conduct unbecoming a teacher and insubordination, and demonstrated gross ineptness and incompetence in performing the responsibilities of a social worker. In regard to the charge of inefficiency, the ALJ noted that: *N.J.S.A.* 18A:6-11 requires a local board of education to allow at least 90 days in which to correct and overcome the inefficiency; *N.J.A.C.* 6A:3-5.1(c) sets forth specific, stringent guidelines that districts must follow with regard to this 90-day period; and failure to adhere to the regulations constitutes a fatal flaw to tenure charges of inefficiency requiring dismissal. However, the ALJ found that the respondent's overall performance and conduct demonstrated incompetence, and there was no need for the Board to comply with the requirements of *N.J.A.C.* 6A:3-5.1(c) as respondent had resisted all efforts of the District to help her and a remedial plan and 90-day period to correct the inefficiencies would have been an exercise in futility. The ALJ ordered that the respondent be dismissed from her tenured position.

Upon a thorough and independent review of the record, the Commissioner rejected the Initial Decision, finding and concluding that the Board's failure to provide respondent with a modified professional improvement plan and to accord a 90-day remediation period along with the provision of positive assistance during this period compel dismissal of the charges of inefficiency against respondent. The Commissioner rejected the Board's attempt to re-categorize its inefficiency charges as ones of incompetence. Even assuming, *arguendo*, that the Commissioner continues to accept incompetency – as defined in prior case law – as a legitimate stand-alone tenure charge rather than merely a gradient of inefficiency, and further assuming that the Board had certified such a charge against respondent, prior case law makes it fully evident that the Board could not sustain this charge. The Commissioner remanded the matter to the OAL for factual findings and conclusions on each of the remaining charges and a recommended penalty determination.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

August 7, 2008

OAL DKT. NO. EDU 5793-03
AGENCY DKT NO. 152-5/03

IN THE MATTER OF THE TENURE	:	
HEARING OF MARIA PARISE,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF BUTLER, MORRIS COUNTY.	:	
	:	

The record of this matter and the Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. Respondent requested and received two extensions of time within which to file exceptions; the Board requested and received one extension of time for the filing of reply exceptions. These submissions – made in accordance with the adjusted schedules – were fully considered by the Commissioner in reaching her determination herein.

On exception, respondent recounts the specific tenure charges which were filed against her by the Board:

I. Inefficiency – under this heading respondent is charged with:

a. Failure to Complete Required Documents in a Timely Manner
b. Failure to Coordinate with Other Members of the Child Study Team
c. Failure to Properly Classify
d. Failure in Dealing with Parents
e. Ignoring Transportation
f. Case Management Failure

II. Conduct Unbecoming – here the District alleges:

a. Failure to Properly Sign and/or Falsifying Sign in Sheets
b. Signing IDEA Documents Herself in Lieu of Obtaining Parental Signatures
c. Inappropriate Dealings With Staff Members

III. Insubordination – alleging:

a. Not Following Directives with Regard to Signing in and out of the District
b. Ignoring Directives with Regard to Calling the Substitute Service to Report Absences
c. Ignoring Directives with Regard to the Installation and Use of Computer Equipment

IV. Other Just Cause

Respondent asserts that this charge merely incorporates the prior three charges.

(Respondent's Exceptions at 2-4)

Respondent first argues that the charge of inefficiency must be dismissed as a consequence of the Board's failure to comply with the dictates of *N.J.S.A.* 18A: 6-11, *N.J.A.C.* 6A:3-5.1(c) and governing case law which require that when initial tenure charges are filed at the District level charging an individual with inefficiency, such individual must at that time be accorded a prospective 90-day remediation period and given a modified professional improvement plan (PIP). The District is further obligated to provide the teaching staff member with assistance to correct the inefficiencies during the 90-day period. (Respondent's Exceptions at 3) While it is conceded that the Board in this matter provided respondent with the requisite 90-day notice, she maintains that it failed to comply with its obligation to modify her PIP or to provide her any assistance during the 90-day remediation period. Furthermore, respondent avers, the record contains absolutely no documentation whatsoever "that anything took place in the

90-days, whether improvement or lack thereof, on the part of Respondent."[1] Citing to *In the Matter of the Tenure Hearing of Alan S. Tenney, School District of the Borough of Palisades Park, Bergen County*, decided by the Commissioner March 18, 1985; *In the Matter of the Tenure Hearing of Julio Triana, School District of the City of East Orange, Essex County*, decided by the Commissioner July 23, 1987; and *In the Matter of the Tenure Hearing of Peter Loria, School District of the City of Newark, Essex County*, decided by the Commissioner October 21, 1992, respondent urges that it is by now well-established that when a Board fails to comply with the procedural requirements attendant to tenure charges of inefficiency, such charges must be dismissed. (*Id.* 18-19)

The Administrative Law Judge (ALJ) clearly erred, respondent professes, when – in addressing the Board's abject failure to deal with the procedural requirements of its inefficiency charge – she stated:

---

[1] As confirmation of the Board's abdication of its legal responsibility during the 90-day remediation period, respondent offers two interrogatory questions which she propounded on the Board and the Board's answers to these questions:

> Q. 69. Describe with particularity each and every occasion and by whom Petitioner gave assistance to Respondent after giving notice of the charge of inefficiency to Respondent with respect to her work and/or position. Include in your answer each person's statements and responses, and if any writings were prepared by Petitioner or Respondent, or by any of Petitioner's agents, members, officers, representatives or employees, attach copies of all writings as well as any written analysis, reports of such assistance given by Petitioner to Respondent, and all actions taken in response to the assistance to Respondent by Petitioner. (Exhibit R-1)
>
> A. Not possible to answer. (Exhibit R-2)
>
> Q. 70. Describe with particularity each conversation that Respondent had with any employees and/or supervisors of Petitioner regarding any improvement plan proposed by Petitioner to assist Respondent in her work and/or position as a result of the charge of inefficiency. Include in your answer each person's statement and responses, and if any writings were prepared by Petitioner or Respondent, or by any of Petitioner's agents, members, officers, representatives or employees, attach copies of all writings, as well as any written analysis, reports of any such improvement plan proposed by Petitioner to assist Respondent's work and/or position, and all action taken in response to the improvement plan proposed by Petitioner. (Exhibit R-1)
>
> A. Not possible to answer. (Exhibit R-2)
>
> (Respondent's Exceptions at 11-12)

> In the present case, I FIND that given the respondent's overall performance and conduct, there was no need for the Board to comply with the requirements of *N.J.A.C.* 6A:3-5.1(c). The respondent had resisted all efforts from the staff to help her, thus a remedial plan and a 90-day period to correct the inefficiencies would have been an exercise in futility.
> (Initial Decision at 15) (Respondent's Exceptions at 23)

Such a contention, respondent avers, is without legal basis. The Board chose to bring a charge of inefficiency against respondent; there is no statute, regulation, or school law case which exempts it from complying with the requisites attendant to this charge because such compliance would be "an exercise in futility." Furthermore, she posits, there is no factual evidence that "respondent had resisted all efforts from the staff to help her," particularly with regard to the specific inefficiency charges against her. (*Id.* at 23-24.)

As to the charges of Conduct Unbecoming and Insubordination, respondent submits that the ALJ failed to make specific findings of fact on each of the allegations as required by *N.J.S.A.* 52:14B-10 but, rather, made vague, generalized statements with regard to some of these charges while leaving others wholly unaddressed. Respondent argues that "it is not sufficient that the ALJ adopt the statements of any other individual. The ALJ is required to specifically make [her] own findings." She urges that this matter must, therefore, be remanded for such factual findings on all of the charges. (*Id.* at 26-27)

In reply, the Board urges that respondent's "performance over her final year of work was so inept as to demonstrate incompetence." Citing several decades-old Commissioner decisions, including *In the Matter of the Tenure Hearing of Inez McRae*, 1977 *S.L.D.* 572; *In the Matter of the Tenure Hearing of Edna Booth*, 1985 *S.L.D.* 722; and *School District of East Brunswick v. Renee Sokolow*, 1982 *S.L.D.* 1358, *aff'd* State Board, 1983 *S.L.D.* 1645, the Board contends that on occasion it is recognized that the "job performance of a teaching staff member

is so inept as to render meaningless the statutory directive that a teacher charged with inefficiency be given 90 days to demonstrate improvement. In such instances, charges of inefficiency are more properly categorized as incompetence, rather than inefficiency, and there need not be a demonstration of how the teaching staff member was aided during the 90 days." (Board's Reply Exceptions at 7) It asserts that such is the case here, where the Board's unrebutted evidence and testimony demonstrates no less than "gross incompetence" on the part of respondent, well transcending anything which could be corrected in the 90-day remediation period provided for correction of inefficiencies. (*Ibid.*) Moreover, respondent's inadequacies extended over a full school year, despite administrative attempts to assist her – which she ignored or defied – indicating that she had no interest in improving her performance. (Board's Exceptions at 9)

Respondent goes to great length, the Board charges, about the absence of proof as to the level of assistance provided to assist her in correcting her inefficiencies during the 90-day period. The Board takes the position that the testimony of its witnesses establishes that respondent "declined all offers of assistance both before and after these tenure charges were filed. Given that refusal, accepting her argument that the Board failed in its duty to help her correct inefficiencies would mean that a teacher charged with that defect could forestall its proof by non-cooperation." (*Id.* at 10)

As to respondent's allegation that the ALJ failed to make factual findings with respect to the charges, the Board points out that due to the fact that respondent did not testify or present any witnesses on her behalf, the facts as presented by the Board were uncontroverted. "Therefore, unless the ALJ, who heard the testimony presented by the Board, had chosen to disbelieve what she heard, and she did not, the facts presented by the Board have been

established and should be accepted by the Commissioner." (Board's Exceptions at 2) The Board urges that, despite respondent's protestations to the contrary, the evidence supports the charges of incompetency, unbecoming conduct, insubordination and other just cause and the ALJ's sustaining of these charges should be affirmed.

Upon her independent and comprehensive review of the record, which includes transcripts of the hearing conducted at the OAL on April 24 and 25, 2007, the Commissioner determines to reject the recommended Initial Decision of the ALJ.

Initially, the Commissioner concurs with the exception argument of respondent that the Board's charges of inefficiency must be dismissed for its failure to comply with the procedural requisites attendant to the bringing of such charges as mandated by *N.J.S.A.* 18A:6-11, *N.J.A.C.* 6A:3-5.1(c) and applicable case law. Specifically, when filing charges of inefficiency against a tenured teaching staff member, *N.J.S.A.* 18A:6-11 requires the following procedure:

> Any charge made against any employee of a board of education under tenure during good behavior and efficiency shall be filed with the secretary of the board in writing, and a written statement of evidence under oath to support such charge shall be presented to the board. The board of education shall forthwith provide such employee with a copy of the charge, a copy of the statement of the evidence and an opportunity to submit a written statement of position and a written statement of evidence under oath with respect thereto. After consideration of the charge, statement of position and statements of evidence presented to it, the board shall determine by majority vote of its full membership whether there is probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to warrant a dismissal or reduction of salary. The board of education shall forthwith notify the employee against whom the charge has been made of its determination, personally or by certified mail directed to his last known address. In the event the board finds that such probable cause exists and that the charge, if credited, is sufficient to warrant a dismissal or reduction of salary, then it shall forward such written charge to the commissioner for a hearing pursuant

> to *N.J.S.A.* 18A:6-16, together with a certificate of such determination. *Provided, however, that if the charge is inefficiency, prior to making its determination as to certification, the board shall provide the employee with written notice of the alleged inefficiency, specifying the nature thereto, and allow at least 90 days in which to correct and overcome the inefficiency.* The consideration and actions of the board as to any charge shall not take place at a public meeting. (Emphasis added)

N.J.A.C. 6A:3-5.1(c) 4. directs:

> Concurrent with notifying the employee of such charges of inefficiency, the district board of education or the State district superintendent shall direct that there be *a modification* of the individual professional improvement plan mandated by *N.J.A.C.* 6A:32-4.3, to assure that such plan addresses the specific charges of inefficiency and comports with the timelines established for correction. (Emphasis added)

Finally, case law interpreting *N.J.S.A.* 18A:6-11 has consistently held that when a board chooses to file tenure charges of inefficiency against a teaching staff member, "the administration bears the heavy responsibility to render positive assistance to the [individual] in an effort to overcome [her] inefficiencies." *In the Matter of the Tenure Hearing of Donald Rowley v. Board of Education of Manalapan-Englishtown*, 205 *N.J. Super.* 65, 72 (App. Div. 1985). The rationale underlying all of these procedural requirements collateral to the certification of tenure charges of inefficiency "is that an employee whose effectiveness is called into question after meritorious service in a school district should, in recognition of that contribution, be afforded an opportunity to demonstrate that he or she is still capable of effective performance." *In the Matter of the Tenure Hearing of Morton,* 96 *N.J.A.R. 2d (*EDU) 440, 441, citing *Rowley, supra.*

In the instant matter, the record establishes that on December 19, 2002 the Board filed tenure charges of inefficiency, conduct unbecoming, insubordination and other just cause against respondent, a social worker in the district for more than 13 years. A copy of these charges was transmitted to respondent by the Business Administrator/Board Secretary along with

a letter of notification of that same date.[2] It is not disputed that such communication accorded respondent 90-days, beginning January 2, 2003, to correct the inefficiencies set forth in the charges and further advised her that if such inefficiencies remained uncorrected at the end of this period the Board may certify these charges to the Commissioner. However, the Board does not assert nor has it produced any affidavit, certification or other documentation to establish that it provided respondent with a *modification* of her professional improvement plan (PIP), nor is a modified plan included in the record of this matter. Lastly, with respect to the Board's obligation to provide respondent with reasonable, positive assistance in overcoming her inefficiencies during the remediation period, the record is wholly devoid of testimonial or documentary evidence demonstrating *any* effort in this regard by school administrators other than that contained in the testimony of Kathy Gordon, Director of Student Services – respondent's supervisor – wherein she stated that she told respondent that her door was always open if she wanted to talk. T-4/24/07, p. 131. Consequently, the Commissioner, recognizing that it is by now axiomatic that a board's compliance with its obligation to give a teaching staff member a modified PIP, and to accord a 90-day remediation period along with the provision of positive assistance during this period are absolute prerequisites to its right to certify inefficiency charges against such teaching staff member, finds and concludes that this Board's failure to provide the modified PIP and reasonable assistance compel dismissal of these charges. See *Rowley, supra.*; *In the Matter of the Tenure Hearing of Peter Loria,* decided by the Commissioner October 21, 1992, *aff'd* State Board, February 2, 1993; *East Orange Board of Education v. Julio Triana*, 1987 *S.L.D.* 1683.

[2] It is noted that respondent acknowledged receipt of the tenure charges and the statement of evidence in support thereof on January 2, 2003.

The Commissioner expressly rejects the ALJ's attempt to re-categorize these inefficiency charges as ones of incompetency, thereby ostensibly obviating the need for compliance with any procedural requisites. (See Initial Decision at 15) The Commissioner cannot countenance allowing this board, which chose to certify tenure charges of inefficiency – and apparently later recognized its failure to follow the legal prescriptions necessary to allow the prosecution of such charges – to sidestep these requirements by after-the-fact alteration of its charge against respondent to incompetency, one where prior case law appears to allow prosecution without such statutory or regulatory procedural restraints. Additionally, even assuming, *arguendo*, that the Commissioner continues to accept incompetency – as defined in prior case law – as a legitimate stand-alone tenure charge, rather than merely a gradient of inefficiency, and further assuming that the Board had certified such a charge against respondent, prior case law makes it fully evident that the Board could not sustain this charge.[3]

Turning to the Board's charges of conduct unbecoming and insubordination, given the dismissal of its inefficiency charges here, it is essential that this matter be remanded to the OAL for factual findings and conclusions on *each* of the remaining charges brought by the Board and a consequential penalty recommendation.

Accordingly, the Initial Decision of the OAL is rejected. The charges of inefficiency against respondent are hereby dismissed and this matter is remanded to the OAL for

[3] The charges against respondent, a more than 13-year employee of the District, are solely restricted to deficiencies in her job performance for the 2001-2002 school year. In view of respondent's previous service – which on this record is not called into question – there is no demonstration here that she lacked the ability to be an effective employee. See *In the Matter of the Tenure Hearing of Edna Booth*, decided by the Commissioner May 31, 1985, *aff'd* State Board April 1, 1987, *aff'd* Docket #A-3985-86T8 (App. Div. 1987); Also see *Board of Education of the City of Newark v. April Renee Bradley*, 1990 *S.L.D.* 790, *aff'd* State Board, 1991 *S.L.D.* 2521.

further fact finding and a recommended penalty determination on the charges of conduct unbecoming and insubordination.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 8/07/08

Date of Mailing: 8/08/08

[4] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5793-03
AGENCY DKT. NO. 152-5/03

BOARD OF EDUCATION OF THE, BOROUGH OF BUTLER, MORRIS COUNTY,

Petitioner,

v.

MARIA PARISE,

Respondent.

James F. Schwerin, Esq., for petitioner, Board of Education of the Borough of Butler, Morris County (Parker, McCay & Criscuolo, P.A., attorneys)

Nancy I. Oxfeld, Esq., for respondent, Maria Parise (Oxfeld Cohen, P.C. attorneys)

Record Closed: November 30, 2007 Decided: March 26, 2008

BEFORE: **IRENE JONES**, ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter originates from tenure charges filed against respondent, Maria Parise ("Parise" or "respondent") by petitioner, the Board of Education of the Borough of Butler ("Board"). The charges were certified on December 19, 2002 by James Smith, former Superintendent of the Butler School District. The charges alleges that the respondent

engaged in acts of (1) Inefficiency; (2) Conduct Unbecoming; (3) Insubordination; and (4) Other Just Cause.

Unrelated to the tenure charges, the respondent on January 14, 2002 filed a handicap discrimination complaint against the petitioner in the Superior Court, Morris County. Petitioner suffers from multiple sclerosis and esophoria. On July 13, 2002, the Superior Court ordered the petitioner to provide reasonable accommodations for respondent's disability during the litigation. In September 2002, respondent amended her Superior Court complaint adding additional counts.

On June 27, 2003 tenure charges were filed at the OAL, but were **STAYED** pending disposition of the respondent's Superior Court case.

On April 10, 2003, petitioner suspended the respondent without pay for lack of work performance and insubordination. The suspension was effective April 11, 2003 through April 25, 2003. On April 28, 2003, the Board eliminated respondent's full-time position as a result of a reduction in force (RIF) for the 2003-2004 school year. The Board did offer the respondent a part-time position as a social worker for the 2003-2004 school year which she declined. Instead, the respondent filed a petition of appeal with the Department of Education (DOE) regarding the RIF and subsequent termination related to her refusal to accept the part-time (.10) position.[1] Subsequently, the RIF matter was transmitted to the Office of Administrative Law and docketed as Parise v. BOE of the Borough of Butler, Morris County, OAL Dkt. No. EDU 5953-03.

On September 10, 2003, respondent filed another petition with the DOE contesting the Board's decision that deemed her resigned based upon her having the declined the .10 position. This matter was assigned OAL Dkt. No. EDU 9055-03 and is pending before ALJ Celentano.[2]

On January 13, 2004, a Motion to Consolidate EDU 5953-03, EDU 9055-03 and and Iris Stock v. BOE Butler, Morris County, EDU 7633-03 was filed. On May 3, 2004,

[1] The Board deemed respondent's refusal to accept the .10 position as a formal resignation.
[2] EDU 9055-03 and EDU 5171-04 were STAYED pending the conclusion of the instant tenure proceeding.

an order was issued by the undersigned consolidating, OAL Dkt. No. EDU 5933-03 and EDU 7633-03, (the Parise and Stock matters).

On May 6, 2004, respondent filed yet another petitioner with the DOE alleging that the BOE violated her tenure and seniority rights when it failed to appoint her to a .40 social worker position. That matter was also transmitted to the Office of Administrative Law and docketed as Parise v. BOE of the Borough of Butler, Morris County. OAL Dkt. No. EDU 5171-04. The matter was assigned to ALJ Sukovich and is now pending before the undersigned, due to former ALJ's retirement.

Significantly, on May 24, 2004, a verdict was rendered in the Superior Court case that concluded that the respondent was not a victim of handicap discrimination nor was she denied a salary increment in retaliation for filing a lawsuit.

On August 1, 2004, petitioner's Ordinary Disability Retirement benefits commenced and she retired from her position that day.

On April 28, 2005, the undersigned issued an Order that found that the respondent should be reinstated to her position as a social worker. Parise v. BOE, Borough of Butler, Morrise County, (OAL Dkt. No. EDU 4953-03). On June 9, 2005, the matter was remanded by the Commissioner to determine appropriate relief given the pending tenure charges and the respondent's disability retirement.

Thereafter, respondent attempted to unretire. After a medical examination, she was found fit for duty. On January 5, 2007, the Board of Trustees of the Teacher's Pension and Annuity Fund determined that Parise's disability had diminished and that she was capable of resuming her duties as a social worker. An Initial Decision was issued on February 26, 2007 by the undersigned finding that the District could continue Parise's suspension as a result of tenure charges, but that she was entitled to back pay from September 26, 2003, the 121st day after certification of the tenure charges, adjusted for her extension, until the day that she received her disability pension, or August 1, 2005.

The matter was heard over the course of two days, April 24, 2007 and April 25, 2007. The record was closed on November 28, 2007, after the parties submitted their summation briefs.

UNDISPUTED FACTS

1. Respondent was hired by the Board in September 1989 as a full-time (1.0) Social Worker. She was granted tenure on September 9, 1992.

2. As a Social Worker, (SW) respondent was a member of the Child Study Team (CST). A CST consists of a SW, a Learning Disabilities Consultant (LDC) and a School Psychologist, among others. The team is required to collaborate and meet with the parents of eligible students.

3. As a SW and a member of CST, respondent is required to work with classified students who are eligible for special education under the Individual with Disabilities Education Act (IDEA), 20 U.S.C. §1400, et seq.

4. Pursuant to the IDEA, classified students are required to have an Individualized Education Program (IEP). Further, pursuant to the IDEA, students are required to have annual and triannual Evaluations.

5. The IDEA specifies numerous deadlines and evaluations and requires an IEP. If same is not completed, the District is subject to significant damages for failure to provide an eligible student with an appropriate education.

TESTIMONY

The charges herein allege that the respondent produced incomplete and or incorrect work, falsified her timesheets; was unable to communicate with the other CTS members; disposed of school property without permission; and refused to follow directions of superiors and written procedures.

James Smith ("Smith") the Superintendent of the Butler School District from 1997-2005 testified in support of the Board's case. Smith signed off on tenure charges against the respondent after receiving many phone calls, letters and memos about her performances problems. Specifically, there were numerous complaints regarding Parise's failure to complete paperwork. She failed to complete transportation forms in a timely manner (P-1). The timely completion of transportation forms was essential to a classified student's ability to get transportation service to and from school. In some instances, Parise failed to complete any forms. (P-1). She also failed to obtain proper consent form before taking a student off school grounds for ice cream (P-12, P-13).

On two occasions, respondent falsified her sign out sheet. Smith recalled one incident where she signed out to go to the Windsor School when she actually went to a medical clinic. (P-14) The second incident involved her signing out at 11:45 a.m. when she really left sometime before 11:30 a.m. Moreover, she would not properly record her absences (P-4).

Smith further noted that the respondent requested, and was granted, a voice-activated computer to accommodate her disability. However, she repeatedly continued to complain about not having the proper equipment even after the computer was provided to her. The principal of Richard Butler Middle School, eventually learned that respondent told the school custodian to "get rid" of the computer, and the custodian complied by removing it to the equipment disposal area. (P-5, P-9) .

Significantly, the cases managed by the respondent were frequently deficient and not in compliance with State regulations. At one point, 21 of her cases were in non-compliance as they were incomplete. (P-9 – P-11). Further, respondent's refusal to communicate with the other Child Study Team ("CST") members was inefficient and ineffective. Instead of orally communicating with the CST members, she would send them numerous memorandums.

Dr. Kathy Gordon ("Dr. Gordon" or "Gordon") the Director of Student Services for the District was responsible for all special services, guidance services, CST, affirmative action and budget items. Gordon was the respondent's supervisor prior to the filing of

the instant tenure charges. Gordon recalled the many phone calls she received from the parents of special education students complaining about respondent's lack of communication, her constantly canceling parent meetings, and her general inability to effectively handle their children's cases. (P-15, P-23, P-30, P-43 – P-49, P-57, P-64, P-66). Dr. Gordon noted that parental participation is required by the Special Education Code and pursuant to same it is to be an integral part of the CST team development of the student's IEP.

Additionally, Gordon noted that numerous of IEPs were incorrect or incomplete (P-16, P-18, P-23 – P-29, P-31 – P-36, P-38 – P-42, P-54, P-62 – P-64, P-67 – P-68); and social histories were missing even though they were required (P-17 – P-22, P-24 – P-26, P-31, P-36, P-54, P-65). She investigated and verified each complaint and incident. The respondent's neglect of her cases put her students in jeopardy. Further, the District was not in compliance with the Special Education Code. Dr. Gordon noted that the CST is still trying to catch up with Parise's work. She, along with the entire Social Services staff, attempted to assist and guide the respondent on many occasions by completing and correcting her files and advising her on proper procedure and rules in the Special Education Code. (P-20, P-28, P-29, P-37, P-52, P-55, P-56, P-58 – P-60, P-63 – P-68). She continued to advise her even after tenure charges were filed against her and the 90-day inefficiency period began to run. (P-56). She invited the respondent to her office on numerous occasions to discuss strategies for improvement. She also provided respondent with written guidance and instruction, and offered her workshops to attend. Respondent always refused or ignored her offers.

Moreover, respondent did not keep her time properly, and would often falsify her time sheets. (P-71, P-73 & P-74). Consequently, Gordon was forced to keep a record of her time to ensure accuracy. Furthermore, respondent rarely made up time at the end of the day as required when she came in late or took extended lunch breaks to accommodate her disability. (P-71). She also failed to report her absences properly, and failed to inform the office when she was going to miss a scheduled parent meeting. (P-78). Finally, Gordon noted that respondent refused to cooperate with the other members of the CST, and was rude to the administrative staff. (P-58, P-61, P-63. P-66).

Andrea Vladichak ("Vladichak") has been employed by Butler Board of Education as the Principal of Richard Butler School for the last 10 years. When she first came to the school, respondent was assigned there however, Vladichak requested to have her moved in June 1998 because she was not effective with the student body. She found that respondent was confrontational with the students, and created issues rather than resolving them. Simply put, she just didn't get along with the students. Vladichak concluded that her expertise may be better at another level, thus she moved her to the out-of-district cases. Subsequently, respondent was returned to Richard Butler School.

Further, respondent did not properly follow the Special Education Code in drafting IEPs. (P-69, P-80 & P-81). She did not engage in the requisite student observation to be able to properly formulate effective IEPs. (P-72). She was often late to parent meetings, or did not show up at all. She received numerous complaints about Parise from parents. (P-70, P-71, P-78, P-82). In one instance, another teacher had to relay information to a parent because Parise did not have the requisite knowledge regarding a program for which she was responsible. (P-72).

Respondent refused to verbally communicate with her and other teaching staff members. Rather, she would leave notes in the staff's mailbox, which was an inefficient method of communication (P-72, P-75 & P-76).

Vladichak personally investigated the computer incident and learned that respondent told the school custodian to "get rid" of the computer, and the custodian complied by removing it to the disposal area. (P-77). Vladichak interpreted "get rid of it" as meaning "throw it in the garbage", not "remove it from the room." Her directive to the night custodian caused him to be reprimanded. In her view, respondent's conduct was unprofessional. Further, it could have meant a loss of $1,000 to the District if the computer had been disposed of. Finally, the witness noted that after requesting the voice activated computer, Parise refused to work with the District's computer technician to learn the new computer software. (P-79).

Vladichak recalled an instance where respondent wanted to take the child out of school to get ice cream without prior Board permission. She noted that is not appropriate procedure to allow students to go out with teachers for ice cream. When Vladichak attempted to stop her, Parise was already in her car with the student. Parise started moving the car while the child was getting out of the car and almost ran over her foot. (P-13).

Deborah Priestner ("Priestner") has been employed by the Butler BOE as a Secretary in the Special Services Department for seven years. It is her job to review special education documents for classified students to make sure they are completed and if they are not, she contacts the individual CST member. The respondent's IEPs were often incorrect or incomplete. Further, she did not follow proper procedure when drafting revisions to IEPs. (P-83, P-93). She attempted to assist Parise in learning how to properly revise an IEP, however, her attempts were rejected. (P-85). Priestner also confirmed that on two occasions, Parise falsified her sign out sheet. (P-14, P-94).

Judith Rivers ("Rivers") has been employed by the Butler BOE as a Learning Consultant for 16 years and is part of the CST with Parise. Rivers was assigned to many of the respondent's cases that were either overdue, incomplete, incorrect, or missing necessary documents. (P-95 to P-106). She was unsure as to how long Parise had the cases before they were assigned to her. However, she was aware that the incomplete IEPs left the District open to litigation.

Rivers recalled that the respondent did not attend any of the CST meetings in the year before tenure charges were filed against her. (P-104). Parise also refused to communicate directly with her. Rivers recalled one incident where she called Parise regarding a student's case, and Parise hung up on her. (P-107).

Iris Stock ("Stock") has been employed by the Butler BOE as a Social Worker for 15 years and is a member of the CST with Parise. Her duties include preparing evaluations of classified students, case management for special education students, and assisting students and families with any crisis or emotional problems. She, too, had to complete many of the respondent's cases because they were overdue, incomplete,

incorrect, or missing necessary documents. (P-108 to P-116, P-31). She requested information from Parise on certain students however, Parise did not follow through with her requests for documents, which made it difficult for her to be effective and efficient with her own duties. (P-31). Consequently, she was forced to request outside help with completing files that were formerly Parise's responsibility as she was left with more work than she was able to complete. Pursuant to her request, the Board hired an outside SW to complete the files. (P-116). Stock concludes that the respondent barely did any work while she was at Aaron Decker School, the District's elementary school.

Parise did not present any witnesses, nor did she testify on her own behalf. She submitted R-1 and R-2, the Board's responses to interrogatories, as evidence.

DISCUSSION AND FINDINGS

Tenure of teaching staff members is bestowed by statute, N.J.S.A. 18A:28-5, and acquired by satisfactory performance by teachers who have a position in which a teaching certificate is required, if they hold the appropriate certificate and if they been employed for the requisite time, generally, three consecutive calendar years. Because it is a form of job security teachers must be diligent in retaining their tenured status, and School Boards must be scrupulous in meeting their evidentiary burden in order to bring tenure charges against a tenured teacher.

> N.J.S.A 18A:6-10 provides that: "No person shall be dismissed or reduced in compensation if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state...except for inefficiency, incapacity, unbecoming conduct, or other just cause..."

The determination of whether to remove a teacher from a tenured position requires consideration of the nature of the act, the totality of the circumstances, and the impact on the teacher's career. In re: Fulcomer, 93 N.J. Super 404, 421 (App. Div. 1967). Fulcomer at 421. Petitioner bears the burden of proof and to prevail in the instant case, the truth of the charges must be established by a preponderance of the "credible evidence." Cumberland Farms, Inc. v. Moffett, 218 N.J. Super. 331, 341 (App.

Div. 1987), see also In re: Tenure Hearing of Grossman, 127 N.J. Super 13, 23 (App. Div. 1974) cert. denied 65 N.J. 292 (1974), In re: Philips, 117 N.J. 567, 575 (1990). The term "preponderance" has been defined as the "greater weight of the credible evidence in the case," as testified to, at trial by the witnesses. State v. Lewis, 67 N.J. 47 (1975). In establishing the credibility of witnesses, the New Jersey Supreme Court has pronounced that credibility "must not only proceed from the mouth of a credible witness, but it must be credible in itself, as well." Spagnuolo v. Bonnett, 16 N.J. 546, 554-55 (1955).

Conduct Unbecoming

Conduct unbecoming a public employee has been described as an "elastic" phrase that includes "'any conduct which adversely affects the morale or efficiency'" of the public entity or "'which has a tendency to destroy public respect for . . . [public] employees and confidence in the operation of . . . [public] services.'" In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960) (citation omitted). See Karins v. City of Atlantic City, 152 N.J. 532 (1998). Behavior rising to the level of unbecoming conduct need not be predicated upon a violation of any particular rule or regulation and may be based simply upon a violation of the implicit standard of good behavior. City of Asbury Park v. Department of Civil Service, 17 N.J. 419, 429 (1955); In re Tuch, 159 N.J. Super. 219, 224 (App. Div. 1978).

In the context of a tenured teacher, the contours for dismissal set forth in N.J.S.A. 18A:6-10 have been found to provide a sufficient standard which, while "general in terms," when "measured by common understanding . . . fairly and adequately conveys its meaning to all concerned." Laba v. Newark Board of Education, 23 N.J. 364, 384 (1957). Succinctly stated, "the touchstone is fitness to discharge the duties and functions of one's office or position." In re Grossman, 127 N.J. Super. 13, 29 (App. Div. 1974), certif. den. 65 N.J. 292 (1974). Such unfitness to remain a teacher may be demonstrated by a single incident, if sufficiently flagrant. In re Fulcomer, 93 N.J. Super. 404, 421 (App. Div. 1967); Redcay v. State Board of Education, 130 N.J.L. 369, 371 (Sup. Ct. 1943), aff'd o.b. 131 N.J.L. 326 (E & A 1944).

The Board charges the respondent with conduct unbecoming a teaching staff member based on allegations that she falsified her sign in/out sheets on multiple occasions. It supports the this allegations by way of documentary evidence, P-14 and P-71, and the testimony of witnesses Smith, Vladichak and Priestner. The respondent did not rebut these allegations and indeed admits that she failed to properly sign in and out during the day on numerous occasions.[3] Moreover, she admits to falsifying the sign out sheet on at least one occasion.[4]

Accordingly, I **FIND** that there is sufficient credible and legally competent evidence to support a conclusion that the respondent did falsify her sign out sheets, and therefore engaged in conduct unbecoming a teaching staff member warranting disciplinary action.

The Board further charges respondent with conduct unbecoming a teaching staff member based on her conduct with other staff members. Specifically, all of the Board's witnesses testified that respondent refused to verbally communicate with them. Priestner testified that respondent was rude to her during their conversations. Rivers testified that respondent hung up on her when she tried to discuss a student's case, and refused to attend CST meetings. Given the team effort required to run an effective CST, I **FIND** that there is sufficient credible and legally competent evidence to support a conclusion that respondent did conduct herself in an improper manner. Further, I **FIND** that the respondent's behavior with respect to the computer incident also constitutes conduct unbecoming.

Based on the totality of the incidents herein, I **CONCLUDE** that respondent engaged in conduct unbecoming a teaching staff member that was sufficiently flagrant so as to warrant the instant charge.

Insubordination

[3] (See Respondent's Brief dated November 28, 2007, ¶¶ 30 – 35).
[4] (See Respondent's Brief dated November 28, 2007, paragraph 34.)

Petitioner also contends that respondent was insubordinate. Insubordination, been defined as the willful and intentional disregard of the lawful and reasonable directives of an employee's duly authorized supervisor. In re Tenure Hearing of Motley, supra, EDU 7421-97, Initial Decision (May 5, 1999), aff'd as modified, Comm'r (August 4, 1999), aff'd, State Bd. of Educ. (December 1, 1999) <http://lawlibrary.rutgers.edu/oal/search.html>. The Board bases the insubordination charge on the following allegations: (1) Parise repeatedly and habitually refused to abide by the District policy as to signing in and out; (2) Parise refused to follow directives as to calling the substitute service to report absences; and (3) her refusal to follow directives regarding the installation and use of computer equipment provided to her. (P, P-).

Parise did not put forth any evidence to rebut these claims. Accordingly, I **FIND** that there is sufficient credible and legally competent evidence to support the charges of insubordination.

Other Just Cause/Incompetency

The Board asserts that the tenure charges against Parise should be upheld for other just cause based on the severe deficiencies in her work product and her refusal to correct such deficiencies. In School District of the Township of East Brunswick v. Renee Sokolow, 1982 S.L.D. 1358, 1362, aff'd by State Board of Education, 1983 S.L.D. 1645, it was held that:

> The charge of incompetence, as distinguished from the charge of inefficiency, presumes that the proofs in support of the charge will demonstrate that respondent is so lacking in competency to perform the responsibilities of classroom teacher that the requirements of the 90-day improvement period, required for a charge of inefficiency, N.J.S.A. 18A:6-11, would be a useless exercise. See In the Matter of the Tenure Hearing of Inez [McRae] 1977 S.L.D. 572, 584. Incompetence requires proof that the affected person, regardless of the assistance offered by certified supervisors, does not have the ability or capacity to be an effective teacher.

The exact same definition is cited again in Ridgefield Board of Education v. Patricia Nafash, 1984 S.L.D. 333, 335-336, and in Board of Education of the City of Newark v. April Renee Bradley, 1990 S.L.D. 790, 813, aff'd as modified in State Board of Education, 1991 S.L.D. 2521. The above-mentioned cases rely on School District of the City of Trenton v. Inez McRae, 1977 S.L.D. 572, does not use the same language, but provides in pertinent part:

> Notwithstanding respondent's contention that inefficiencies did, in fact, exist, the hearing examiner finds that respondent demonstrated gross ineptness in performing the responsibilities of a classroom teacher. The testimony of the supervisors clearly portrays this ineptness. Whether the ineffectiveness in this case results from lack of understanding of the teaching-learning process, from lack of effort or from indifference, the hearing examiner finds that respondent failed to measure up to even minimal standards of satisfactory teaching. Respondent's lack of adequate and thorough planning demonstrated a dereliction of duty. Her lack of discipline and class control was so gross as to rise above a charge of minimal inefficiency to incompetency.
>
> [Id. at 584 (citations omitted).]

The Appellate Division further elaborated on the meaning on "incompetency" in the context of a teaching staff member in In re Grossman, 127 N.J. Super. 13, 29 (App. Div. 1974):

> "Incompetency," a term closely allied to "incapacity," was defined in Horosko v. Mt. Pleasant School District, 335 Pa. 369 (Sup. Ct. 1939), cert. den. 308 U.S. 553 (1939): The term "incompetency" has a "common and approved usage." The context does not limit the meaning of the word to lack of substantive knowledge of the subjects to be taught. Common and approved usage gives a much wider meaning. For example, in 31 C.J., with reference to a number of supporting decisions, it is defined: "A relative term without technical meaning. It may be employed as meaning disqualification; inability; incapacity; lack of ability, legal qualifications, or fitness to discharge the required duty." In Black's Law Dictionary, 3rd edition, page 945, and in 1 Bouv. Law Dict., Rawle's Third Revision, p. 1528, it is defined as "Lack of ability or fitness to discharge the required duty." * * * Webster's New International Dictionary defines it as "want of physical, intellectual, or moral ability; insufficiency;

> inadequacy; specif., want of legal qualifications or fitness." Funk & Wagnall Standard Dictionary defines it as "General lack of capacity of fitness, or lack of the special qualities required for a particular purpose."

In support of its charge, the Board presented extensive documentary evidence as to Parise's total disregard for the cases she managed. Almost all of the 116 documents moved into evidence address the fact that the respondent's work product was consistently incomplete and/or incorrect. Dr. Gordon testified that she in fact investigated and verified each and every documented incident. She further testified that she and the rest of the Special Services team made many attempts to assist and guide the respondent to no avail. Smith and Vladichak testified that they made an effort to accommodate Parise by allowing her to come in late, take extended lunches, and providing her with a voice activated computer, and Parise only abused these accommodations.

I **FIND** and **CONCLUDE** there is sufficient credible and legally competent evidence to support a conclusion that Parise demonstrated gross ineptness and incompetency in performing the responsibilities of a social worker, and therefore the Board's action in removing her as a social worker was not only justified but unequivocally required.

Inefficiency

The Board charges Parise with inefficiency due to: (1) failure to complete required documents in a timely manner; (2) failure to coordinate with other members of the CST; (3) failure to properly classify students; (4) failure to properly deal with parents; (5) failure to address the need for provision of student transportation; and (6) failure to properly manage cases.

Where a tenure charge is one of inefficiency, prior to certifying the charges, a local board of education must provide the employee a written notice of the alleged inefficiency, specifying the nature thereof, and allow at least 90 days in which to correct and overcome the inefficiency. N.J.S.A. 18A:6-11. To that end, N.J.A.C. 6A:3-5.1(c)

sets forth very specific and stringent guidelines that Districts must follow with regard to this 90-day period.

The intent of the aforementioned regulations is to promote correction of inefficiencies pursuant to carefully supervised specific guidelines established at the time a teacher has been formally apprised of the nature of inefficiencies. In The Matter of the Tenure Hearing of Julio Triana, School District of the City of East Orange, 1987 S.L.D. 1691-1697. A failure to adhere to the regulations constitutes a "flaw fatal" to tenure charges of inefficiency, requiring dismissal. Id. at 1696.

In the present case, I **FIND** that given the respondent's overall performance and conduct, there was no need for the Board to comply with the requirements of N.J.A.C. 6A:3-5.1(c). The respondent had resisted all efforts from the staff to help her, thus a remedial plan and a 90 day period to correct the inefficiencies would have been an exercise in futility.

CONCLUSION

For all the reasons summarized above, the tenure charges herein are hereby sustained. Having considered all the facts and the controlling case law, **I CONCLUDE** that the petitioner has, by a preponderance of the credible evidence, proven that the respondent has engaged in conduct unbecoming a social worker, insubordination, inefficiency, incompetency and other just cause.

It is **ORDERED** that the respondent, Maria Parise be dismissed as a tenured social worker in the employ of the Board of Education of the Borough of Butler, Morris County.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

3/26/08
DATE

Irene Jones
IRENE JONES, ALJ

Date Received at Agency: 3/26/08

Mailed to Parties:

MAR 27 2008
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

sej

APPENDIX

WITNESSES

For Petitioner:
James Smith
Dr. Kathy Gordon
Andrea Vladichak
Deborah Priestner
Judith Rivers
Iris Stock

For Respondent:
No Witnesses

EXHIBITS IN EVIDENCE

For Petitioner

P-1	Memo dated April 25, 2002
P-2	Letter to Parise from James Smith dated August 21, 2002
P-3	Memo dated 9/19/02
P-4	Memo dated 9/11/02
P-5	Memo dated 10/10/02
P-6	Undated Memo-designated as Pg. 188
P-7	Memo 10/24/02
P-8	Memo 10/29/02
P-9	Memo 10/29/02
P-10	Memo 10/31/02
P-11	Memo 11/05/02
P-12	Memo 12/3/02
P-13	Memo 12/03/02 marked Pg. 201
P-14	Memo form Dr. Gordon to secretary (Doc. 205)
P-15	Memo form Gordon to Maria Parise (Doc. 1)
P-16	Memo regarding no IEP for a new student (Doc. 3)
P-17	Memo regarding social histories not completed (Doc. 4)
P-18	Memo regarding responsibilities of social histories (Doc. 5)
P-19	Memo regarding social history not received (Doc. 6)

P-20	Memo regarding list of missing socials with attachments (Doc. 7)
P-21	Memo dated May 16th (Doc. 9)
P-22	Memo regarding no socials complete for 2001/2001 year (Doc. 10)
P-23	Memo dated 6/14/02 (Doc. 11)
P-24	Memo dated 6/18/02 (Doc. 12)
P-25	Memo regarding end of 2001/2002 school year (Doc. 14)
P-26	Memo regarding "Supportive Services," change (Doc. 21)
P-27	Memo to Parise regarding students to counsel at Richard Butler School (Doc. 22)
P-28	Memorandum from Melissa Polison (Doc. 31)
P-29	Memo dated 3/27/02 (Doc. 54)
P-30	Memo dated 4/3 (Doc. 58)
P-31	Memo from Ira Stock (Doc. 60)
P-32	Memo regarding OT/PT in IEP not being consistent with Speech Therapist (Doc. 63)
P-33	Memo regarding scheduled revision meeting without parent (Doc. 73)
P-34	Memo regarding lapse of time with a particular IEP (Doc. 80)
P-35	Memo dated 3/4/02 (Doc. 81)
P-36	Memo regarding change to IEP with two page attachment (Doc. 83)
P-37	Memo regarding no handwritten notes being accepted by the office (Doc. 85)
P-38	Memo to Parise regarding missing socials and goals (Doc. 87)
P-39	Memo regarding extended school year for student (Doc. 89)
P-40	Memo dated 5/16/02 (Doc. 90)
P-41	Memo with attached copies of Regulations (Doc. 91)
P-42	Memo to Parise regarding getting familiar with IEP's (Doc. 106)
P-43	Memo to Parise regarding second missed appointment (Doc. 109)
P-44	Memo dated 5/7 (Doc. 110)
P-45	Letter from parent to Kathy Gordon (Doc. 113)
P-46	Letter from parent regarding no OT/PT evaluation done for student (Doc. 114)
P-47	Memo regarding a complaint from parent (Doc. 115)
P-48	Memo regarding not keeping scheduled appointments (Doc. 122)
P-49	Memo regarding no being present for meeting with parent (Doc. 124)
P-50	Memo regarding meeting with parent for annual review not re-evaluation (Doc. 129)
P-51	Memo regarding not having parent consent for meeting (Doc. 130)
P-52	Memo regarding accepting verbal permission from parent (Doc 134)

P-53	Memo to Parise regarding submitting proper transportation forms (Doc. 137)
P-54	Memo regarding booster seat for student (Doc. 139)
P-55	Memo to Parise regarding late transportation forms (Doc. 141)
P-56	Performance improvement plan for Ms. Parise (Doc. 161)
P-57	Memo regarding scheduling an appointment and then being absent for the day (Doc. 185)
P-58	Memo regarding procedures for calling out (Doc. 190)
P-59	Memo regarding Ira Stock personally counseling students (Doc. 191)
P-60	Memo regarding professional development workshops (Doc. 194)
P-61	Memo to Parise regarding not cooperating with staff (Doc. 209)
P-62	Memo regarding Parise moving two students into different classes without notice (Doc. 218)
P-63	Memo to Parise regarding various issues (Doc. 220)
P-64	Memo to Parise regarding her not following special education code (Doc. 226)
P-65	Memo regarding Parise not signing social assessment she completed (Doc. 228)
P-66	Memo to Parise regarding her not following special education code (Doc. 229)
P-67	Memo to Ms. Parise (Doc. 231)
P-68	Memo to Parise regarding planning schedule after parent gave permission (Doc. 232)
P-69	Memo 9/27/02
P-70	Memo 10/7/02
P-71	Memo 9/13/02
P-72	Memo 10/24/00
P-73	Memo 9/11/02
P-74	Memo 10/1/02
P-75	Memo 9/19/02
P-76	Memo 09/19/02
P-77	Memo 10/11/02
P-78	Memo 10/07/02
P-79	Memo 11/27/02
P-80	Memo 11/25/02
P-81	Memo 11/22/02
P-82	Memo 11/22/02
P-83	Memo 4/24/02

P-84	Memo 10/28/02
P-85	Memo 10/15/02
P-86	Memo 9/17/02
P-87	Memo 9/19/02
P-88	Memo 9/20/02
P-89	Memo 9/25/02
P-90	Memo 9/25/07
P-91	Memo 9/30/02
P-92	Memo 10/3/02
P-93	Memo 10/4/02
P-94	Memo 11/25/02
P-95	Memo 10/18/02
P-96	Memo 9/10/02
P-97	Memo 9/18/02
P-98	Memo 9/18/02
P-99	Memo 9/30/02
P-100	Memo 10/01/02
P-101	Memo 10/04/02
P-102	Memo 10/04/02
P-103	Memo 3/16/02
P-104	Memo 10/08/02
P-105	Memo 10/25/02
P-106	Memo 6/14/02
P-107	Memo 11/22/02
P-108	Undated Memo
P-109	Memo 9/18/02
P-110	Memo 9/27/02
P-111	Memo 10/4/02
P-112	Memo 10/08/08
P-113	Undated Memo
P-114	Memo 10/25/02
P-115	Memo 2/27/02
P-116	Memo 10/30/02

For

Respondent

R-1	Request for Production of Documents and Initial Interrogatories
R-2	Answers to Interrogatories

340-08

CATHOLIC FAMILY AND COMMUNITY SERVICES (FRIENDSHIP CORNER I AND FRIENDSHIP CORNER II),	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY AND NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENTS.	:	

SYNOPSIS

Petitioning provider of Abbott preschool services appealed the Department's recommendation that the respondent school district recover $88,858 in tuition paid for the 2003-04 school year, based on an audit finding that – after deduction of disallowed expenditures – petitioner had underspent its approved budget by that amount. Petitioner contended that no repayment was warranted because the Department's audit was based on standards not specified within the guidance document on which the budget was based, and because the district had not identified errors through review of quarterly reports. The Department contended, *inter alia*, that the appeal was untimely filed.

The ALJ found that the Department had raised the defense of untimeliness too late in proceedings and declined to consider dismissal of the appeal on that basis. The ALJ further found that – while the Department was entitled to place restrictions on provider expenditures and impose accountability requirements for such expenditures – it also had a duty to make providers aware of its expectations and could not, as here, make audit findings inconsistent with the guidance issued. The ALJ further found that – to any extent petitioner's recordkeeping was not in accord with its contract with the district – petitioner cannot be penalized for this because the district did not fulfill its own obligation to provide monitoring and assistance.

The Commissioner adopted the ALJ's recommendation as to untimeliness but rejected the substantive conclusions of the Initial Decision. The Commissioner found that the budget guidance document relied on by petitioner and the ALJ was not a comprehensive manual of fiscal and recordkeeping requirements, but a tool for budget construction purposes only, so that the ALJ erred in ignoring the clear provisions of the parties' contract, regulation and Department policy as communicated to districts and providers at meetings and workshops. The Commissioner upheld the audit findings and dismissed the appeal, directing petitioner to repay $88,858 to the district, but in installments during the 2009-10 school year so as to mitigate the impact on petitioner in recognition of the district's failure to identify errors through the quarterly review process.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

August 8, 2008

OAL DKT. NO. EDU 3681-06
AGENCY DKT. NO. 74-2/06

CATHOLIC FAMILY AND COMMUNITY SERVICES (FRIENDSHIP CORNER I AND FRIENDSHIP CORNER II),	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY AND NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have exceptions filed by the Department of Education (Department) pursuant to *N.J.A.C.* 1:1-18.4 and the reply filed by petitioner in accordance with *N.J.A.C.* 1:1-18.4 and *N.J.A.C.* 1:1-18.8. The Paterson School District (Paterson) filed neither exceptions nor replies.

On exception, the Department initially takes issue with the standard of review applied by the Administrative Law Judge (ALJ) in this matter, asserting that – as petitioner itself recognizes – the Department's actions are entitled to deference and a presumption of correctness, and may not be disturbed unless a petitioner meets the burden of proving them patently arbitrary, capricious or unreasonable. (Department's Exceptions at 2-3)

The Department next objects to the ALJ's reliance on the 2003-04 Abbott Preschool Program Budget Instructions ("budget guidance") (Exhibit P-1) to conclude

that – because the Department's audit required accounting methods and applied standards not specifically set forth in this document – petitioner cannot be found to have underspent its approved 2003-04 budget and, thus, is not obligated to repay $88,858 to the Paterson School District. The Department stresses that the document in question – distributed during the budget development process for a clearly specified purpose – controls budget preparation only and certainly does not govern a provider's recordkeeping and accounting, nor audits thereof. (Department's Exceptions at 3-4)

Specifically, the Department contends that: 1) In reversing the Department's disallowance of the prorated salaries of administrative positions such as chief executive officer, comptroller and chief financial officer, the ALJ ignored testimony establishing that districts were notified of the limitation on approved administrative positions to a director, a clerical and a janitor, and did not place sufficient import on the Department's express denial of the positions at issue in the prior budget year; 2) In rejecting the Department's disallowance of purchases made on the last day of the contract period – clearly in an effort to use up excess funds – the ALJ ignored both contract provisions requiring that expenditures benefit the contract period and regulations requiring that Abbott district expenditures support the current school year; 3) In determining that petitioner was improperly penalized for lacking documentation in support of indirect and administrative expenditures, the ALJ ignored the fact that while costs of this type need not have been documented during the budget *construction* process – since a fixed amount would be provided for that purpose – they still needed to be documented and records still needed to be retained in order to comply with applicable contractual and regulatory provisions regarding propriety and review of expenditures; and

4) In concluding that petitioner's indirect and administrative expenditures should not have been prorated to adjust for non-Abbott program and classroom costs, the ALJ relied on nothing more than on petitioner's representation – based on quarterly expenditure reports not produced as evidence – that Abbott and non-Abbott monies were not commingled in fact, notwithstanding their commingling in the general ledger on which the Department's audit was based, and further ignored the clear requirement of both the Abbott contract and the budget guidance that Abbott and non-Abbott costs must be governed by separate agreement with Abbott costs budgeted on a prorated basis. (Department's Exceptions at 4-8)

In reply, petitioner counters that – while it does not object to the standard applied by the ALJ – if the Commissioner were to determine that the arbitrary and unreasonable standard should apply instead, either the ALJ's conclusion should nonetheless be adopted because the Department's actions were so unjust, or, alternatively, the matter should be remanded to the OAL for review under the correct standard. (Petitioner's Reply at 2-3)

Petitioner also objects to the Department's contention – raised, it claims, for the first time on exception – that the budget guidance was intended for budget preparation only. Petitioner asserts that testimony and argument in this matter have until now "conceded reliance" on the guidance document and focused instead on whether it was ambiguous and how it should be interpreted for purposes of the present litigation, with petitioner demonstrating that necessary expenditures were disallowed "based on an unwritten, unpublished, unverifiable, completely internal, and conspicuously convenient 'policy' " that was not shared with petitioner until a year after the 2003-04 school year

had ended, and then only verbally. Thus, petitioner contends, the Department cannot now argue that petitioner unreasonably relied on the budget guidance's representation that a full 17.65 % of the overall budget would be received, without any need for special justification, to fund administrative costs. (Petitioner's Reply at 3-5, quotation at 4) Similarly, petitioner asserts that purchases made at the end of the contract period cannot be excluded solely on the basis of their timing – particularly where there is no challenge to their use for Abbott purposes – since neither the budget guidance nor the Abbott contract placed any restriction on the timing of purchases. (*Id.* at 5-6)

Finally, petitioner contends that to whatever extent the Abbott contract – as opposed to the budget guidance on which petitioner properly relied – required retention of expenditure records or development of a budget that segregated Abbott costs from non-Abbott, petitioner should not now be penalized for deficiencies in this regard when the Paterson School District – as found by the ALJ and, significantly, not challenged by the district on exception – failed to honor its own contractual obligation to provide financial management assistance and on-site monitoring. Had Paterson provided the requisite monitoring and assistance, according to petitioner, the alleged budgeting and recordkeeping errors underlying all of the exclusions at issue in this matter could have been timely corrected and petitioner would not have been faced with "crippling reclamations" years after the fact, when it was "too late to do anything about it." (Petitioner's Reply at 7-9, quotations at 8 and 9)

Upon review, the Commissioner adopts in part and rejects in part the Initial Decision of the ALJ.

Preliminarily, the Commissioner concurs with the ALJ that dismissal of this matter on the basis of untimely filing would not be appropriate in view of the Department's having clearly asserted such defense so late in proceedings. (Initial Decision at 13) Additionally, the Commissioner finds that the ALJ's understanding (*Id.* at 14) of the standard of review to be applied in this matter – that findings of fact and conclusions of law must be made based upon the fullness of testimony and evidence presented at hearing so that the correctness of the Department's actions can be gauged – is not inconsistent with application of the arbitrary and capricious standard as (properly) invoked by the Department; indeed, the Initial Decision may fairly be characterized as a determination that petitioner met its burden of demonstrating that the Department's actions were unreasonable under the circumstances.

The Commissioner cannot, however, agree with that determination.

The ALJ's decision in this matter is premised in its entirety on acceptance of the contention that the Department could not, through audit, hold petitioner to recordkeeping and expenditure limitation standards not expressly set forth in the Department's budget guidance document for the year in question – particularly where Paterson did not honor its own monitoring and assistance responsibilities under the effectuating contract. As correctly noted by the Department, however, this contention is rooted in a fundamental misconstruction of the nature and purpose of the budget guidance document (Exhibit P-1);[1] moreover, it ignores the Department's independent obligation

[1] The Commissioner categorically rejects petitioner's assertion that the Department is foreclosed from arguing on exception – since it did not do so previously – that the guidance document was for budget preparation only. In point of fact, the purpose of the guidance document was repeatedly raised at hearing (see, for example, T2:31-33, 57, 60, and 117, T3:210-11, and T4:88), and the Department consistently argued that other documents and communications controlled in this matter. (These and all subsequent similar references refer to the transcripts of hearings conducted on March 22, 2007 (T1), May 9, 2007 (T2), May 16, 2007 (T3) and November 27, 2007 (T4).)

to ensure that Abbott district funds have been expended – whether directly by the district or indirectly through contracted service providers – in a manner that is effective, efficient and consistent with law.

Petitioner's central assertion in this matter is that the budget guidance document entitled it to incur administrative and indirect costs in the amount of a flat 17.65 % of its total approved budget – without documentation or limitation except as specifically stated in the guidance – so that the Department could not later seek to apply standards and limitations not embodied in the guidance document to disallow individual expenditures within the allowable percentage. In effect, what petitioner is contending is that – because providers were instructed to develop budgets allocating a fixed percentage to administrative and indirect costs without providing specific line-item documentation for each component thereof – their actual expenditure of budgeted funds is insulated from scrutiny in accordance with otherwise applicable contractual and regulatory provisions.

However, both on its face and as utilized by the Department,[2] the budget guidance document on which petitioner relies is nothing more than a tool developed to assist districts and their providers, in conjunction with related informational and interactive meetings, in constructing approvable budgets for the upcoming school year; it is not – nor was it at any time purported to be – the definitive statement of all fiscal requirements for Abbott preschool providers.[3] Thus, petitioner and the ALJ cannot employ the document as they have done herein, citing it as the standard against which petitioner's audit should have been conducted and relying on its silence or ambiguity

[2] See Exhibit P-1 at 2, 4 and 9, and testimony of Karin Garver at T2:31-34.

[3] Indeed, separate workshops and informational sessions were held by the Department to address the requirements of the contract. (Testimony of Karin Garver at T2:44-45)

with respect to a particular point to hold petitioner harmless from any finding of error, or any consequence therefor, notwithstanding that the point at issue is addressed by contract or regulation, or duly communicated Department policy.

In this latter regard, the ALJ fully accepted petitioner's contention that it had no notice of the standards to which it was eventually held, asserting that – while the Department was entitled to place restrictions on provider expenditures and impose accountability requirements for such expenditures – it also had a duty to make providers aware of its expectations. (Initial Decision at 16) However, the record in this matter is clear that districts and providers were, in fact, notified – through informational meetings and workshops – of the nature and purpose of the new "flat rate" method of budgeting administrative costs for 2003-04, which did not include permission to budget for previously unapprovable costs – such as staffing over and above a director, clerical and janitor (Testimony of Corradina Fronte at T3:206-07, 210-213 and testimony of Steven Hoffmann at T2:132-33); that the information provided at these sessions was somehow missed or misunderstood by petitioner or "lost in translation" in its communications with Paterson – whose representative (Fronte) clearly heard the pertinent instruction – does not alter the correctness of the disallowance. Similarly, the contract underlying this matter (Exhibit IAU-4) pertains on its face to provision of services between July 1, 2003 through June 30, 2004, so that expenditures for postage and computers made on the last day of the contract period cannot possibly have been for the purpose of fulfilling the 2003-04 contract; that petitioner continued to provide services during 2004-05 under a new contract effective July 1, 2004, and that the disallowed expenditures would have been permissible if budgeted for that year, does not alter the fact that funds budgeted for the 2003-04 school year were not expended on services rendered during that year. Finally,

the same contract – like the budget guidance document itself (at 2-3, 4 and 7-8) – expressly requires documentation and recordkeeping consistent with the requirements of *N.J.A.C.* 6A:10A-2.2(b) and (d) and clearly provides for segregation of Abbott and non-Abbott monies, with shared costs to be prorated according to an established formula; that petitioner misunderstood the budget construction process to mean that the fundamental accountability provisions and generally accepted accounting practices required by the parties' signed contract would not apply to administrative costs – and that Paterson did not correct this misunderstanding during the course of the contract year – cannot serve to shield petitioner from all consequences of noncompliance.

The Commissioner, then, finds that the Department's review on audit was not – indeed, could not be – limited to the language of the budget guidance document alone, but was properly based on all standards of applicable law and policy. Consequently, the Department's cost disallowances and determination of under-expenditure of budgeted funds must be upheld as reasonable and proper in all respects, and the funds identified must be refunded to the district.

There can be no question of the Department's overarching obligation to ensure the proper and prudent use of Abbott monies, nor of its ability – indeed, duty, if State oversight of Abbott expenditures is to be at all meaningful – to seek their recoupment by a contracting district when, as here, the contracted provider has been found through a duly conducted State audit[4] to have underspent the approved budget by making unallowable or insufficiently documented expenditures.[5] This remains so

[4] Petitioner was audited at random as part of a continuing cycle of audits of contracted preschool providers in State-operated school districts. (Testimony of Steven Hoffmann at T2:70-74)

[5] The Commissioner rejects petitioner's suggestion that recoupment is not warranted because its errors were not the result of malfeasance or flagrant impropriety. (Statement of counsel at T1:33-34)

notwithstanding that the contract between provider and district – which provides for a quarterly reporting-and-recoupment process that is separate and apart from the after-the-fact audits conducted by the Department[6] – makes no express provision for recovery by the district once the contract year has ended, and notwithstanding that the district itself may bear a degree of responsibility for the provider's misunderstandings and failure to make corrections during the course of the contract year.

On this latter point – while in no way minimizing petitioner's own responsibility to know and comply with the provisions of its contract and applicable law – the Commissioner does agree with the ALJ that Paterson cannot be found on the present record to have provided the monitoring and assistance required of it during the 2003-04 school year, and that such monitoring and assistance might well have prevented in significant part the disallowances subsequently found by the Department on audit. Consequently, although petitioner cannot be permitted to retain Abbott preschool monies which have not expended or documented strictly pursuant to law, the Commissioner does deem it appropriate to afford petitioner an opportunity to budget for the required refund and effectuate it over a reasonable period of time; for that reason, the Commissioner directs that petitioner's payment to Paterson is to be made in equal monthly installments during the 2009-2010 school year, as either a credit toward the tuition charged pursuant to the contract in effect for that year or as a direct remittance to the district in the event the parties' relationship has ceased prior to or during the 2009-2010 school year.

Accordingly, for the reasons set forth above, the Commissioner adopts in part and rejects in part the Initial Decision of the OAL. The appeal is dismissed and petitioner is directed to repay the Paterson School District – in accordance with the

[6] Testimony of Steven Hoffmann at T2:89.

petitioner is directed to repay the Paterson School District – in accordance with the schedule established herein – $88,858 attributable to underspending of its Abbott preschool budget for the 2003-04 fiscal year.

IT IS SO ORDERED.[7]

COMMISSIONER OF EDUCATION

Date of Decision: 8/08/08

Date of Mailing: 8/11/08

[7] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 03681-06
AGENCY DKT. NO. 74-2/06

CATHOLIC FAMILY AND COMMUNITY SERVICES, FRIENDSHIP CORNER I AND FRIENDSHIP CORNER II,

Petitioners,

v.

STATE-OPERATED SCHOOL DISTRICT OF CITY OF PATERSON, PASSAIC COUNTY AND NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondents.

Vito A. Gagliardi, Jr., Esq., for petitioners (Porzio, Bromberg & Newman, P.C., attorneys)

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Record Closed: February 14, 2008 Decided: March 25, 2008

BEFORE **JESSE H. STRAUSS**, ALJ:

STATEMENT OF THE CASE

The State-Operated School District of the City of Paterson (Paterson) has contracted with petitioner Catholic Family and Community Services (CFCS) and its Friendship Corner Schools (Friendship) to provide early child educational services to 360 children enrolled in the Paterson public school district pursuant to Abbott v. Burke, 153 N.J. 480 (1998) and Abbott v. Burke, 163 N.J. 95 (2000). The Paterson Internal Audit Unit (IAU) for respondents Paterson and the Department of Education (DOE) has determined, after review of the financial records of CFCS, that CFSC owes, and must return to, Paterson $88,858 in Abbott funding paid during fiscal year 2003-2004 because it did not follow the approved Abbott budget regarding certain administrative expenses. Private preschool providers are required to implement sound fiscal practices, including making all educational, administrative and indirect support cost expenditures in accordance with the budget approved by an Abbott district and the DOE. N.J.A.C. 6A:10A-2.2 (b) (11) (ii). At issue in the appeal of CFCS is whether the audit determinations requiring the return of certain funds are correct and, if so, whether Paterson can recoup these funds by a repayment or reduction schedule regarding future services rendered by CFCS. The DOE also contends that the appeal should be dismissed as untimely.

PROCEDURAL BACKGROUND

Following CFCS's February 14, 2006 filing with the DOE of a Verified Petition of Appeal with an application for emergent relief, its Office of Controversies & Disputes transmitted the matter, pursuant to N.J.S.A. 52:14B-1 to –15 and N.J.S.A. 52:14F-1 to –13, to the Office of Administrative Law (OAL), which filed it for hearing and determination as a contested case on March 29, 2006. The Petition complained about Paterson's attempt to withhold monies from CFCS in the 2005-2006 school year based on audits for the 2003-2004 and 2004-2005 school years.

I heard the application for emergent relief on April 4, 2006, at which time I ordered that Paterson shall not implement a repayment or reduction schedule as to the 2004-2005 fiscal year by reducing agreed upon monthly purchase orders to CFCS under the 2005-2006 fiscal year contract pending disposition of the pending dispute and that CFCS is not required to repay the District any monies from the 2004-2005 fiscal year pending disposition of the appeal.

Before the conclusion of the hearings, the parties settled all claims relating to the 2004-2005 fiscal year. The only substantive issue remaining is whether CFCS is obligated to return $88,858 to Paterson because it allocated certain administrative expenses which were not permitted under its contract with Paterson.

FACTUAL DISCUSSION

Uncontested Facts

Most of the facts are undisputed, and I **FIND** the following to be **FACTS** of this matter:

CFCS is a not-for-profit corporation that operates and administers a wide variety of social service programs within the boundaries of the Diocese of Paterson. It has a budget of about $18 million and has about 350 employees. Among its programs, it operates the Friendship Schools, which are early childhood educations programs to about 360 children.

Because Paterson does not have the facilities to furnish all of the preschool services required by the Abbott cases, it has contracted with and paid with Abbott money flowing from the State various entities including CFCS to provide preschool services.

CFCS and Paterson entered into a contract on July 3, 2003, for the period of July 1, 2003 through June 30, 2004, to provide preschool services through Friendship. Section I, Paragraph E5 provides that:

> The term "Quarterly Expenditure Report" means a report of all actual expenditures with supporting documentation and receipts for each quarter following the payment and report schedule provided in Section VI. Compensation, below for all approved budget lines for the 2003-2004 school year. This includes reporting all approved salaries, benefits, payroll taxes, substitute stipends, consumable materials and supplies, the startup costs, if applicable, durable materials and supplies, field trips, security costs, cleaning costs, space costs, food and food related services, special requests, summer and enrichment costs, if applicable, administrative and indirect costs on the expenditure report [IAU-4].

Section VI, Paragraph I required CFCS to submit to Paterson quarterly expenditure reports and supporting documentation and receipts no later than October 15, January 15, April 15 and June 20 or the last school day of the school calendar year. The Agreement provided for the 6-hour comprehensive educational component of the 10-hour program for the school calendar days with the remainder of the day to be funded by the Department of Human Services. Paragraph K of Section VI requires that:

> The provider shall implement sound fiscal practices including, but not limited to, maintaining a financial management system that provides timely, accurate, current and complete disclosure of all financial activities related to the Agreement, in accordance with Generally Accepted Accounting Principles; making expenditures in strict accordance with the budget approved by the Paterson Public School District and the Department; and amending the approved budget with approval by the board of education and the Department [IAU-4].

Section VIII, Paragraph M provides that the "Paterson Public School District shall provide financial management assistance to the provider in the development and monitoring of the provider's annual budget and implementation of the preschool program." Under Paragraph Q, the District was to conduct on-site monitoring at least twice in each contract year to assess compliance and shall ensure that CFCS is complying with the contract requirements. Finally, Article XII, Paragraph A required CFCS to maintain all records concerning the operation of the program and to make them available to the District and to the Department upon request.

The IAU issued a document entitled "Private Provider One-year Programmatic Budget Instructions and Forms" for the 2003-2004 school year [P-1]. With regard to administrative and indirect costs this guidance provides at pp. 8-9:

> No more than 17.65 percent of the provider's total approved Abbott Educational Program budget may be allocated for administrative and indirect costs associated with operating the Abbott preschool program. This administrative/indirect cost allocation includes all administrative and clerical salaries, including the director's salary. It also includes accounting and payroll fees, office equipment, office supplies. Indirect costs such as office space, utilities, telephone, insurance, and building maintenance and repair are also included in this allocation. Classroom and gross motor space for the Abbott preschool program is considered a direct cost and must be budgeted above under Abbott Educational Program Costs. Providers do not need to document their administrative and indirect costs, as each provider will receive a fixed amount for such costs based on their approved Abbott Educational Program Costs. To calculate the amount your center may budget for administrative and indirect costs, the budget worksheet automatically applies the following formula to your budget: **Approved Abbott Educational Program Costs x 17.65% = Administrative/Indirect Cost.**

In the fall of 2005, the DOE's IAU conducted a review of the financial records of Friendship for the 2003-2004 school year. It issued an Executive Summary Report where it determined that Friendship did not spend Abbott funds for that year in accordance with individual line items in the area of administrative and indirect costs and recommended that Paterson recover $88,858 in unspent funds from Friendship. [IAU-3 and IAU-10]. The IAU disallowed those expenses because they allegedly were not documented correctly and were underspent.

CFCS contends that it followed the IAU guidelines for the preparation of the 2003-2004 budget. Since the 2003-2004 budget approved by Paterson indicates a subtotal for Abbott Educational Costs of $1,838,704, CFCS argues that up to $324,531 could have been approved for the line item entitled "Administrative/Indirect" costs and that the administrative/indirect costs in its approved budget was within the 17.65% guideline. Instead the IAU only approved $235,673, leaving a balance of $88,858 at issue.

Karin Garver, an educational program development specialist in the Division of Early Childhood Education at the DOE testified that, during the 2003-2004 school year, for the first time, administrative costs were collapsed into one line on the budget to give providers more flexibility to spend money within allowable costs for administrative and indirect costs so that they did not have to do budget transfers from one line item to another. Whereas in prior years the provider's budget had to have specific sub-categories for Administrative/Indirect costs, in 2003-2004 providers were given a 17.65 percent of their budget for those costs.

Steven Hoffmann, a Certified Public Accountant with the DOE, is responsible for overseeing the IAUs for the three state-operated school districts including their random audits of the districts' contracted early childhood providers. As to the Friendship audit, the IAU only allowed expenses for one director because only one director had been allowed in the previous year, and his subordinate auditors had been given verbal instructions to continue the same limitation. Hoffmann conceded however that the continuation of this limitation was not written into the 2003-2004 guidelines although it has at page 8 a reference to "director's salary" in the singular.

Hoffmann and IAU supervising internal auditor Dan Sackner explained the audit process that led to a conclusion that Friendship had under spent its Administrative/Indirect cost line item. It is a review of actual expenditures versus budgeted expenditures. For cost allocation purposes in the Friendship budget, certain items such as teachers' salaries and benefits and field trips are entirely funded at 100 percent by the Department, because they are specifically related to the Abbott program. Friendship also offers a before and after school program funded by the Department of Human Services (DHS). Shared costs such as rent and heat, which benefit both the Abbott and DHS programs, are allocated based on the number of hours of the Abbott program, 1243 instructional hours (based on 182 days a year, for 6.5 hours a day, plus 60 hours for summer enrichment), versus the DHS program, which is open for 1207 total hours. For the shared costs, the Department funds 50.7 percent and DHS funds 49.3

percent. Because Friendship also operated four non-Abbott private classrooms that year, there was a 20 percent proration for those private classrooms on shared costs [IUA 1]. Hoffmann explained that, although the DOE allowed a provider to spend a flat 17.65 percent on Administrative/Indirect costs, it still had to document the expenditures through invoices, and the expenditures had to be properly allocated to the Abbott program. Under this principle, the auditors would allow Friendship all documented Abbott Administrative/Indirect costs up to $324,531, which represented 17.65 percent of the approved budget. The auditors determined that, although Friendship indicated that it spent $324,531 on Administrative/Indirect costs (up to the allocated amount), Friendship's documented and allowed Administrative/Indirect cost expenditures, after applying the allocation percentages and the disallowances, was under the budgeted amount by $88,858.

Sackner was more specific regarding that part of the Friendship audit concerning Administrative/Indirect expenditures. The auditors matched each expenditure with its invoices and calculated the portion attributable to the Abbott program. For example, they took the pay registers of the director, a clerical and an accountant and allowed six and one-half hours of each person's eight hour day for salary and payroll tax purposes against the Abbott budget. They excluded costs where there was no invoice, and they excluded costs which did not benefit the Abbott program. For instance they excluded a large postage purchase ($1900) and a purchase of computers on June 30, 2004 ($9,560.80), on the premise that those items could have been charged to the following school year, but did not benefit the children in the 2003-2004 school year. They also excluded partial salary allocations for several executives of CFCS, because they were beyond the administrative personnel allowed in the 2002-2003 guidelines, which, in their view, was limited to one director, one clerical and a janitor, even though there was no such limitation written into the 2003-2004 guidelines. CFCS had provided the IAU with a one month time study of several CFCS employees such as Chief Executive Officer Joseph Duffy, Comptroller Tom Verghese and Chief Financial Officer Bob Jacobs to demonstrate that they are in daily touch with the Friendship director monitoring the

outcome of the program and processing each of its invoices [P-2].[1] Sackner conceded that he dealt with several executives of CFCS whom he knew were involved in the Abbott process, but felt compelled nonetheless to exclude them. Finally, Sackner testified that code "253" on the Friendship general ledger refers to the Abbott program but that the funds were commingled with DHS funds and that it was impossible to determine what percentage of the Administrative/Indirect costs were attributable to the Abbott versus the four non-Abbott classrooms. In those instances, they multiplied the claimed cost by 80 percent (sixteen of twenty classrooms were for the Abbott program) and again by 65 percent (six and one-half hours out of a ten-hour day).

Additional Testimony

Antionette Scholing was the fiscal monitor for Paterson overseeing its Department of Early Childhood for the 2003-2004 school year. At that time Paterson did not have a real auditing structure for the Preschool Program, but Paterson was required to provide fiscal assistance and oversight to the early childhood centers. She testified that Paterson did so through monthly meetings with the preschool directors and a meeting on how the budget works at the beginning of the year and explaining the State's guidelines. She recalled doing a compliance audit in 2003-2004 of Friendship to look at documentation to make sure it was following the guidelines. She believed that during the year, someone from Paterson was collecting invoices from providers but was not sure. Scholing also did not know if Paterson implemented written procedures for fiscal assistance and oversight for early childhood centers. She did not recall whether the issue of the number of administrators allowed to be counted in administrative expenses in 2003-2004 came up at directors' meetings, and she was not aware of whether any Paterson official directed providers to document their Administrative/Indirect costs, notwithstanding language to the contrary in the State guidelines.

[1] The CFCS time study for the 2003-2004 school year shows that the portion of the salaries, taxes and benefits of administrators in the main office incurred while performing functions on behalf of Friendship totaled $95,239.59. For instance, 15 percent of Duffy's salary, taxes and benefits was allocated toward Friendship administrative expenses. The same analysis was done for Verghese and Jacob as well as for a payroll staff, accounts payable, senior accountant, administrative assistant and administrator of maintenance staff employee.

Corradina Fronte, a Data Management Specialist for Paterson, also confirmed that providers were never given any guidance indicating that Administrative/Indirect Costs had to be documented, nor could she recall any meeting after September 2003 where revisions to the applicable guidelines may have been reviewed. In June of 2002, there was an exchange of correspondence between CFCS CEO Duffy and Paterson Assistant Superintendent for the Department of Early Childhood Education Anna DeMolli. Duffy was requesting a budget adjustment to include some administrative cost for part of the salaries of Bob Jacobs, Verghese and Duffy because of their input into the Abbott program. DeMolli responded that the issue of administrative expenses had been presented to the DOE for further consideration and that no adjustment would be made at that time [RP-25 and RP-26]. This exchange preceded the DOE's subsequent issuance of its guidance for the 2003-2004 budget around February 14, 2003. However, she met with the providers in August or September 2002, and talked about changes in the guidance before new contracts were signed in May or June of 2003. For instance, the new guidance [P-1] advised that non-Abbott expenses must be charged to other funding sources and that Administrative/Indirect expenses must be prorated to reflect the ratio of Abbott to non-Abbott classrooms. Fronte also testified that, although the guidance instructed that providers need not document their administrative and indirect costs, Paterson personnel would have told them that they still had to keep track of where they were expending the money. Paterson did not however issue this "counter-instruction" in writing.

Friendship Director Wanda Alicea oversaw its instructional and support staff and provided information to the main CFCS office to assist in compiling the annual budget. Her budget involved was however limited to responding to requests for information from the main office and keeping track of budget expenditures. She regularly received administrative support to run Friendship from Executive Director Joseph Duffy, Chief Financial Officer Bob Jacobs and Comptroller Tom Verghese. All of whom worked out of the CFCS main office. During the audit process, CFCS provided the IAU with very specific information related to time spent by those three administering to Friendship in order to demonstrate their participation in the administration of the program [P-2]. Alicea testified that she attended monthly directors' typically presided over by Dr. DeMolli. She

criticized these meetings in that agenda topics were often not adequately addressed and presenters were unable to answer provider questions. They were often told that Paterson would make inquiries of the Department, but there was no follow-up. She recalled that power point presentations on the proper completion of the budget rather than substantive explanations of the relevant guidelines. According to Alicea, since the instant litigation, there is more and quicker communication from Paterson. She learned from the monthly meetings preceding the creation of the 2003-2004 budget that the providers had 17.65 percent of their total budget to spend on Administrative/Indirect costs, but was never told that such costs were subject to additional restrictions.

During the 2003-2004 school year, no one from Paterson or the DOE informed her or Duffy that monitoring assistance would be provided or that the quarterly reports Friendship submitted on its spending were a cause of concern or showed improper expenditures. For instance, no one informed her during or at the end of the 2003-2004 school year that the purchase of postage and computers was outside the contract purpose. Alicea further explained that they were used for the Abbott programs despite the timing of the purchase.[2] According to Duffy Paterson never performed on-site monitoring. No one at the directors meetings ever explained that, for the 2003-2004 school year, there would be a catch all reserve for miscellaneous expenditures.

Alicea testified that during the IAU audit in 2005 she compiled information for the IAU. At the October 5, 2005 IAU exit conference, she learned for the first time that the IAU had raised issues relating to commingling of funds, teaching time, expenditures spent outside the contract period and coverage of salaries for certain administrative positions. She was surprised to learn at the exit conference that the auditors had subdivided the Administrative/Indirect costs into sub-line items, because it was her understanding that, for 2003-2004, the guidance allowed all administrative expenses that did not exceed 17.65 percent of the total budget.

Duffy, who has oversight of Friendship, testified that his 2002 correspondence with DeMolli, referred to by Fronte, was his expression of dissatisfaction with the amount

[2] CFCS and Friendship continued to provide preschool services to Paterson in the 2004-2005 school year.

of administrative costs allowed by Paterson. He did not have such concerns going into the 2003-2004 school year because he had subsequently learned from DeMolli that the guidelines for that year would be changed to reflect a different approach, and they indeed appeared to change for the next year as reflected in the 2003-2004 Department guidelines [P-1]. Garver, on behalf of the DOE, took a different position, contending that the added that the new flexibility of 17.65 percent was not intended to allow a provider to add administrative positions not permitted under the 2002-2003 budget, such as more than one director, because the DOE felt that the previous limit on administrative positions was adequate for staffing the Abbott program. If a provider wanted to add an administrative position, if would have to make a special request during budget preparation.

Duffy further testified that he first heard during the 2005 audits that the IAU was accusing CFCS with commingling funds in 2003-2004 with those of non-Abbott programs. Although the code "253" on the general ledger reviewed by the IAU did, in fact, include DHS funds, the IAU had been also receiving Friendship's quarterly reports that reflected only those funds used on the Abbott programs, and at no time did CFCS bill Paterson for that which was not spent on the Abbott programs. The quarterly reports also reflected that that there were administrative expenses being paid for part of the salaries for Duffy, Jacobs and Verghese.

Additional Facts

Based on the testimony of the witnesses and documentary evidence presented, I **FIND** the following additional **FACTS**:

Duffy, Jacobs and Verghese, whose overall responsibilities were for multiple CFCS programs in addition to the Friendship preschool program, committed a certain portion of their work to the administration of the Friendship program. Sackner acknowledged as much. CFCS submitted quarterly reports in 2003-2004 as required by its contract with Paterson. These reports reflected that Friendship was treating part of the salaries of Duffy, Jacobs and Verghese as Abbott administrative expenses. The

reports also reflected that, notwithstanding the general ledger entries, Friendship was not commingling Abbott monies with other monies and was not billing Paterson for items not spent on the Abbott programs. Paterson did not perform the monitoring during the 2003-2004 school year to which it was committed under the contract. No one from Paterson or the DOE informed anyone from Friendship or CFCS during the 2003-2004 school year that any of its expenditures were contrary to the DOE's guidance in effect for that year. The guidance itself did not indicate that the limitation on the number of administrative staff permitted in the prior year would continue for the 2003-2004 school year.

LEGAL ANALYSIS AND CONCLUSIONS

I.

The DOE contends that CFCS's petition, filed with the Commissioner on February 22, 2006, should be dismissed for failure to state a claim upon which relief can be granted as the petition was filed out of time. It claims that the filing was thirty days out of time from an October 17, 2005, trigger date. I **CONCLUDE** that there is no basis for dismissing the petition as out of time.

N.J.A.C. 6A:3-1.3(i) provides:

> [t]he petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing. This rule shall not apply in instances where a specific statute, regulation or court order provides for a period of limitation shorter than 90 days for the filing of a particular type of appeal.

Additionally however N.J.A.C. 6A:3-1.16 provides:

> The rules in this chapter shall be considered general rules of practice to govern, expedite and effectuate the procedure before, and the actions of the Commissioner in connection with, the determination of controversies and disputes under the school laws. Where such rules do not reflect a specific statutory requirement or an underlying rule of the OAL, they may be relaxed or dispensed with by the Commissioner, in the Commissioner's

> discretion, in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice.

Inexplicably, two years after the filing of the petition, after pleadings and a hearing related to an application for emergent relief, after cross motions for summary decision, and after three days of a plenary hearing, the DOE raises a statute of limitations defense for the first time in its post hearing brief. For the following reasons set forth in Williams v. Bell Telephone Laboratories, 132 N.J. 109 (1993), dismissal of this petition on the statute of limitations basis is inappropriate where first raised after the completion of the process and where the DOE never even raised it in its Answer except arguably implicitly in an affirmative defense of failure to state a claim upon which can be granted:

> The mere one-time mention of the statute in [defendant's] Answer –filed in 1986 – should not serve to preserve that otherwise-unasserted defense through the entire three-and-one-half-year span of the litigation, through preparation for and conduct of a protracted trial, and into a post-verdict submission, in the course of which both parties undoubtedly expended large amounts of time, money, and energy. The statute is designed to order the business of litigants and courts. In the circumstances of this appeal – in which a failure to find waiver would only frustrate those objectives – we refuse to apply the statute to render void an otherwise legitimate claim. Id. at 199-120.

Additionally, the implementation of a statute of limitations bar here is inappropriate under DOE regulations. Although the IAU provided CFCS with a draft of its audit for 2003-2004 at an exit conference of October 5, 2005, and provided CFCS with a letter memorializing its final adjustments on October 17, 2005, discussions continued with Paterson regarding the return of monies for 2003-2004 as well as issues arising out of Paterson's audit for 2004-2005 (issues which were made part of and ultimately settled in the course of these proceedings) [See, Verified Petition at ¶¶ 2, 3, 4, 6 and 11]. Discussions regarding the two audits (one performed by the IAU and the other performed by Paterson) and the recoupment of alleged overpayments became intertwined and concluded on February 1, 2006, when DeMolli told Duffy that "...there is no further internal appeal mechanism for CFCS to exhaust with regard to the 2003-2004 and 2004-2005 findings" [See, Verified Petition at ¶ 11]. The DOE has not denied that DeMolli made such a statement regarding both audited years. [See, DOE Answer]. The filing of the petition occurred fourteen days later. In view of (1) the involvement of

both the IAU and Paterson in the review process of CFCS and Friendship expenditures; (2) the service provider contract being between Paterson and CFCS; and (3) the participation of Paterson's DeMolli in a limited internal appeal process, it is inappropriate to pinpoint the October 17, 2005, DOE letter as the objective event triggering the applicable limitations period. This intertwined process and procedural history presents a compelling reason for the Commissioner to exercise her discretion under N.J.A.C. 6A:3-1.16 to relax strict adherence to the ninety-day filing limitations period as its imposition is inappropriate and would result in injustice. After a full litigation of this matter, it is evident that no party has suffered any disadvantage by a claimed delay in the filing of the petition.

II.

The DOE contends that the IAU's finding that CFCS underspent Administrative/Indirect costs should not be disturbed unless its finding was arbitrary, capricious or unreasonable. Although that may be the appropriate standard of limited review for an appellate court to a final decision of an administrative agency, such is not the case here were an administrative law judge is called upon by the agency to review, not final action, but rather to make findings of fact and conclusions of law upon consideration of testimony and evidence presented in a plenary hearing. The inquiry in this proceeding is whether the IAU's findings were erroneous. Youth Consultation Service, Inc. (Fort Lee Education Center v. New Jersey State Department of Education, Office of Fiscal Policy and Planning, EDU 03573-06 Initial Decision, (August 20, 2007) at p.22, <http://lawlibrary.rutgers.edu/oal/search.html>, aff'd. Final Decision (October 4, 2007).

III.

The Legislature created Abbott districts in response to the New Jersey Supreme Court's decision in Abbott v. Burke, 119 N.J. 287, 294 (1990) ("Abbott II). They are 28 urban districts classified as special needs districts under the Quality Education Act of 1990. N.J.S.A. 18A:7F-3. Because Abbott districts do not have the local resources to provide

their students with a thorough and efficient education ("T&E"), the State must assure that funding adequately provides for the unique educational needs of the districts. Abbott II, supra, 119 N.J. at 295. Since the Abbott districts receive public State funds, the Department of Education has a duty to scrutinize how they spend these monies to ensure that they are spent in accordance with their intended purpose. Board of Educ. of the City of Vineland v. N.J. Dep't of Educ., EDU660-05, (March 24, 2005), adopted in part and rejected in part, Comm'r (April 15, 2005). http://lawlibrary.rutgers.edu/oal/html/initial/edu00660-05_1.html.

The Abbott districts are obligated to "ensure economies and efficiencies are being attained in the delivery of programs and services." Former N.J.A.C. 6A:10A-7.1(b).[3] The Commissioner has the authority to "take any affirmative action as is necessary to ensure the effective and efficient expenditure of funds for the implementation of all Abbott v. Burke programs, reforms and remedies." Appropriations Act, FY 2007, P.L. 2006, c. 45. The Commissioner is also authorized to "establish any additional condition on the disbursement of Education Opportunity Aid that the [C]ommissioner deems appropriate to ensure the effective and efficient spending in the "Abbott districts.'" Ibid. Clearly, the Legislature has vested in the Commissioner the authority to oversee spending within the Abbott districts.

Private preschool providers are required to implement sound fiscal practices, including making all educational, administrative and indirect support cost expenditures in accordance with the budget approved by the district and the DOE. N.J.A.C. 6A:10A-2.2(b)(11)(ii). An Abbott child care center provider must expend funds "only as specified in the approved budget." N.J.A.C. 6A:10A-2.2(e)(8).

With regard to its guidance or budget instructions to private providers of the Abbott preschool program, it is evident that the DOE has attempted, during the infancy of this program, to develop a balance between its mandate to oversee spending within the Abbott districts and the need to permit these providers to operate with a reasonable

[3] N.J.A.C. 6A:10A-7.2 is now located at N.J.A.C. 6A:10A-7.1. The regulations were adopted by the Department on October 24, 2006.

degree of flexibility. Unfortunately, the changes appear to have caused a disconnect, ambiguity and misunderstanding at least in the 2003-2004 school year between the IAU and CFCS. The manner in which the DOE expected providers to allocate and justify their Administrative/Indirect costs changed substantially between the 2002-2003 and 2003-2004 school years. As DOE representative Karin Garver explained, in 2002-2003, provider's had to have specific sub-categories for Administrative/Indirect costs. The guidance for 2003-2004 however for the first time collapsed administrative costs into one line on the budget in order to provide more flexibility to the providers. The problem arose because CFCS conducted itself in 2003-2004 in accordance with what it understood to be the parameters of its rights and what the DOE and Paterson expected of it in terms of accountability under the published guidance. CFCS contends that the IAU conducted its audit in 2005 in a manner that required an accountability and imposed limitations not set forth in the guidance.

The DOE is entitled to place any restrictions it wishes on how Abbott monies are to be spent and to so restrict the contracts between providers and the Abbott school districts, and, if a provider finds the restrictions onerous, it is free to withdraw from the process. The DOE also has a concurrent duty to explain to and guide providers as to the Department's expectations. Here, the IAU audit, and the conclusions drawn from it, were inconsistent with the guidance the DOE issued.

The guidance for 2003-2004 clearly departed from a requirement that each Administrative/Indirect cost be itemized in a line item. Instead, providers were allowed to allocate up to 17.65 percent of its budget for Administrative/Indirect costs but "...do not need to document their administrative and indirect costs." Yet, the IAU, to the contrary, is attempting to penalize CFCS for costs that are not documented.

Although, the IAU (1) concedes that main office CFCS administrative personnel were involved in the day-to-day running of Friendship; (2) concedes that CFCS is a more comprehensive operation than most if not all of the Abbott preschool providers; and (3) has not disputed the accuracy of the CFCS cost analysis for certain main office personnel ($95,239.59) [P-2], it rejected the inclusion of part of their salaries in the

Administrative/Indirect costs, because the guidance for the previous year limited such administrative personnel costs to one director, one clerical and one janitor. Garver testified that the 2003-2004 guidance was not intended to allow a provider to add administrative positions, because it was not allowed under the 2002-2003 budget since the DOE believed that the previous limit was adequate for staffing the Abbott program. Hoffmann testified that the IAU auditors only allowed one director for Friendship because only one had been allowed the previous year and the auditors were given verbal instructions to continue the same limitation. Such a limitation was however not carried over, conveyed or set forth or published in the written 2003-2004 guidance. Had the DOE intended to continue this limitation of personnel into 2003-2004 (and it certainly was entitled to do so), it was obligated to make that clear. It did not do so. The guidance provides that the administrative costs includes, "...all administrative and clerical salaries, including the director's salary." This is not language of limitation. Garver further testified that, if a provider wanted to add an administrative position, it would have to make a special request during budget preparation. However, that requirement does not appear in the 2003-2004 guidance. To the contrary, whereas the guidance required providers to make special requests in excess of budget guidelines for educational programs, it emphatically stated that, "[P]rovider special requests are for Abbott educational costs only, not for administrative or indirect costs [emphasis added] [P-1, p. 3]." This suggests an exception because the DOE, for that year, was going to allow the providers to use the 17.65 percent formula rather than line items. It is of no moment, as the DOE argues, that Duffy sought additional administrative compensation in his 2002 communications, because he was then limited by guidance then in effect which did not carry over into the next school year.

A similar shortcoming in the IAU audit was its rejection of expenditures of $1900.00 for postage and $9,560.80 at the end of the 2003-2004 school year on the basis that those items would not benefit Abbott preschool children during the 2003-2004 school year. There is no such limitation on the time of purchase in the guidance. The guidance does indeed require that the budget include only those costs associated with running the Abbott preschool program. CFCS continued to provide preschool services during the 2004-2005 school year, and there has been no showing that CFCS duplicated

those expenses for the same items in the following year. Obviously, CFCS could not use Abbott monies for non-Abbott purposes. This was not the case for either these expenditures or the prorated additional administrative personnel salaries discussed above.

Finally, the IAU took items from the general ledger sheets such as telephone, gas and electric, water, office supply, and cleaning supply charges and either discounted them because of missing vouchers or prorated them to account for the fact that only sixteen of the twenty classrooms were for the Abbott preschool program and only 65 percent of the ten hours of operation were for Abbott as opposed to DHS programming. The audit noted that the general ledger commingled Abbott and DHS wrap-around funds. A penalty for the lack of vouchers is contrary to that part of the guidance that allowed up to 17.65 percent of the budget for Administrative/Indirect costs without the need to document the costs. Additionally, the prorating process used in the 2005 audit, although logical in terms of general accounting practices, was inappropriate here after the fact when CFCS was instructed by the guidance in 2003-2004 that it did not need to document each specific cost and where the quarterly reports dutifully submitted to Paterson would have shown how the Abbott money was spent.

Had CFCS been contractually required to conduct its recordkeeping in a different manner during the contract period than what the guidance suggested, Paterson then had an obligation under its contract with CFCS to monitor and immediately cause the correction of improper conduct. It did not do so. CFCS timely submitted quarterly reports to Paterson during the 2003-2004 school year, which only reflected Abbott expenditures and also disclosed the inclusion of part of the salaries of administrators beside that of Director Alicea. For the first time in the IAU audit over one year later, CFCS's recordkeeping is criticized.

For the above reasons, I **CONCLUDE** that CFCS and Friendship is not required to repay Paterson $88,858 from the 2003-2004 fiscal year. Its Administrative/Indirect costs for that year did not exceed the 17.65 percent of the Approved Educational Program Costs allowed under the applicable DOE guidance.

ORDER

It is hereby **ORDERED** that the petition of Catholic Family and Community Services, Friendship Corner is **GRANTED** insofar as it is not required to repay the State Operated School District of the City of Paterson $88,858 in Administrative/Indirect costs from the 2003-2004 fiscal year.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 25, 2008
DATE

JESSE H. STRAUSS, ALJ

Date Received at Agency: 3/25/08

Mailed to Parties:
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

MAR 26 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

id

APPENDIX

Witnesses

For Respondent: Department of Education, Internal Audit Unit

Karin Garver

Steven Hoffmann

Dan Sackner

For Respondent: State Operated School District, City of Paterson

Toni Scholing

Corradina Fronte

For Petitioner: Catholic Family & Community Services

Wanda Alicea

Joseph Duffy

Exhibits:

For Respondent: Department of Education, Internal Audit Unit

IAU-1 Approved Abbott Provider Budget for Friendship for 2003-2004

IAU-2 Sign-in Sheet from the October 5, 2005 Audit Exit Conference

IAU-3 IAU's 2003-2004 Audit Findings

IAU-4 Abbott Preschool Educational Program Contract for the 2003-2004 School Year entered into by Paterson and Friendship Corner

IAU-5 Analysis of Administrative/Indirect Costs prepared by IAU

IAU-6 General Ledger of CFCS for July 1, 2003 through June 30, 2004

IAU-7 Analysis of Payroll prepared by IAU

IAU-8 Analysis of Payroll Taxes prepared by IAU

IAU-9 Analysis of Support and Indirect Cost prepared by FCS

IAU-10 Budget v. Actual prepared by IAU

For Respondent: State Operated School District, City of Paterson

RP-23 Directors Meeting Agenda and Sign-In Sheet for meeting, March 21, 2002

RP-24 Directors Meeting Agenda and Sign-In Sheet for meeting, April 17, 2002

RP-25 Letter from Mr. Duffy to Dr. DeMolli, June 3, 2002

RP-26 Memorandum from Dr. DeMolli to Mr. Duffy, June 14, 2002

RP-27 Letter from Mr. Duffy to Dr. DeMolli, June 24, 2002

RP-29 August 19, 2002 Memorandum from Dr. DeMolli to all Center Directors scheduling an August 22, 2002 meeting of all Center Directors.

****(all other RP Exhibits either not offered or withdrawn due to settlement.)**

For Petitioner: Catholic Family and Community Services

P-1 Abbott Preschool Program, Private Provider One-Year Programmatic Budget Instructions and Forms, Revised February 14, 2003

P-2 Letter to Daniel Sackner with attachments, September 23, 2005

P-3 N.J.A.C. 6A:10-1.1 et seq.

P-4 Curriculum Vitae Joseph F. Duffy

341-08LA

341-0

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

JON S. CORZINE
Governor

August 13, 2008

LUCILLE E. DAVY
Commissioner

Joanne L. Butler, Esq.
Schenck, Price, Smith & King, L.L.P.
10 Washington Street
P.O. Box 905
Morristown, NJ 07963-0905

Nancy I. Oxfeld, Esq.
Oxfeld Cohen, P.C.
60 Park Place, 6th Floor
Newark, N.J. 07102

Dear Counsel:

I have reviewed the papers filed in conjunction with the District's motion for stay, pending appeal to the Appellate Division of the Superior Court, of the State Board of Education's April 16, 2008 decision in the matter entitled *In the Matter of the Tenure Hearing of Ardeena Long, State-operated School District of the City of Paterson, Passaic County*, Commissioner Appeal Dkt. No. 9-7/08A (formerly State Board Docket #47-06). As you are aware, this matter was transferred to me for determination pursuant to *P.L.* 2008, *c.* 36.

The standard by which I must review this matter is well-established. Pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), an applicant for extraordinary relief must demonstrate irreparable harm, a settled legal right to relief, a likelihood of prevailing on the merits of the underlying matter, and a balancing of equities and interests in the applicant's favor. As was pointed out in respondent's brief in opposition to stay, the District's submission failed to address any of the components of this requisite standard – instead focusing on reiteration of its arguments as to why respondent should have been dismissed from her tenured position. Consequently, I have no recourse here other than to deny the District's motion.

Accordingly, the District's request for a stay of the State Board of Education's April 16, 2008 decision is hereby DENIED.

Sincerely,

Lucille E. Davy
Commissioner

LED/DA/MKD/MH
Via Facsimile and Regular Mail

342-0

OAL DKT. NO. EDE 460-07
STATE BOARD OF EXAMINERS DKT. NO. 0506-287
STATE BOARD DOCKET #17-08
AGENCY DKT NO. 5-7/08A

IN THE MATTER OF THE SUSPENION	:	
OF THE TEACHING CERTIFICATES	:	COMMISSIONER OF EDUCATION
OF KEVIN JORDAN BY THE	:	DECISION
STATE BOARD OF EXAMINERS.	:	
	:	

Decision by the State Board of Examiners issued on February 28, 2008

For the Respondent-Appellant, Wills, O'Neill & Mellk (Arnold M. Mellk, Esq., of Counsel)

For the Petitioner-Respondent State Board of Examiners, Melissa T. Dutton, Deputy Attorney General (Anne Milgram, Attorney General of of New Jersey)

I have reviewed the record and the papers filed in connection with respondent's appeal of the State Board of Examiners order of February 21, 2008 revoking his teaching certificates. As you are aware, this matter was transferred to me for determination pursuant to *P.L.* 2008, *c.* 36.

After full consideration of the record and all submissions, the decision of the State Board of Examiners is affirmed for the reasons expressed therein.*

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 8/13/08
Date of Mailing: 8/13/08

*This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

IN THE MATTER OF	:	NEW JERSEY DEPARTMENT OF EDUCATION
THE CERTIFICATES OF	:	STATE BOARD OF EXAMINERS
KEVIN JORDAN	:	ORDER OF REVOCATION
_____	:	DOCKET NO: 0506-287

At its meeting of June 8, 2006, the State Board of Examiners reviewed information received from the Cinnaminson Township Clerk indicating that on January 2, 2003, the Cinnaminson Municipal Prosecutor had charged Kevin Jordan with lewdness, contrary to the provisions of N.J.S.A. 2C:14-4a. On June 19, 2003, Jordan pled guilty to disorderly conduct and was fined and ordered to undergo counseling. He was also given a 90 day suspended jail sentence. Upon review of the above information, at its July 20, 2006 meeting, the State Board of Examiners voted to issue Jordan an Order to Show Cause. Jordan currently holds a Teacher of Elementary School Certificate of Eligibility With Advanced Standing, issued in August 2000 and a Teacher of Elementary School certificate, issued in July 2001.

The Board sent Jordan the Order to Show Cause by regular and certified mail on July 26, 2006. The Order provided that Jordan's Answer was due within 30 days. Jordan filed his response on December 4, 2006. In that Answer, Jordan stated that the allegations spoke for themselves and were not proof of unbecoming conduct. (Answer, ¶¶ 1-5).

The Board of Examiners transmitted the matter to the Office of Administrative Law (OAL). Administrative Law Judge Jeff Masin heard testimony on August 23, 2007. After receiving post-hearing submissions, the record closed and the ALJ issued an Initial Decision on December 6, 2007. *In the Matter of the Certificates of Kevin Jordan,* Dkt. No. EDE 00460-07 (Initial Decision, December 6, 2007).

In that decision, ALJ Masin noted that, several times, Jordan had masturbated in front of the lone employee, a female, while he was the sole customer in a men's clothing store. (Initial

Decision, slip op. at 2-5.) Although Jordan testified that he thought he had her consent, the female employee testified that she had not liked what he did and told him so on a previous occasion. (Initial Decision, slip op. at 2-5.) Jordan's therapist, Dr. Fred Chase, also testified that after treating Jordan, he was convinced these incidents represented aberrational behavior and that Jordan was deeply regretful. (Initial Decision, slip op. at 6.) Dr. Chase further opined that Jordan's prognosis was excellent for not repeating the conduct. (Initial Decision, slip op. at 6.) The doctor expressed no concern that Jordan was a teacher. (Initial Decision, slip op. at 6.)

ALJ Masin found that the female employee never invited or encouraged Jordan to act as he did: "He may have thought she did, or may have hoped she did, and her failure to alert the police after the first incident may have encouraged him to believe she would not mind a second event, but I am convinced that what we have is an individual who decided, for his own possibly unfathomable reasons, to foist his own sexual activity on an unwilling victim." (Initial Decision, slip op. at 8.) The ALJ noted that the real question of the case was whether Jordan's lewd behavior of several years before precluded him from retaining his teaching certificates. (Initial Decision, slip op. at 8.)

After considering all the testimony and the case law, ALJ Masin determined "that the drastic revocation of Mr. Jordan's certificates is unwarranted." (Initial Decision, slip op. at 9.) The ALJ found that even though Jordan's behavior was "obnoxious" there was no evidence that he had "any likelihood of inflicting such improprieties upon his students." (Initial Decision, slip op. at 9.) The ALJ stated that he was "convinced by a preponderance of the credible evidence that Jordan does not pose a threat and that his misconduct is remote enough that it will not disserve his status as a role model for his students." (Initial Decision, slip op. at 10.) ALJ Masin

therefore concluded that no sanction needed to be imposed and he dismissed the Order to Show Cause. (Initial Decision, slip op. at 10.)

The Deputy Attorney General (DAG) representing the Board of Examiners filed Exceptions to the Initial Decision and Jordan filed Reply Exceptions. In her Exceptions, the DAG argued that the ALJ acknowledged that Jordan engaged in conduct unbecoming a teacher. (Exceptions, pp. 1-2.) The DAG further argued that ALJ Masin erred in relying on Dr. Chase's testimony to dismiss the Order to Show Cause since he was not a qualified expert in treating sexual predators and possessed "no specific knowledge as to how respondent's behavior may impact his abilities as a teacher." (Exceptions, p. 2.) The DAG therefore claimed that Jordan's actions "clearly warrant some level of action upon his certificates." (Exceptions, p. 4.) In his Reply Exceptions, Jordan argued that in rendering his decision, the ALJ fully and carefully considered Jordan's behavior and the potential impact of that behavior on his teaching position. (Reply Exceptions, p. 2.) Jordan reiterated that Judge Masin determined that Jordan's "behavior of several years ago was wholly unrelated to his employment, and had no impact whatsoever upon his ability or fitness to continue as a teacher. (Reply Exceptions, p. 2.) Moreover, Jordan claimed that since he met with Dr. Chase on six occasions, the doctor had "ample opportunity to thoroughly diagnose Respondent, and form a prognosis with respect to his psychological condition and behavior." (Reply Exceptions, p. 2.) Thus, according to Jordan, since the ALJ determined that Jordan's ability and fitness to teach were unaffected by his past actions, the ALJ was correct in dismissing the Order to Show Cause. (Reply Exceptions, p. 3.)

The Board must now determine whether to adopt, modify or dismiss the Initial Decision in this matter. At its meeting of January 17, 2008, the State Board of Examiners reviewed the Initial Decision, Exceptions and Reply Exceptions. After full and fair consideration of all the

submissions, the Board voted to reject the Initial Decision. There is no doubt that the ALJ is in the best position to render credibility determinations in this matter. Accordingly, the Board will defer to those findings. However, credibility is not at issue in this matter. Jordan has not denied that, at a minimum, he exposed himself in full sight of an unwilling witness. His behavior leaves no doubt that he clearly has engaged in conduct unbecoming a teacher, one of the grounds for revocation or suspension of a teaching certificate. *N.J.A.C.* 6A:9-17.5. Accordingly, the remaining decision for this Board is one of penalty.

The State Board of Examiners may revoke or suspend the certification of any certificate holder on the basis of demonstrated inefficiency, incapacity, conduct unbecoming a teacher or other just cause. *N.J.A.C.* 6A:9-17.5. Furthermore, unfitness to hold a position in a school system may be shown by one incident, if sufficiently flagrant. *Redcay v. State Bd. of Educ.*, 130 *N.J.L.* 369, 371 (Sup. Ct. 1943), *aff'd,* 131 *N.J.L.* 326 (E & A 1944). "Teachers ... are professional employees to whom the people have entrusted the care and custody of ... school children. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." *Tenure of Sammons*, 1972 *S.L.D.* 302, 321. The Board of Examiners agrees with the ALJ that Jordan's conduct warrants condemnation. Where the Board and the ALJ part company is the decision of the appropriate response to Jordan's breach. Jordan's acts of public masturbation are inexcusable for any individual, teacher or not. While he may have been an exceptional teacher in the classroom, he has not demonstrated like behavior outside that arena.

Jordan argues that he should retain his certificates since the incident occurred off school grounds. It is well established that the State Board of Examiners has the right to revoke a certificate where the teacher was involved in criminal activities, even if the activities were

unrelated to the classroom. *See Cox v. State Board of Examiners,* (App. Div. Docket No. A-3527-81T3) (November 18, 1983); *State Board of Examiners v. Krupp,* 3 *N.J.A.R.* 285 (1981).

Moreover, the Commissioner has long held that teachers serve as role models for their students. Therefore, a teacher's whole life is subject to scrutiny, not just his actions within the schoolhouse doors:

> [R]espondent's argument that, because the occurrence happened in the evening away from school premises, both the Board and the Commissioner have no authority to act, is without merit. Individuals who must comport themselves as models for young minds to emulate choose the teaching profession. This heavy responsibility does not begin at 8:00 a.m. and conclude at 4:00 p.m., Monday through Friday, only when school is in session. Being a teacher requires, *inter alia,* a consistently intense dedication to civility and respect for people as human beings. The Commissioner has, on past occasions, determined tenure charges arising from incidents which happened in the evening both on and off school property. *See In the Matter of the Tenure Hearing of Thomas Appleby, School District of Vineland,Cumberland County,* 1965 *S.L.D.* 159, *aff'd,* State Board of Education 1970 *S.L.D.* 448; *In the Matter of the Tenure Hearing of John H. Stokes, School District of the City of Rahway, Union County,* 1971 *S.L.D.* 623.

[*In the Matter of the Tenure Hearing of Robert H, Beam*, 1973 *S.L.D.* 157, 163.] Jordan therefore cannot exclude his "out-of-school" behavior from this tribunal's examination.

Notwithstanding Jordan's contentions of rehabilitation, this is not the proper context for such considerations. The purpose of this proceeding is "to permit the individual certificate holder to demonstrate circumstances or facts to counter the charges set forth in the Order to Show Cause, not to afford an opportunity to show rehabilitation." *See In the Matter of the Revocation of the Teaching Certificate of Gloria Jackson by the State_Board of Examiners*, 96 *N.J.A.R.* 2D (EDE) 1, 16 *aff'd,* App. Div. Dkt. No. A-1246-96T5 (September 9, 1997) citing *In the Matter of the Revocation of the Teaching Certificate of James Noll*, State Bd. of Examiners decision (February 7, 1990). Thus, the fact that Jordan has taught successfully in another

district, has no bearing on the decision the Board of Examiners must make with regard to his certification.

Accordingly, on January 17, 2008 the Board of Examiners voted to revoke Jordan's Teacher of Elementary School Certificate of Eligibility With Advanced Standing and Teacher of Elementary School certificate. On this 21st day of February 2008 the Board of Examiners voted to adopt its formal written decision and it is therefore ORDERED that the revocation of Kevin Jordan's certificates be effective immediately. It is further ORDERED that Jordan return his certificates to the Secretary of the State Board of Examiners, Office of Licensure, P.O. Box 500, Trenton, NJ 08625-0500 within 30 days of the mailing date of this decision.

Robert R. Higgins, Secretary
State Board of Examiners

Date of Mailing: FEBRUARY 28, 2008

Appeals may be made to the State Board of Education pursuant to the provisions of *N.J.S.A.* 18A:6-28.

RaSHAWN ADAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a former principal in respondent's district – contests the Board's decision to non-renew his annual contract at the end of the 2006-2007 school year. The Board filed a motion for summary decision, asserting their right to non-renew the petitioner, who had not attained tenure in the district.

The ALJ found, *inter alia*, that: the facts in this matter are essentially undisputed and summary decision is appropriate; the Board has the final authority to determine whether to renew the contract of a non-tenured employee; the burden of proof is upon the petitioner to establish that the Board acted in an arbitrary and capricious manner; and the record cannot support such a finding. The ALJ concluded that the Board did not act arbitrarily in non-renewing petitioner's contract, granted the Board's motion for summary decision, and dismissed the appeal.

Upon a thorough and independent review of the record, the Commissioner concurred with the ALJ that respondent Board properly exercised its right to non-renew petitioner's employment, rejected the petitioner's exceptions, and adopted the Initial Decision with supplementation.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

August 13, 2008

OAL DKT. NO. EDU 8237-07
AGENCY DKT. NO. 217-8/07

RaSHAWN ADAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions were timely filed in accordance with the prescriptions of *N.J.A.C.* 1:1-18.4. The Board filed no reply exceptions.

On exception petitioner asserts that there were material facts in dispute with respect to the reasons given by the Board for his non-renewal which preclude the grant of summary decision. He, therefore, urges that the Administrative Law Judge's (ALJ) decision be reversed and this matter proceed to hearing. (Petitioner's Exceptions at 2-5)

Upon a thorough review of the record, the Commissioner concurs with the ALJ that summary decision is appropriately granted to the Board.

It is by now axiomatic that a board has virtually unlimited discretion in hiring or renewing non-tenured teaching staff members. *Dore v. Bedminster Twp. Bd. of Ed.*, 185 *N.J. Super.* 447 (App. Div. 1982). "[A]bsent constitutional constraints or legislation affecting the tenure rights of [teaching staff members], local boards of education have an almost complete right to terminate the services of a [teaching staff member] who has no tenure and is

regarded as undesirable by the local board." (*Id.* at 456) As such, a non-tenured teaching staff member challenging a board's decision to terminate his employment on the grounds that the reasons given by the board are not supported by the facts is entitled to litigate that question only if the facts he alleges, if true, would constitute a violation of constitutional or legislatively-conferred rights. *Guerriero v. Board of Education of the Borough of Glen Rock*, decided by the State Board, February 5, 1986, *aff'd* Docket #A-3316-85T6 (App. Div. 1986) *Also see Lydia Anderson v. State-operated School District of the City of* Newark, decided by the State Board February 7, 2001; *John Kufel. Jr. v. Board of Education of the Union County Vocational-Technical School* District, 96 *N.J.A.R.* 2d (EDU) 446; *Randy Pratt v. Board of Education of the Borough of Butler, Morris* County, decided by the State Board January 6, 1999. The instant non-tenured petitioner has made no such claim. Therefore, even accepting petitioner's allegations as true, the Board is entitled to summary decision as a matter of law.

Accordingly, the Initial Decision of the OAL, as supplemented above, is adopted and the instant petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 8/13/08

Date of Mailing: 8/13/08

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 08237-07
AGENCY DKT. NO. 217-8/07

RaSHAWN ADAMS,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,

Respondent.

Robert M. Schwartz, Esq., for respondent

Thomas W. Sumners, Jr., Esq., for respondent (Sumners George, attorneys)

Record Closed: May 29, 2008 Decided: July 3, 2008

BEFORE **JEFF S. MASIN**:

Petitioner RaShawn Adams, who was employed by the respondent school board (Trenton or Board) as a principal assigned to Parker Annex II during the 2006-2007 school year, appeals from a decision of the Board, which voted not to renew his contract. The Board rejected the recommendation of the Superintendent and voted the non-renewal at its meeting on May 14, 2007. It then advised Adams of its decision. He asked for an informal meeting before the Board; that meeting was held on June 25, 2007. After receiving public comment on the issue, and considering Mr. Adams' contention that his performance merited renewal, the Board again voted against renewal of the contract. Adams then filed a petition with the Commissioner of Education on August 14, 2007, seeking to overturn the Board's action. An answer was filed on behalf of the Board on September 12, 2007. The Commissioner transferred the

contested case to the Office of Administrative Law on October 3, 2007. A prehearing conference was held on December 14, 2007. A scheduled hearing date of May 15, 2008, was adjourned when counsel for the Board filed a motion for summary decision on April 28, 2008. The petitioner responded to the motion and the record closed on May 29, 2008.

BURDEN OF PROOF

In this matter, as the petitioner was not a tenured employee at the time of the Board's action, the burden falls on the petitioner to establish that the Board acted in an arbitrary and capricious manner. While N.J.S.A. 18A:27-4.1 states that

> Notwithstanding the provisions of any law, rule or regulation to the contrary,
> a. A board of education shall appoint, transfer or remove a certificated or non-certificated officer or employee only upon the recommendation of the chief school administrator and by a recorded roll call majority vote of the full membership of the board. The board shall not withhold its approval for arbitrary and capricious reasons.
>
> [Ibid.]

in Jackson Tp. Bd. of Educ. v. Jackson Educ. Assn. ex rel., 334 N.J. Super. 162 (App. Div. 2000), the court held that the final authority as to the decision whether to renew remains with the Board. So long as the Board did not act arbitrarily, its determination will be upheld. Kopera v. West Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960).

EVIDENCE

In this case, Mr. Adams received his first evaluation from the Deputy Superintendent for the 2004-2005 school year. In all categories regarding "Management" he was graded "outstanding," except one, "Assumes responsibility for the implementation of Board policies, administrative directives, and state law and rules." For each of twelve categories under "Supervision," he was rated outstanding, as he was in each of ten "Curriculum" categories. For the 2005-2006 school year, in the

"Management" category, of fourteen criteria he received one "outstanding," twelve "satisfactory" and one "unsatisfactory" rating. This latter was for "Establishes and maintains favorable relationships with local community and business groups, and individuals in development and execution of the school program (Monitoring Element #2)." For the twelve "Supervision" categories, he received one "outstanding," ten "satisfactory" and one "unsatisfactory," this in "Works harmoniously with supervisory, teaching, and support staff, practicing confidentiality and fairness." The evaluator wrote that

> Mr. Adams is the educational leader of his building, however, he must more often hear the voice of his school leadership team and others when developing and disseminating instructional practices, as this will build a more harmonious working relationship and create an atmosphere more conducive to teaching and learning.
>
> [2005-2006 Evaluation of petitioner, page 3 of 9]

In the ten ratings under "Curriculum," Adams received eight "satisfactory" and two "unsatisfactory" ratings. One of these was for "provides leadership in implementing and articulating the Board approved curriculum (Monitoring Element #2)," the other for "ensures that the approved curriculum is being delivered to students (Monitoring Element #3)."

Finally, for the 2006-2007 school year, the evaluation graded Adams on fourteen points regarding "Management." He received eight "outstanding," ratings, and six "satisfactory" ratings. The evaluator's comments were

> Mr. Adams is a third-year principal in the district currently assigned to Parker Annex II. He has implemented a sound master schedule that maximized the instructional time and meeting opportunities for the staff. He has created a school that demonstrates success can be created from the top; however, he must continue to focus on building relationships with his staff, parents, and community members and developing a building culture that is focused on working as a team.
>
> [2006-2007 Evaluation of petitioner, page 1]

The grades for the twelve "Supervision" categories were seven "outstanding," and five "satisfactory." The comments were

> Rashawn Adams maintains a strong visible presence throughout the school day. He is a sound educational practitioner that encourages the use of best practices within his building. He articulates and promotes high expectations for teaching and learning. Moreover, Mr. Adams is an individual that practices and implements accountability and responsibility for all staff members within his building to ensure the academic success of the children. He needs to continue to develop his ability to work harmoniously with staff without comprising (sic) his ability to get the results that he has accomplished.
>
> [2006-2007 Evaluation of petitioner, page 2]

Lastly, Adams received two "outstanding" and eight "satisfactory" marks for the "Curriculum" category.

At its meeting on May 14, the Board voted 4-2 (three absent) in favor of approval of Adam's tenure, but as this did not reach the level of approval required by N.J.S.A. 18A:27-4.1 (majority roll call vote of the full membership), Adams was not renewed. Adams requested an informal meeting with the Board, as provided for in N.J.S.A. 18A:27-4.1(b)

> An officer or employee whose employment contract is not renewed shall have the right to a written statement of reasons for nonrenewal pursuant to section 2 of P.L.1975, c.132 (C.18A:27-3.2) and to an informal appearance before the board. The purpose of the appearance shall be to permit the staff member to convince the members of the board to offer reemployment. . . .
>
> [N.J.S.A. 18A:27-4.1(b)]

The written statement of reasons for nonrenewal, dated June 15, 2007, gave the following reasons for the Board actions: "1. inconsistent evaluations" and "2. Staff complaints regarding management style (disrespectful and abrasive)." The Minutes of the June 25, 2007, meeting of the Board show that during the public participation

portion five teachers from Parker Annex II expressed support for Adams; one teacher reading a letter from a student in support of Adams commenting on how he relates to students. One other teacher spoke about "a stressful atmosphere at the school and no sharing of information with the teachers." In Executive Session, the Board considered a motion to give Mr. Adams a contract for 2007-2008. This motion failed by a vote of two in favor and four against.

ANALYSIS

In opposition to the motion for summary decision, Mr. Adams first cites the recommendation of the chief school administrator in favor of renewal and notes the last evaluation received by Adams, for 2006-2007. He asserts that the disagreement of certain Board members with the evaluation and the Superintendent's recommendation creates a factual issue that must be explored at an evidentiary hearing, therefore precluding a successful motion for summary decision under the standard of Brill v. The Guardian Life Insurance Company of America, et al., 142 N.J. 520 (1995). He sees the purpose of the hearing as to allow the members who voted not to renew to articulate their reasons for doing so. Further, he asserts, without any certification or affidavit, that Adams denies the characterization of him as "disrespectful and abrasive."[i] And he argues that the evaluations do not support the respondent's contentions as to his behavior.

As noted, the burden that a non-tenured employee denied renewal must shoulder is quite significant. Only where the Board's action can be fairly characterized as arbitrary and capricious will the Commissioner interfere with the Board's choice. Kopera, supra. Arbitrary and capricious action is that which is not based upon rationale grounds, which is unsupported by substantial objective evidence. Here, despite the positive information that is contained in the three evaluations provided to Mr. Adams, it cannot be denied that there is also reference to concerns about his interpersonnel relationships and his ability to act as the head of his school in regard to staff and community relations. Thus, while in his first year in the district, 2004-2005, Adams was

[i] N.J.A.C. 1:1-12.5(b) provides that an adverse party opposing a motion for summary decision "in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding."

certainly rated quite highly, in his second year, 2005-2006, he was rated "unsatisfactory" in the "Management category" for "Establishes and maintains favorable relationships with local community and business groups, and individuals in development and execution of the school program (Monitoring Element #2)." In the "Supervision" category, he received an "unsatisfactory," rating for "Works harmoniously with supervisory, teaching, and support staff, practicing confidentiality and fairness." The evaluator wrote

> Mr. Adams is the educational leader of his building, however, he must more often hear the voice of his school leadership team and others when developing and disseminating instructional practices, as this will build a more harmonious working relationship and create an atmosphere more conducive to teaching and learning.
>
> [2005-2006 Evaluation of petitioner, page 3 of 9]

He also received "unsatisfactory" ratings for "Provides leadership in implementing and articulating the Board approved curriculum (Monitoring Element #2)." Then, for 2006-2007, when he was in his third year and renewal for a fourth year would give him tenure, the evaluator, who did write favorably about much of his performance, noted

> [H]owever, he must continue to focus on building relationships with his staff, parents, and community members and developing a building culture that is focused on working as a team.
>
> [2006-2007 Evaluation of petitioner, page 1]

and added, "He needs to continue to develop his ability to work harmoniously with staff without comprising (sic) his ability to get the results that he has accomplished." (Id. at page 2.)

From these evaluations, it is clear that while there was much about Mr. Adams' performance that evaluators praised, there was an ongoing concern about his relationships with staff and the working atmosphere that existed in his building. This resulted in unsatisfactory ratings in 2005-2006 in both "management" and "supervision" areas related to this attribute and in 2006-2007, while his ratings in these areas

improved, the evaluator did note this as an area that Adams had to continue working on, an area he had to continue to develop. When the Board determined to deny renewal and a hearing was held on that decision, the teachers who appeared and spoke included one teacher who complained about the "stressful atmosphere" at the school and the lack of information shared with teachers.

It is clear that when the Board chose to disregard the recommendation of the Superintendent, it did not act on a blank slate. The reasons set forth in its June 15th letter to Adams, explaining its decision to deny renewal, spoke of inconsistent evaluations and staff complaints regarding management style. This second reason, most particularly, appears consistent with the concerns expressed in the evaluations for the last two of Adams' years with Trenton. It is hard to see how the Board's action can rationally be deemed arbitrary and capricious when the evaluations themselves show the concern about Adams' performance in this important area and, even when the Board received outside input from teachers before its second vote, the same concern was raised, albeit along with other, positive praise. There is no lack of rational foundation for the Board's action, even if others in the same position to judge this decision to renew might have acted differently.

A determination made by an administrative body such as a board of education, acting on a discretionary matter such as whether to renew the employment contract for a non-tenured employee who by means of renewal and statutory provisions will gain tenure upon renewal, will not be disturbed "if there is any fair argument in support of the course taken [by the agency] or any reasonable ground for difference of opinion among intelligent and conscientious officials, ... Doubts held by the court as to the wisdom of the administrator's decision do not alter the case. . . . " Flanagan v. Civil Service Dept., 29 N.J. 1, 12 (1959); New Jersey Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 562-563 (1978). The Commissioner of Education likewise will not interfere with the discretionary actions of local boards of education unless that action is patently arbitrary and without rational support. Kopera, supra.

Based upon the record as produced for this motion, and the applicable case law, including the Brill standard, I **FIND** that the Board of Education had and considered

evaluative materials that set forth concerns about Mr. Adam's managerial style and abilities. The last such evaluation expressed his need to continue to develop in this area. I **CONCLUDE** that the Board could rationally and without arbitrariness determine that this ongoing concern was of such a nature that it should not renew Adam's contract and thereby grant him tenure. I **CONCLUDE** that given the significant legal hurdle that the statute and case law present to one challenging a decision of nonrenewal, that on the record here, summary decision is warranted. Given the legal standard, no rational finder of fact could determine that the Board's action was arbitrary and capricious, even if that decision could have been determined differently by others. As the only basis for overturning the Board's decision would be that it acted arbitrarily, and the record cannot support such a finding, the motion for summary decision on behalf of the Board is **GRANTED** and the appeal is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 3, 2008
DATE

JEFF S. MASIN, ALJ

July 7, 2008
Mailed to Parties:

Date Received at Agency:

JUL -9 2008

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

FOR THE PETITIONER:

None

FOR THE RESPONDENT:

Exhibit A	Letter dated 8/27/04 from Carolyn Gibson to petitioner
Exhibit B	2004-2005 Evaluation of petitioner
Exhibit C	2005-2006 Evaluation of petitioner
Exhibit D	2006-2007 Evaluation of petitioner
Exhibit E	Minutes of Board meeting of 5/14/07
Exhibit F	Letter dated 6/15/07 from Carolyn Gibson to petitioner
Exhibit G	Reference Check Control Form dated 7/19/04
Exhibit H	Minutes of Board meeting of 6/25/07

344-0

OAL DKT. NO. EDU 4192-08
AGENCY DKT. NO. 95-4/08

L.C., on behalf of minor child, O.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NORTH PLAINFIELD, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4, along with copies of the notification sent to the petitioner by the OAL on July 18, 2008, providing petitioner thirteen days to submit an explanation for such nonappearance have been reviewed. Upon such review, it is noted that the record contains a handwritten note from B.D.T. – Secretary to the Administrative Law Judge in this case – dated "7/16 10:30", stating that "L.C. called – said she was in her car in Trenton and could not find our office. She said she'd left home at 8:30 and had been driving around since then. She had stopped several times to ask directions." The note further reports that B.D.T. told L.C. "that the judge had dismissed the case because she did not appear…"

Given that on the day of the hearing petitioner L.C. provided the OAL with an explanation for her nonappearance, this matter is being returned to the OAL for further disposition pursuant to *N.J.A.C.* 1:1-14.4 (a) 1 or 2. It is further noted that the Board's answer in

this residency matter contained a counterclaim for tuition which was left unresolved by the Administrative Law Judge.

Accordingly, this matter is hereby remanded to the OAL for further disposition as indicated herein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8/14/08

Date of Mailing: 8/14/08

344-08

L.C., on behalf of minor child, O.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NORTH PLAINFIELD, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a *pro se* residency appeal on behalf of her son, O.C., a student in respondent's school district. The respondent Board contends that O.C. is not eligible for a free public education in the district based on surveillance and information showing that petitioner is not a resident of North Plainfield. The petitioner failed to appear for a scheduled hearing on July 16, 2008, and the OAL returned the file to the Commissioner's Office of Controversies and Disputes.

Upon review of the record of this matter, it was noted that the record contains a handwritten note from the ALJ's secretary which indicates that on the day of the scheduled hearing, the petitioner telephoned the ALJ's office and stated that she was in her car and unable to find the hearing site. The ALJ's secretary advised petitioner that the judge had already dismissed the case because L.C. did not appear for the hearing. Accordingly, since petitioner provided the OAL with an explanation for her nonappearance, the matter was remanded to the OAL for disposition pursuant to *N.J.A.C.* 1:1-14.4 (a) 1 or 2, and for resolution of Board's counterclaim for tuition.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

August 14, 2008

345-08

OAL DKT. NO. EDU 11209-07
AGENCY DKT. NO. 165-6/07

CATHLEEN LINDSTRAND,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF RANDOLPH, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

This matter was transmitted to the Office of Administrative Law (OAL) on September 17, 2007 for a hearing. On the designated hearing date, June 23, 2008, neither party appeared. The Administrative Law Judge (ALJ) returned the file to the Commissioner on or about June 27, 2008. By letter dated July 3, 2008, petitioner's counsel provided the Commissioner with a proposed settlement agreement (Agreement) that had been reached by the parties but not conveyed to the ALJ.

Upon review of the record and Agreement, the Commissioner finds that the settlement conforms to the requirements of *N.J.A.C.* 6A:3-1.13 and *N.J.A.C.* 1:1-19.1. Consequently, the Commissioner approves the Agreement and adopts it as the final decision in this case. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8/18/08

Date of Mailing: 8/18/08

KENNEY, GROSS, KOVATS & PARTON
130 Maple Avenue, Building 8
P.O. Box 8610
Red Bank, New Jersey 07701
(732) 530-7500
Attorneys for Respondent
Randolph Township Board of Education

CATHLEEN LINDSTRAND Petitioner, v. BOARD OF EDUCATION OF THE TOWNSHIP OF RANDOLPH, MORRIS COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY OAL DOCKET NO. EDOUT 11209-2007N AGENCY REF. NO. 165-6/07 **SETTLEMENT AGREEMENT**

WHEREAS, Petitioner Cathleen Lindstrand (hereinafter **LINDSTRAND**) and Respondent Randolph Township Board of Education, County of Morris (hereinafter the BOARD), having entered into discussions concerning an amicable settlement of the above-captioned dispute, herewith agree and are agreed as follows, subject to ratification by the Board of Education:

1. Respondent Randolph Township Board of Education (the **BOARD**) shall provide Petitioner, Cathleen Lindstrand (**LINDSTRAND**) with health insurance benefits for a period of eighteen (18) months from the date of the severance of her employment with the Randolph School District pursuant to COBRA requirements, provided that **LINDSTRAND** makes the necessary premium payments to Horizon Blue Cross/Blue Shield of New Jersey (hereinafter **HORIZON**).

2. **LINDSTRAND** shall be permitted to continue to obtain health insurance benefits after the expiration of the statutory COBRA entitlement, at her own expense, under the auspices of Respondent **BOARD** provided that she completes the paper work required by a division of **HORIZON** known as

COBRA ELECT, which materials will be provided to her by Cobra Elect approximately fifteen (15) months after the date of the severance of her employment with the **BOARD**.

3. The insurance coverage described in Paragraph 2, above, is made available to **LINDSTRAND** in accordance with Article XXIX, Section E. of the 2004-2007 Collective Negotiations Agreement between the **BOARD** and the Randolph Township Education Association covering a bargaining unit of which **LINDSTRAND** was a member while employed by the **BOARD**. Article XXIX, Section E. provides, in its entirety, as follows:

   "Those individuals who retire shall be eligible for the foregoing health coverage. The individual shall assume 100% of the premium cost."

4. Article XXIX, Section E. of the Collective Negotiations Agreement was incorporated into that Agreement in accordance with the requirements of N.J.S.A. 18A:16-18 which mandates that school districts make health insurance coverage available to retired employees at the individual retiree's own cost.

5. It is the understanding of the parties based on representations made by representatives of **HORIZON** to **BOARD** employees, that **LINDSTRAND** remains eligible to purchase both COBRA and Cobra Elect coverage upon becoming a resident of Florida.

6. **LINDSTRAND** shall, pursuant to the requirements of N.J.S.A. 18A:16-18 and Article XXIX. Section E. of the Collective Negotiations Agreement, continue to be eligible to purchase health insurance through the **BOARD** in the event that the **BOARD** replaces **HORIZON** with another carrier.

7. It is the understanding of the parties that, although **LINDSTRAND** does not have enough years of service to qualify for health insurance coverage for retirees with premium costs paid by the State, she is expected to become eligible to obtain health insurance coverage, at her own expense, through the New Jersey School Health Benefits Program (NJSHBP) for retirees when she reaches the age of sixty five, provided that she continues to purchase health insurance through the **BOARD** up until that time.

8. **LINDSTRAND** agrees that, should she become eligible to obtain New Jersey School Health Benefits Program retiree insurance coverage at her own expense, she shall do so and, upon entering into that Program, she shall withdraw from the coverage provided by the **BOARD**. If **LINDSTRAND** is found, upon proper and timely application to NJSHBP to be ineligible for that coverage, she may continue to obtain coverage through the **BOARD**.

9. It is agreed and understood by the parties that this Agreement shall also apply to the Horizon Blue Cross/Blue Shield prescription insurance benefits and the dental insurance provided by Delta Dental which **LINDSTRAND** received while employed by the **BOARD**. **LINDSTRAND** shall have the right to apply for enrollment in these plans at the next open period. The **BOARD** shall advise **LINDSTRAND** of the time of those open periods.

10. In consideration for the above, **LINDSTRAND** agrees that the terms of this Settlement Agreement shall constitute a full and complete settlement of all claims she has against the Randolph Township Board of Education, its officers, employees and agents arising out of her employment with the **BOARD** and/or the severance of that employment.

11. In further consideration for the above, **LINDSTRAND** agrees to dismiss with prejudice the above-captioned Petition of Appeal and all other related litigation.

12. The parties agree and understand that this Settlement Agreement shall not constitute a precedent with regard to any other dispute that may arise among the parties and it shall not be referred to in any other litigation, whether before a Court, administrative tribunal, or contract grievance arbitrator, except in an action to enforce the terms of this Agreement.

13. Petitioner **LINDSTRAND** acknowledges that she has been represented by counsel in this matter, has had an opportunity to consult with counsel concerning the terms of this settlement, and enters into this settlement voluntarily, of her own free will and not under any duress or coercion of any kind.

IN WITNESS WHEREOF, the undersigned put their signatures on this _____ day of January, 2008.

Cathleen Lindstrand
CATHLEEN LINDSTRAND
3-18-08

_____
Witness

For the Randolph Township Board of Education

_____ Date: 5/22/08
GREGORY MARK,
Board President

_____ Date: 5/22/08
MICHAEL S. NEVES,
Board Secretary

9. It is agreed and understood by the parties that this Agreement shall also apply to the Horizon Blue Cross/Blue Shield prescription insurance benefits and the dental insurance provided by Delta Dental which **LINDSTRAND** received while employed by the **BOARD**. **LINDSTRAND** shall have the right to apply for enrollment in these plans at the next open period. The **BOARD** shall advise **LINDSTRAND** of the time of those open periods.

10. In consideration for the above, **LINDSTRAND** agrees that the terms of this Settlement Agreement shall constitute a full and complete settlement of all claims she has against the Randolph Township Board of Education, its officers, employees and agents arising out of her employment with the **BOARD** and/or the severance of that employment.

11. In further consideration for the above, **LINDSTRAND** agrees to dismiss with prejudice the above-captioned Petition of Appeal and all other related litigation.

12. The parties agree and understand that this Settlement Agreement shall not constitute a precedent with regard to any other dispute that may arise among the parties and it shall not be referred to in any other litigation, whether before a Court, administrative tribunal, or contract grievance arbitrator, except in an action to enforce the terms of this Agreement.

13. Petitioner **LINDSTRAND** acknowledges that she has been represented by counsel in this matter, has had an opportunity to consult with counsel concerning the terms of this settlement, and enters into this settlement voluntarily, of her own free will and not under any duress or coercion of any kind.

IN WITNESS WHEREOF, the undersigned put their signatures on this ____ day of January, 2008.

Cathleen Lindstrand
CATHLEEN LINDSTRAND
3-18-08

Witness

For the Randolph Township Board of Education

Date: 5/22/08
GREGORY MARK,
Board President

Date: 5/22/08
MICHAEL S. NEVES,
Board Secretary

Malachi J. Kenney, Esq.
Board Attorney

BOARD OF EDUCATION
OF THE TOWNSHIP OF RANDOLPH
MORRIS COUNTY, NEW JERSEY
as recorded in the official minute book

The Board of Education of the Township of Randolph in the County of Morris, New Jersey, convened in public session on Wednesday, **May 14, 2008** in the Randolph High School Library, Millbrook Avenue, Randolph, New Jersey.

Gregory Mark – President
Christine Carey - Vice President

The following Board members were present: Christine Carey, Claire Keller, Barbara Levinson, Maria Martorana, Amy Sachs, Douglas Weisberger and Gregory Mark.

Board Member, Ethan Blynn was absent.
Board Member, Al Matos was absent.

Douglas Weisberger made a motion seconded by Claire Keller and carried unanimously by roll call vote to approve the following personnel motion:

F. Settlement Agreement

1. Approve the settlement agreement between the Randolph Township Board of Education and **Cathleen Lindstrand, OAL Docket No. EDOUT 11209-2007N, AGENCY REF.NO. 165-6/07.**

ROLL CALL:
AYES: 7
NO: 0
ABSTAIN: 0
ABSENT: 2

STATE OF NEW JERSEY)

COUNTY OF MORRIS) ss

I, **Michael S. Neves,** Secretary of the Board of Education, of the Township of Randolph, in the County of Morris, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of **May 14, 2008** has been compared by me with the original minutes as officially recorded in my office in the minute book of said Randolph Township Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relates to the subject matter referred to in said extract in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this day of **June 2, 2008**.

SEAL

Michael S. Neves
BOARD SECRETARY

#346-08

346-0

OAL DKT. NO. EDU 8551-07
AGENCY DKT. NO. 229-8/07

BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF EDUCATION, DIVISION OF FINANCE, AND BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY,	:	DECISION
RESPONDENTS.	:	

The record, Stipulation of Settlement (Agreement), and Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner observes that the Agreement contains no language dismissing the action against the New Jersey Department of Education (the Department). Nor does it contain the signature of the New Jersey Attorney General or designee, who is the Department's duly authorized representative in litigation. The Commissioner consequently cannot approve the within settlement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Agreement to include language disposing of the claim against the Department, and to include the signature of the Attorney General or her designee. If the parties are unwilling or unable to effectuate the requested revisions, the matter shall proceed to hearing.

IT IS SO ORDERED.*

Lucille E. Davy
COMMISSIONER OF EDUCATION

Date of Decision: 8/18/08
Date of Mailing: 8/19/08

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8551-07

AGENCY DKT. NO. 229-8/07

BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION, DIVISION OF FINANCE, AND BOARD OF EDUCATION OF SOUTH PLAINFIELD, MIDDLESEX COUNTY,

Respondent.

David B. Rubin, Esq., for petitioner

Jennifer L. Campbell, Deputy Attorney General, for respondent, New Jersey State Department of Education (Anne Milgram, Attorney General of New Jersey, attorney)

Marc H. Zitomer, Esq., for respondent, Board of Education of South Plainfield, Middlesex County (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: July 2, 2008 Decided: July 3, 2008

BEFORE **ANA C. VISCOMI**, ALJ:

This matter was transmitted to the Office of Administrative Law on October 19, 2007, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The matter was scheduled for a telephone conference on January 22, 2008, at which time counsel requested an opportunity to negotiate a settlement. The parties have agreed to a settlement and prepared a Stipulation of Settlement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement, as well as the respective Boards of Education resolutions approving the settlement, and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

July 3, 2008
DATE

ANA C. VISCOMI, ALJ

Date Received at Agency:

JUL -7 2008
DATE

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cs

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER LLC
44 Whippany Road, Suite 210
P.O. Box 2355
Morristown, NJ 07962
(973) 301-0001; FAX (973) 993-3152
Attorneys for Respondent
South Plainfield Board of Education

PISCATAWAY TOWNSHIP BOARD OF EDUCATION, MIDDLESEX COUNTY, Petitioner. vs. NEW JERSEY DEPARTMENT OF EDUCATION, DIVISION OF FINANCE, and SOUTH PLAINFIELD BOARD OF EDUCATION, MIDDLESEX COUNTY, Respondents.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY AGENCY REF. NO.: 229-8/07 OAL DKT. NO.: EDU 08551-2007S **STIPULATION OF SETTLEMENT**

This Stipulation of Settlement is made by and between the Piscataway Township Board of Education ("Piscataway"), with administrative offices at 1515 Stelton Road, Piscataway, New Jersey 08854 and the South Plainfield Board of Education ("South Plainfield") with administrative offices at 125 Jackson Avenue, South Plainfield, New Jersey 07080. In consideration of the mutual promises and undertaking contained in this Agreement, and for good and valuable consideration, the receipt of which is hereby acknowledged, the undersigned state:

WHEREAS, On March 8, 2005, Dr. Patrick Piegari, the Middlesex County Superintendent of Schools, issued a written determination that N.M., an adult female, and her four minor children were homeless, and that South Plainfield, the last district where N.M. was domiciled, was financially responsible for her children's education; and

WHEREAS, South Plainfield sought review of said determination by the New Jersey Department of Education, Division of Finance; and

WHEREAS, on or about July 31, 2007, Assistant Commissioner Katherine Atwood, issued a written determination reversing the earlier determination of the Middlesex County Superintendent of Schools. In particular, the Assistant Commissioner found that N.M. was domiciled in Piscataway Township, and held Piscataway financially responsible for the education of N.M's four minor children; and

WHEREAS, Piscataway filed a Petition of Appeal with the Commissioner of Education on or about August 16, 2007 against South Plainfield and the New Jersey Department of Education, Division of Finance, challenging the Assistant Commissioner's decision; and

WHEREAS, on or about September 27, 2007, South Plainfield filed its Answer and Affirmative Defenses to the Petition of Appeal; and

WHEREAS, N.M and her four minor children are currently residing in Piscataway Township; and

WHEREAS, the parties wish to amicably resolve this matter without the need for litigation;

NOW, THEREFORE, in consideration of the mutual promises and covenants the parties agree as follows:

1. South Plainfield will pay to Piscataway back-tuition in the amount of $23,752.80 in full and complete satisfaction of the alleged amount which is due and owing. This amount represents the first six months of tuition for each of N.M.'s children during the 2004-2005 school year, between September 2004 through February 2005 as follows:

a. G.P. $5,895.60 (Grade 1)

b. J.P. $5,895.60 (Grade 5)

c. N.P. $5,895.60 (Grade 5)

d. J.P. $6,066.00 (Grade 6)

Total:.....$23,752.80

2. Piscataway will be responsible for the tuition and any related educational costs from March 1, 2005 going forward, for so long as the students remain residents of Piscataway or otherwise lawfully entitled to be educated at Piscataway's expense. South Plainfield will not be responsible for any tuition expenses or educational costs for the subject pupils other than that which is set forth in paragraph 1, supra.

3. Once this Agreement is approved by South Plainfield, the tuition amount will be paid directly to Piscataway's legal counsel, David B. Rubin, Esq., 44 Bridge Street, Metuchen, New Jersey 08840, with a check made payable to the "Piscataway Township Board of Education".

4. Piscataway, in consideration of this Agreement and in full, final and complete settlement of this matter hereby withdraws the above-docketed Petition of Appeal against the South Plainfield Board of Education and the New Jersey Department of Education, Division of Finance.

5. Nothing contained in this Agreement should be construed as an admission of wrongdoing by either party and neither party shall be considered a prevailing party for any reason.

6. This agreement contains the entire Agreement between the parties, and no other representations, whether verbal or in writing shall be binding upon them.

7. All terms of this Agreement are deemed material. This document may not be altered, amended, modified, or revoked except by an instrument executed in writing by the parties.

8. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

9. This Agreement is subject to approval by each respective Board of Education.

IN WITNESS WHEREOF, the parties, or their duly authorized representatives, do set forth their hands and seal as of the date first above written.

FOR THE SOUTH PLAINFIELD BOARD OF EDUCATION:

By: _____, Board President

_____
Witness

FOR THE PISCATAWAY TOWNSHIP BOARD OF EDUCATION:

By: _____
Paul A. Herman, Board President

_____
Witness

Dated: 4/7/08

SOUTH PLAINFIELD PUBLIC SCHOOLS
125 Jackson Avenue
South Plainfield, New Jersey 07080-3509
Telephone: 908.754.4620
Website: spnet.k12.nj.us

Fax: 908-822-2453 Fax: 908-822-2848 Fax: 908-822-2516

Mr. Jose R. Negron
Superintendent

Dr. Fredrik M. Oberkehr
Assistant Superintendent

Mr. Richard A. Guarini
Business Administrator/
Board Secretary

Be it Resolved ***By the Board of Education of the Borough of South Plainfield, New Jersey***

Approval of Settlement Agreement in the matter of Piscataway Township Board of Education v. New Jersey Department of Education, Division of Finance, and South Plainfield Board of Education

RESOLVED, that the Board of Education approved the settlement in the matter captioned Piscataway Board of Education v. New Jersey Department of Education, Division of Finance, and South Plainfield Board of Education, Agency Ref. No.: L229-8/07, OAL Dkt No.: EDU 08551-2007S in accordance with the terms and conditions thereof; and

BE IT FURTHER RESOLVED, that the Board President is authorized to execute the Agreement on behalf of the Board.

MOTION: Mr. Markham SECOND: Mrs. Boyle VOTE: 8-0
Absent: Mrs. Rann

I certify the foregoing to be a true and correct abstract of a resolution passed at a meeting of the South Plainfield Board of Education held on June 18, 2008 and in that respect is a true and correct copy of its minutes.

Richard A. Guarini
Board Secretary/Business Administrator

B. APPROVAL OF SECRETARY'S/TREASURER'S/TRANSFERS REPORTS

1. *Explanation: Pursuant to 18A:6-59*

BE IT RESOLVED that the following report be approved and filed for audit:

Secretary/Transfers Report February 2008

AND BE IT FURTHER RESOLVED that the above report be accepted as submitted and that no major account or fund has been overexpended in violation of N.J.A.C. 6A:23-2.11 and that sufficient funds are available to meet the district financial obligations for the remainder of the fiscal year.

2. *Explanation: Pursuant to 18A:6-59*

BE IT RESOLVED that the following report be approved and filed for audit:

Treasurer's Report February 2008

AND BE IT FURTHER RESOLVED that the above report be accepted as submitted and that no major account or fund has been overexpended in violation of N.J.A.C. 6A:23-2.11 and that sufficient funds are available to meet the district financial obligations for the remainder of the fiscal year.

C. APPROVAL OF JOINT TRANSPORTATION AGREEMENTS

Explanation:

In an effort to reduce transportation costs, the district utilizes transportation jointures where appropriate.

1. BE IT RESOLVED that the Piscataway Township Board of Education authorizes the School Business Administrator to execute Joint Transportation Agreements with Piscataway as the "joiner" district and Middlesex Regional Educational Services Commission (MRESC) as the "host" district for the 2007 - 2008 school year:

Route	Destination	Joiner District	Students	Jointure Amount (per diem)
7052	Children's Center of Monmouth	Piscataway	3	$234.36
8024	CPC High Point Elementary	Piscataway	4	157.33
7134	CPC – Coastal – Collier Schools	Piscataway	5	344.78
T8838	High Road – Lower	Piscataway	2	162.18
5008	Marine Academy – Sandy Hook	Piscataway	1	163.69
7077	Newmark HS – Carteret	Piscataway	1	75.48
8116	Newmark School – Plainfield	Piscataway	1	91.74
VP08/T8802	Perth Amboy Vo-Tech	Piscataway	1	116.28/160.14
T8804/8153	Schor/Grandview/Eisenhower	Piscataway	1	53.39/95.68
8068	Greenbrook Academy	Piscataway	1	112.80
VP07	Piscataway Vo-Tech	Piscataway	1	10.90

2. BE IT RESOLVED that the Piscataway Township Board of Education authorizes the School Business Administrator to execute Joint Transportation Agreements with Piscataway as the "host" district and Elizabeth Board of Education as the "joiner" district for the 2007 - 2008 school year:

Route	Destination	Joiner District	Students	Jointure Amount
8153	Eisenhower Elementary School	Elizabeth	1	$3,798.42

3. BE IT RESOLVED that the Piscataway Township Board of Education authorizes the School Business Administrator to approve participation in Coordinated Transportation with Piscataway as the "joiner" district and Middlesex Regional Educational Services Commission (MRESC) as the "host" district for the 2008 - 2009 school year as needed including a 4% administrative fee.

D. AUTHORIZATION TO EXECUTE A WRITTEN AGREEMENT

Explanation:

The Board sought tuition payments from the South Plainfield Public School District for four students of a homeless family whose last legal domicile was South Plainfield. The parties have agreed to resolve the dispute by South Plainfield paying tuition for the first six months of the students' enrollment in Piscataway, since the family eventually established legal residence at the home where they were temporarily living.]

BE IT RESOLVED that the Piscataway Township Board of Education authorizes the Superintendent to execute a written agreement, in a form acceptable to the Board Attorney, resolving all claims in the matter of Piscataway Township Board of Education v. South Plainfield Board of Education.

E. AUTHORIZATION TO CHANGE GROUP INSURANCE PROGRAM

Explanation:

In order to provide the most cost effective health insurance plans to District employees, the District will change the health insurance provider to Horizon Blue Cross Blue Shield of New Jersey, effective July 1, 2008.

BE IT RESOLVED that per the recommendation of its group insurance broker-of-record, Grinspec Consulting, the Piscataway Township Board of Education hereby resolves effective July 1, 2008 to make the following changes to its group insurance programs:

1. Terminate its group medical and dental insurance policies with CIGNA Healthcare.
2. Terminate its group prescription drug insurance policy with Benecard Services, Inc.
3. Select Horizon Blue Cross Blue Shield of New Jersey as its group medical, dental, and prescription drug insurance carrier.
4. Designate Grinspec Consulting, a Division of Brown & Brown, Inc., of Murray Hill, NJ as the Board's group insurance broker-of-record for our new Horizon group medical, dental, and prescription drug insurance programs. Grinspec Consulting is authorized to act on behalf of the Board in all matters related to these programs. Grinspec Consulting's responsibilities will include – but are not limited to – negotiating annual renewal rates, marketing our group insurance programs, and aiding our staff in the resolution of billing, enrollment, and claim problems. Grinspec Consulting is authorized to receive commission payments from Horizon as compensation for their services, percentages for which are included in Horizon's proposed premium rates.
5. All appropriate Board of Education staff are authorized to take such action and effect such documentation as necessary to implement this change.
6. The Board reserves its right under state law to terminate any group insurance policy held by the district with 30 days prior written notice to the carrier(s).

M/S		Vote	M/S		Vote	M/S		Vote
	Mr. Connors	Y		Mr. Kumar	Y		Mr. Bozzo	Y
	Mrs. Greeley	Y	S	Mr. Perez	Y		Ms. Maas	Y
	Mrs. King	Y	M	Mr. Stoddard	Y		Mr. Herman	Y
		Yea	9		Nay	0		

XV. POLICY- Margaret King

BE IT RESOLVED that the following motion, identified as item "A" be approved as presented.

A. ACCEPT ON FIRST READING

BE IT RESOLVED that the Piscataway Township Board of Education accepts on first reading the following policies:

3570	District Records and Reports
4231/4231.1	Staff Development; In-service Education/Visitations/Conferences
5131	Conduct/Discipline
5131.5	Vandalism/Violence

M/S		Vote	M/S		Vote	M/S		Vote
S	Mrs. Greeley	Y		Mr. Perez	Y		Mr. Connors	Y
M	Mrs. King	Y		Mr. Stoddard	Y		Ms. Maas	Y
	Mr. Kumar	Y		Mr. Bozzo	Y		Mr. Herman	Y
		Yea	9		Nay	0		

XVI. CURRICULUM – Paula Maas

BE IT RESOLVED that the following motions, identified as items "A" and "B" be approved as presented.

A. APPROVAL OF PROFESSIONAL DEVELOPMENT PLAN 2008-2009

Explanation:

Each year as required, a Local Professional Development Plan is developed and submitted to the New Jersey Department of Education via the County Office of Education. We received notification from the Middlesex County Professional Development Board granting approval of the District's Plan for the 2008-2009 school year.

BE IT RESOLVED that the Piscataway Township Board of Education approves the Professional Development Plan for the 2008-2009 school year.

#346-08+

346

OAL DKT. NO. EDU 8551-07
AGENCY DKT. NO. 229-8/07

AMENDED DECISION

BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF EDUCATION, DIVISION OF FINANCE, AND BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY,	:	DECISION
RESPONDENTS.	:	

The record, Stipulation of Settlement, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1 and *N.J.A.C.* 1:1-19.2, have been reviewed.

Upon review, the Commissioner notes that petitioner has withdrawn the case against the Department of Education, Division of Finance; she approves the parties' settlement and the withdrawal and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 9/29/08
Date of Mailing: 9/30/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8551-07

AGENCY DKT. NO. 229-8/07

BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION, DIVISION OF FINANCE, AND BOARD OF EDUCATION OF SOUTH PLAINFIELD, MIDDLESEX COUNTY,

Respondent.

David B. Rubin, Esq., for petitioner

Jennifer L. Campbell, Deputy Attorney General, for respondent, New Jersey State Department of Education (Anne Milgram, Attorney General of New Jersey, attorney)

Marc H. Zitomer, Esq., for respondent, Board of Education of South Plainfield, Middlesex County (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: July 2, 2008 Decided: July 3, 2008

BEFORE **ANA C. VISCOMI**, ALJ:

This matter was transmitted to the Office of Administrative Law on October 19, 2007, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The matter was scheduled for a telephone conference on January 22, 2008, at which time counsel requested an opportunity to negotiate a settlement. The parties have agreed to a settlement and prepared a Stipulation of Settlement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement, as well as the respective Boards of Education resolutions approving the settlement, and **I FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

July 3, 2008
DATE

ANA C. VISCOMI, ALJ

Date Received at Agency:

JUL -7 2008

DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

/cs

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER LLC
44 Whippany Road, Suite 210
P.O. Box 2355
Morristown, NJ 07962
(973) 301-0001; FAX (973) 993-3152
Attorneys for Respondent
South Plainfield Board of Education

PISCATAWAY TOWNSHIP BOARD OF EDUCATION, MIDDLESEX COUNTY, Petitioner. vs. NEW JERSEY DEPARTMENT OF EDUCATION, DIVISION OF FINANCE, and SOUTH PLAINFIELD BOARD OF EDUCATION, MIDDLESEX COUNTY, Respondents.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY AGENCY REF. NO.: 229-8/07 OAL DKT. NO.: EDU 08551-2007S **STIPULATION OF SETTLEMENT**

This Stipulation of Settlement is made by and between the Piscataway Township Board of Education ("Piscataway"), with administrative offices at 1515 Stelton Road, Piscataway, New Jersey 08854 and the South Plainfield Board of Education ("South Plainfield") with administrative offices at 125 Jackson Avenue, South Plainfield, New Jersey 07080. In consideration of the mutual promises and undertaking contained in this Agreement, and for good and valuable consideration, the receipt of which is hereby acknowledged, the undersigned state:

WHEREAS, On March 8, 2005, Dr. Patrick Piegari, the Middlesex County Superintendent of Schools, issued a written determination that N.M., an adult female, and her four minor children were homeless, and that South Plainfield, the last district where N.M. was domiciled, was financially responsible for her children's education; and

WHEREAS, South Plainfield sought review of said determination by the New Jersey Department of Education, Division of Finance; and

WHEREAS, on or about July 31, 2007, Assistant Commissioner Katherine Atwood, issued a written determination reversing the earlier determination of the Middlesex County Superintendent of Schools. In particular, the Assistant Commissioner found that N.M. was domiciled in Piscataway Township, and held Piscataway financially responsible for the education of N.M's four minor children; and

WHEREAS, Piscataway filed a Petition of Appeal with the Commissioner of Education on or about August 16, 2007 against South Plainfield and the New Jersey Department of Education, Division of Finance, challenging the Assistant Commissioner's decision; and

WHEREAS, on or about September 27, 2007, South Plainfield filed its Answer and Affirmative Defenses to the Petition of Appeal; and

WHEREAS, N.M and her four minor children are currently residing in Piscataway Township; and

WHEREAS, the parties wish to amicably resolve this matter without the need for litigation;

NOW, THEREFORE, in consideration of the mutual promises and covenants the parties agree as follows:

1. South Plainfield will pay to Piscataway back-tuition in the amount of $23,752.80 in full and complete satisfaction of the alleged amount which is due and owing. This amount represents the first six months of tuition for each of N.M.'s children during the 2004-2005 school year, between September 2004 through February 2005 as follows:

a. G.P. $5,895.60 (Grade 1)

b. J.P. $5,895.60 (Grade 5)

c. N.P. $5,895.60 (Grade 5)

d. J.P. $6,066.00 (Grade 6)

Total:.....$23,752.80

2. Piscataway will be responsible for the tuition and any related educational costs from March 1, 2005 going forward, for so long as the students remain residents of Piscataway or otherwise lawfully entitled to be educated at Piscataway's expense. South Plainfield will not be responsible for any tuition expenses or educational costs for the subject pupils other than that which is set forth in paragraph 1, supra.

3. Once this Agreement is approved by South Plainfield, the tuition amount will be paid directly to Piscataway's legal counsel, David B. Rubin, Esq., 44 Bridge Street, Metuchen, New Jersey 08840, with a check made payable to the "Piscataway Township Board of Education".

4. Piscataway, in consideration of this Agreement and in full, final and complete settlement of this matter hereby withdraws the above-docketed Petition of Appeal against the South Plainfield Board of Education and the New Jersey Department of Education, Division of Finance.

5. Nothing contained in this Agreement should be construed as an admission of wrongdoing by either party and neither party shall be considered a prevailing party for any reason.

6. This agreement contains the entire Agreement between the parties, and no other representations, whether verbal or in writing shall be binding upon them.

7. All terms of this Agreement are deemed material. This document may not be altered, amended, modified, or revoked except by an instrument executed in writing by the parties.

8. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

9. This Agreement is subject to approval by each respective Board of Education.

IN WITNESS WHEREOF, the parties, or their duly authorized representatives, do set forth their hands and seal as of the date first above written.

FOR THE SOUTH PLAINFIELD BOARD OF EDUCATION:

By: _____, Board President

_____
Witness

FOR THE PISCATAWAY TOWNSHIP BOARD OF EDUCATION:

By: _____
Paul A. Herman, Board President

_____
Witness

Dated: 4/3/08

SOUTH PLAINFIELD PUBLIC SCHOOLS
125 Jackson Avenue
South Plainfield, New Jersey 07080-3509
Telephone: 908.754.4620
Website: spnet.k12.nj.us

Fax: 908-822-2453 — ***Mr. Jose R. Negron, Superintendent***

Fax: 908-822-2848 — ***Dr. Fredrik M. Oberkehr, Assistant Superintendent***

Fax: 908-822-2516 — ***Mr. Richard A. Guarini, Business Administrator/ Board Secretary***

Be it Resolved ***By the Board of Education of the Borough of South Plainfield, New Jersey***

Approval of Settlement Agreement in the matter of Piscataway Township Board of Education v. New Jersey Department of Education, Division of Finance, and South Plainfield Board of Education

RESOLVED, that the Board of Education approved the settlement in the matter captioned Piscataway Board of Education v. New Jersey Department of Education, Division of Finance, and South Plainfield Board of Education, Agency Ref. No.: L229-8/07, OAL Dkt No.: EDU 08551-2007S in accordance with the terms and conditions thereof; and

BE IT FURTHER RESOLVED, that the Board President is authorized to execute the Agreement on behalf of the Board.

MOTION: Mr. Markham SECOND: Mrs. Boyle VOTE: 8-0
Absent: Mrs. Rann

I certify the foregoing to be a true and correct abstract of a resolution passed at a meeting of the South Plainfield Board of Education held on June 18, 2008 and in that respect is a true and correct copy of its minutes.

Richard A. Guarini
Board Secretary/Business Administrator

B. APPROVAL OF SECRETARY'S/TREASURER'S/TRANSFERS REPORTS

1. Explanation: Pursuant to 18A:6-59

BE IT RESOLVED that the following report be approved and filed for audit:

Secretary/Transfers Report February 2008

AND BE IT FURTHER RESOLVED that the above report be accepted as submitted and that no major account or fund has been overexpended in violation of N.J.A.C. 6A:23-2.11 and that sufficient funds are available to meet the district financial obligations for the remainder of the fiscal year.

2. Explanation: Pursuant to 18A:6-59

BE IT RESOLVED that the following report be approved and filed for audit:

Treasurer's Report February 2008

AND BE IT FURTHER RESOLVED that the above report be accepted as submitted and that no major account or fund has been overexpended in violation of N.J.A.C. 6A:23-2.11 and that sufficient funds are available to meet the district financial obligations for the remainder of the fiscal year.

C. APPROVAL OF JOINT TRANSPORTATION AGREEMENTS

Explanation:

In an effort to reduce transportation costs, the district utilizes transportation jointures where appropriate.

1. BE IT RESOLVED that the Piscataway Township Board of Education authorizes the School Business Administrator to execute Joint Transportation Agreements with Piscataway as the "joiner" district and Middlesex Regional Educational Services Commission (MRESC) as the "host" district for the 2007 - 2008 school year:

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2. BE IT RESOLVED that the Piscataway Township Board of Education authorizes the School Business Administrator to execute Joint Transportation Agreements with Piscataway as the "host" district and Elizabeth Board of Education as the "joiner" district for the 2007 - 2008 school year:

Route	Destination	Joiner District	Students	Jointure Amount
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3. BE IT RESOLVED that the Piscataway Township Board of Education authorizes the School Business Administrator to approve participation in Coordinated Transportation with Piscataway as the "joiner" district and Middlesex Regional Educational Services Commission (MRESC) as the "host" district for the 2008 - 2009 school year as needed including a 4% administrative fee.

D. AUTHORIZATION TO EXECUTE A WRITTEN AGREEMENT

Explanation:

The Board sought tuition payments from the South Plainfield Public School District for four students of a homeless family whose last legal domicile was South Plainfield. The parties have agreed to resolve the dispute by South Plainfield paying tuition for the first six months of the students' enrollment in Piscataway, since the family eventually established legal residence at the home where they were temporarily living.]

BE IT RESOLVED that the Piscataway Township Board of Education authorizes the Superintendent to execute a written agreement, in a form acceptable to the Board Attorney, resolving all claims in the matter of Piscataway Township Board of Education v. South Plainfield Board of Education.

E. AUTHORIZATION TO CHANGE GROUP INSURANCE PROGRAM

Explanation:

In order to provide the most cost effective health insurance plans to District employees, the District will change the health insurance provider to Horizon Blue Cross Blue Shield of New Jersey, effective July 1, 2008.

BE IT RESOLVED that per the recommendation of its group insurance broker-of-record, Grinspec Consulting, the Piscataway Township Board of Education hereby resolves effective July 1, 2008 to make the following changes to its group insurance programs:

1. Terminate its group medical and dental insurance policies with CIGNA Healthcare.
2. Terminate its group prescription drug insurance policy with Benecard Services, Inc.
3. Select Horizon Blue Cross Blue Shield of New Jersey as its group medical, dental, and prescription drug insurance carrier.
4. Designate Grinspec Consulting, a Division of Brown & Brown, Inc., of Murray Hill, NJ as the Board's group insurance broker-of-record for our new Horizon group medical, dental, and prescription drug insurance programs. Grinspec Consulting is authorized to act on behalf of the Board in all matters related to these programs. Grinspec Consulting's responsibilities will include – but are not limited to – negotiating annual renewal rates, marketing our group insurance programs, and aiding our staff in the resolution of billing, enrollment, and claim problems. Grinspec Consulting is authorized to receive commission payments from Horizon as compensation for their services, percentages for which are included in Horizon's proposed premium rates.
5. All appropriate Board of Education staff are authorized to take such action and affect such documentation as necessary to implement this change.
6. The Board reserves its right under state law to terminate any group insurance policy held by the district with 30 days prior written notice to the carrier(s).

M/S		Vote	M/S		Vote	M/S		Vote
	Mr. Connors	Y		Mr. Kumar	Y		Mr. Bozzo	Y
	Mrs. Greeley	Y	S	Mr. Perez	Y		Ms. Maas	Y
	Mrs. King	Y	M	Mr. Stoddard	Y		Mr. Herman	Y
		Yea	9		Nay	0		

XV. POLICY- Margaret King

BE IT RESOLVED that the following motion, identified as item "A" be approved as presented.

A. ACCEPT ON FIRST READING

BE IT RESOLVED that the Piscataway Township Board of Education accepts on first reading the following policies:

3570	District Records and Reports
4231/4231.1	Staff Development; In-service Education/Visitations/Conferences
5131	Conduct/Discipline
5131.5	Vandalism/Violence

M/S		Vote	M/S		Vote	M/S		Vote
S	Mrs. Greeley	Y		Mr. Perez	Y		Mr. Connors	Y
M	Mrs. King	Y		Mr. Stoddard	Y		Ms. Maas	Y
	Mr. Kumar	Y		Mr. Bozzo	Y		Mr. Herman	Y
		Yea	9		Nay	0		

XVI. CURRICULUM – Paula Maas

BE IT RESOLVED that the following motions, identified as items "A" and "B" be approved as presented.

A. APPROVAL OF PROFESSIONAL DEVELOPMENT PLAN 2008-2009

Explanation:

Each year as required, a Local Professional Development Plan is developed and submitted to the New Jersey Department of Education via the County Office of Education. We received notification from the Middlesex County Professional Development Board granting approval of the District's Plan for the 2008-2009 school year.

BE IT RESOLVED that the Piscataway Township Board of Education approves the Professional Development Plan for the 2008-2009 school year.

#347-08+

347-08

OAL DKT. NO. EDU 11569-07
AGENCY DKT. NO. 295-10/07

IN THE MATTER OF THE TENURE HEARING OF GILBERT YOUNG, JR., SCHOOL DISTRICT OF THE BOROUGH OF ROSELLE, UNION COUNTY.	COMMISSIONER OF EDUCATION CORRECTED DECISION

Respondent challenges an Initial Decision of the Office of Administrative Law (OAL) which upholds two charges brought against him for unbecoming conduct. Both charges pertain to improper relations with a teen-aged student. The Commissioner of Education (Commissioner) has independently reviewed the record, which includes transcripts for all three hearing dates, the Initial Decision and the exceptions and replies thereto. Upon such review, she adopts the Initial Decision as the final decision in this case. In addressing the parties' exceptions and reply exceptions, the Commissioner will rely on the Administrative Law Judge's (ALJ) comprehensive factual presentation and findings.

In his first and second exceptions, respondent asserts that the ALJ's credibility determinations concerning the first tenure charge against him were arbitrary, capricious, and not based on substantial evidence, and that petitioner consequently did not carry its burden to prove the charge.[1] These assertions were based upon the following propositions.

[1] The first charge stated:

> In or about December 2004 or January 2005, Young drove C.W. home after school on a couple of occasions. On one such trip, Young drove C.W. to Warinanco Park instead of bringing him home. It was dark at the time. Young turned off the motor and kissed C.W., putting his tongue in his mouth. He also caressed and touched his body, including his genitals, over his clothing. After 15 or 20 minutes, Young drove C.W. to a location near C.W.'s house and dropped him off.

First, respondent argued that C.W.'s credibility was weakened by alleged discrepancies between information given by C.W. to the police in a February 27, 2007 taped interview (the Police Interview) – which took place over two years after the events at the heart of this controversy – and testimony that C.W. gave at the OAL hearing in February of 2008. In particular, respondent points to C.W.'s failure to place the interactions between himself and respondent into the correct time frame during the Police Interview, which was transcribed and entered into evidence as Petitioner's Exhibit 12 (P-12). (Respondent's Exceptions at 3)[2] In that interview, C.W. told police that the interactions were in December 2004 or January 2005, that the incident in Warinanco Park occurred in late January 2005, and that a kissing incident that had preceded the Warinanco Park episode had occurred after New Year's Day, 2005.

At the OAL hearing in February 2008, C.W corrected his testimony about the timing of his involvement with respondent. He recalled going to respondent's classroom 2-3 times a week, beginning in September or October 2004, to do homework and talk. During cross examination about the differences between the Police Interview and his OAL testimony, C.W. stated that an investigator from the board attorney's office had visited him a few days before the OAL hearing and had showed him copies of the notes (dated October 22 and November 5, 2004) that he had given respondent in the Fall of 2004. The notes, which respondent had kept for over three years but never shown to the school authorities, apparently jogged C.W.'s memory.

---

[2] Respondent also opines that C.W. was influenced during the taped interview by certain questions that the police interviewer asked that pertained to the first kissing interaction between C.W. and respondent. More specifically, the interviewing detective reminded C.W. that he had previously told her about a kissing incident that had occurred prior to the one in Warinanco Park, and asked if that was still his testimony. Also, when C.W. could not remember when the first kissing incident occurred, the detective assisted him by asking if it was after Christmas; then if it was after the New Year. (Respondent's Exceptions at 3) The Commissioner cannot find that the detective unduly influenced C.W. by these questions.

Respondent contends that C.W., in changing his testimony about the time frame for the incidents in question, "destroyed his own credibility and the entire fabric of the Board's case." Thus, reasons respondent, the ALJ's determination about C.W.'s credibility was arbitrary and capricious and should be rejected by the Commissioner. (Respondent's Exceptions at 5) The Commissioner cannot agree.

C.W.'s estimate about when the interactions with respondent took place was "off" by no more than two months. Considering that C.W. was asked to pinpoint a time frame for incidents that occurred three years prior, the Commissioner cannot find fault with the ALJ's determination that C.W.'s inaccuracy was insignificant. Nor does the Commissioner find it surprising that the refreshment of C.W.'s memory – by the provision to him of copies of his dated notes to respondent – caused him to change his testimony about when the interactions occurred. Showing witnesses documents to help them recall details is a practice permitted by the court rules, and is not – as respondent suggests – inimical to the goal of fact-finding in a plenary hearing.

In addition to his arguments about C.W.'s recollections about time, respondent discusses certain differences between respondent's and C.W.'s testimony, and maintains that the ALJ should have chosen respondent's version. The differences in testimony pertained to 1) whether C.W. had been going to respondent's classroom after school to be tutored or to do homework and talk with respondent; and 2) whether C.W.'s parents knew that respondent sometimes drove him home. Respondent contends that because petitioner did not call C.W.'s parents to testify about their knowledge concerning tutoring or rides home from school, the ALJ should have accepted Young's account and found C.W.'s testimony to lack credibility. (Respondent's Exceptions at 5-7)

The Commissioner does not view the purpose of C.W.'s after-school visits to respondent, or C.W.'s parents' knowledge of the rides home, to be material to the resolution of issues in this case.[3] It is agreed by all that they occurred. At issue in this matter is whether C.W. was taken advantage of as a result of the after-school visits and rides home.[4]

Respondent also asserts that C.W.'s credibility should have been called into question by the ALJ because of a phrase in a sentence on page 9 of the transcript of the Police Interview. The phrase was part of a sentence uttered in response to the detective's questions about C.W. "seeing" a teacher. The detective asked "And what do you mean by 'seeing'?" C.W. responded "By going to visit him, like how I was doing since seventh grade." Respondent interpreted the underlined phrase to mean that C.W. had been visiting respondent continually since seventh grade. (Respondent's Exceptions at 7) Based upon that interpretation, respondent argued that C.W. presented conflicting information to the police, since C.W. stated later in the interview (P-12 at 14), that he did not visit respondent when he was in eighth or ninth grade. C.W. also told the police that he hadn't seen respondent from 7th grade to around December 2004, when he went to see his sister in the middle school where respondent then taught. Respondent urges the Commissioner to view the alleged conflict as further evidence of C.W.'s lack of credibility. (Respondent's Exceptions at 7)

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[3] The Commissioner notes that assuming, *arguendo,* that C.W.'s mother had asked respondent to tutor C.W., as respondent contends, it would not be unusual for C.W. to be unaware of his parent's request. Thus, the Commissioner cannot conclude that C.W.'s testimony – that he did not believe his mother asked respondent to tutor him – was untruthful.

[4] Respondent maintains that the ALJ improperly "found" that school policy forbade teachers from driving students home. (Respondent's Exceptions at 9) The Commissioner notes, however, that the language in the Initial Decision to which respondent refers was set forth solely in a summary of testimony – not in the ALJ's "Findings of Fact." Nor is the question of petitioner's policy about driving students home determinative of the credibility of the parties in this case or the merits of each party's position. Consequently, the issue needs no further discussion.

The Commissioner does not believe that respondent's understanding of the above quoted phrase is the only possible interpretation. C.W. told the police detective – on page 11 of P-12 – that while his relationship with respondent was initially strictly teacher-student at the beginning of his tenure in respondent's seventh grade math class, he started "liking [respondent in] like maybe February or March" of seventh grade. The phrase "like how I was doing since seventh grade" is consistent with the fact that C.W. started liking and talking to respondent in seventh grade. Under that scenario, it would be understandable for C.W. to refer to his tenth grade interactions with respondent as having originated in seventh grade, despite the hiatus during the eighth and ninth grades. Accordingly, the Commissioner is not prepared to conclude that C.W. testified inconsistently about the chronological parameters of his interactions with respondent.

Finally, to cast aspersions on C.W.'s credibility, respondent points out that the petitioner provided no witnesses to vouch for C.W.'s veracity, and that C.W. "admitted that his own father believed that C.W. was lying about the allegations against Mr. Young." (Respondent's Exceptions at 11)[5] Thus, respondent reasons, the ALJ improperly determined that C.W. was more credible than respondent, and that petitioner had sustained its burden to prove Charge I against respondent.

The Commissioner may not ignore an ALJ's credibility determinations simply because a party produced, or did not produce, witnesses to testify about the party's reputation for veracity. The ALJ had the opportunity to observe C.W. and respondent at the OAL hearing. He was able to make determinations about the viability of each witness's testimony and about both the overall internal consistency of witness testimony, and its consistency with all of the

[5] The Commissioner finds nothing out of the ordinary about a father who does not want to believe that his son has had a sexual encounter with a male teacher, and cannot conclude that such a paternal reaction signifies that C.W. is untruthful.

evidence presented at the hearing. *See, e.g., Congleton v. Pura-Tex Stone Corp.*, 53 *N.J. Super.* 282, 287 (App. Div. 1958). Respondent himself cited to the relevant case law which advises that the trier of fact, as part of his or her assessment of credibility, will evaluate whether the testimony can be accepted as probable in the circumstances – given "common experience and observation of mankind." (Respondent's Exceptions at 8, citing *Spagnuolo v. Bonnett*, 16 *N.J.* 547, 554-55 (1954), *et. al.*) The Commissioner cannot disagree that, overall, C.W.'s version of the facts could be accepted as probable in the circumstances – given common experience and observation of mankind.

The Commissioner "may not reject or modify any findings as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent and credible evidence in the record." *N.J.S.A.* 52:14B-10 (c). She finds nothing arbitrary or capricious about the ALJ's credibility determinations, which are well supported by the record. C.W. provided a great deal of accurate information about the events in question. In addition, much of C.W.'s testimony is corroborated by respondent himself. For example, respondent agrees that C.W. frequently visited his classroom after school during the Autumn of 2004, and that he gave C.W. rides home.

In considering respondent's credibility, the Commissioner notes that the ALJ had three days of hearing time to observe respondent. In addition, in weighing respondent's denials regarding the Warinanco Park charge, the ALJ had before him the following facts: respondent had known in the Fall of 2004 that C.W. was gay or bisexual; respondent had given C.W. rides; respondent had kept blatantly affectionate notes from C.W. for three plus years without bringing them to the attention of the school authorities; and respondent received a cell phone call from

C.W. in the Fall of 2004 – wherein C.W. had informed him that he was just out of the shower, wearing only a towel – but respondent never reported the call to the school authorities. In sum, the Commissioner has no grounds upon which to replace the ALJ's credibility determinations with her own. Those determinations, coupled with the facts in evidence, support Tenure Charge I.

In his third, fourth and fifth exceptions, respondent urges that – as to the second tenure charge in this case[6] – the ALJ's credibility determinations are arbitrary, capricious and unreasonable, and the ALJ's finding that petitioner proved the charge is erroneous. Respondent also claims that the ALJ improperly shifted the burden of proof to respondent.

Respondent's contentions about the second tenure charge also begin with an argument about the changes in C.W.'s recollections about time frames He urges that the Commissioner should find that C.W. was not credible because he failed to accurately pinpoint the date of the motel incident until after he was shown the motel receipt signed by respondent. For the same reasons that were discussed in conjunction with the first tenure charge, the Commissioner finds this argument to be without merit.

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[6] The second tenure charge provides:

> In or about January or February 2005, C.W. was staying at his grandmother's home in Irvington, New Jersey for a weekend visit. Young telephoned at approximately 5:30 a.m. and informed C.W. that he would pick him up in front of the house. Shortly thereafter, Young arrived and C.W. left with him in Young's vehicle. After stopping at a CVS store in Roselle to pick up a prescription for Young's daughter, they proceeded to the daughter's house to drop it off, and then to the Linden Motor Inn.
>
> After checking in, Young parked the car and he and C.W. entered a room at the Inn. Shortly thereafter, Young and C.W. disrobed and started kissing. They eventually engaged in oral and anal sex. Later, Young drove C.W. back to his grandmother's house.
>
> The foregoing conduct by Young constitutes conduct unbecoming a teaching staff member and/or other just cause for dismissal.

Additional differences between the information C.W. gave in the Police Interview, C.W.'s testimony at trial and a social worker's account of her interview with C.W. are recited by respondent in furtherance of his challenge to C.W.'s credibility. First, respondent asserts that C.W. presented conflicting statements about whether oral sex took place between C.W. and respondent in the Linden Motor Inn (the motel). During an interview with a social worker from the Department of Children and Families (DCF)[7] – called by the school authorities pursuant to law – C.W. allegedly denied that there was oral sex at the motel.[8] During the police interview, which was six days after the interview with the social worker, C.W.'s testimony indicated that he and respondent performed oral sex on each other. At the OAL hearing C.W. testified that respondent performed oral sex on him but denied that he performed oral sex on respondent.

At the outset, the Commissioner notes that Joint Exhibit 1 (J-1) – a copy of the IAIU social worker's report – is double hearsay, and must be given the weight that double hearsay warrants. The social worker, whose notes about her interview with C.W. are referenced by respondent, did not testify at the OAL hearing. The Commissioner will not give her account of what C.W. said priority over C.W.'s taped and transcribed statement to the police or his direct testimony at the OAL hearing. The fact that she read her account of C.W.'s statements to him and asked him if it was true,[9] cannot overcome the fact that she was not produced to testify and submit to cross examination. Thus, while C.W. seems to offer different responses to questions

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[7] The social worker represented the Institutional Abuse Investigation Unit of the Department of Children and Families (IAIU).

[8] The social worker wrote, in pertinent part, "C[] reported that Mr. Young got undressed and then he got undressed and Mr. Young lay on top of him and then the two began kissing and ultimately engaged in anal sex. C[] reported that Mr. Young penetration (sic) him. He denied any oral sex occurred at that time." (J-1 at 38)

[9] C.W. was asked at the hearing whether the social worker read her account to him and whether she asked him if it was true. He was not, however, asked at the hearing to reveal how he responded to that question.

about oral sex with respondent, the Commissioner is satisfied that C.W.'s statements to the police and at the OAL hearing are consistent enough for the ALJ to conclude, in conjunction with the other evidence presented by petitioner, that oral sex took place between C.W. and respondent.

The second alleged discrepancy in C.W.'s testimony pertains to C.W.'s reaction to respondent's behavior. Respondent points to the social worker's interview summary which stated that C.W. "denied being forced or coerced." (J-1 at 38) On the other hand, C.W. told the police that he resisted by trying to break away from respondent when respondent was "on top of" him. (P-12 at 42) And at the OAL hearing C.W. testified that while respondent was on top of him, he told respondent to stop and tried to push him off. (1T87)[10] The Commissioner sees no arbitrariness in the ALJ's determination that C.W.'s testimony was not materially inconsistent concerning the issue of resistance to respondent's actions.

Respondent's next contention about C.W.'s allegedly inconsistent testimony concerned the manner in which C.W. exited and entered his grandmother's house before and after the motel incident. At the OAL hearing C.W. testified that when respondent brought him back to his grandmother's house he did not have to sneak in. (1T145) Respondent claims that that testimony is inconsistent with a clause in the IAIU social worker's summary of her interview with C.W. In the social worker's words, C.W. snuck out of his grandmother's house – while everyone was sleeping – to meet respondent. (J-1 at 38) As stated above, J-1 contains a third party's paraphrasing of C.W.'s interview. No inconsistencies between that double hearsay and C.W.'s direct testimony can be shown. Further, the Commissioner finds the question of how C.W. described his exit from the house to be unhelpful to the adjudication of the issues in this case.

[10] 1T = Transcript from February 20, 2008.

The third alleged discrepancy between information C.W. provided to the police and his OAL testimony related to his sexual history. Initially, the Commissioner concludes that C.W.'s sexual history should not be considered – directly or indirectly – in determining whether respondent behaved inappropriately. Nor is it germane to the evaluation of respondent's conduct as an adult teacher toward a teenaged student. As to respondent's position that C.W.'s testimony about his sexual history contained material inconsistencies, the Commissioner does not agree.

Respondent begins his argument with the supposition that CW "attempted to imply" that he had had only oral sex with men prior to the motel incident. This supposition is based upon respondent's counsel's questions to C.W. about his sexual history:

> Q. And had you had sexual experiences with men prior to January 1, 2005?
> A. No.
> . . . .
> Q. Do you recall telling the police that you'd been sexually active since you were 13 years old with both men and women?
> A. Yes.
> . . . .
> Q. Well, was it a lie?
> A. No, but – like, because it depends on what sex you're talking about, oral sex or –
> Q. So you were talking about the type of sex you were having?
> A. Yes.
> Q. But you were having some form of sexual activity with men prior to January 1, 2005?
> A. Yes.
> 1T105:21 to 1T106:20.

Respondent maintains that the foregoing testimony is at odds with the social worker's account of C.W.'s interview, which related that C.W. said he was not a virgin prior to the motel incident with respondent, but had previously engaged in sexual intercourse three or four times. (J-1 at 38) Respondent also suggests that C.W.'s statements to the police were inconsistent with his OAL testimony. The testimony in question consisted of C.W.'s disclosure that he had been familiar

with the kind of condom respondent used (P-12 at 56-57) and that – prior to his 2007 interview with the police – he had used lubricants. (P-12 at 60)

The Commissioner cannot agree that the foregoing suggests untruthfulness and should have altered the ALJ's evaluation of C.W.'s credibility. C.W. was clearly denying that he had had intercourse with a man prior to going to the Linden Motor Inn with respondent. To the extent that the ALJ should have even considered the social worker's interview summary, C.W.'s statement that he had had intercourse before the motel incident cannot be construed to mean that he had had it with a man. It is undisputed that C.W. identified himself as a bisexual. C.W.'s familiarity with condoms could be as easily attributed to sexual activity with females as with males. Finally, C.W.'s statement to the police about lubricants was made two years after the incident with respondent. The police did not specifically ask C.W. if he had used lubricants prior to January 1, 2005, but rather if he had ever used them in the past.

Finally, respondent suggests that there is internal inconsistency in C.W.'s testimony that his father questioned him about people touching him, and that his father did not believe him when he related the incident with respondent. (Respondent's Exceptions at 19-20) The Commissioner cannot fault the ALJ for seeing no inconsistency. Respondent's position that C.W.'s parents should have been called to testify on this point is without merit, as 1) there is no inherent contradiction in the testimony and 2) the parents' questions and reactions are not material to the ultimate issues in this case.

In sum, respondent's contentions about C.W.'s credibility are not persuasive. By way of contrast, the Commissioner concurs with the ALJ's determination that respondent was lacking in credibility – for the reasons set forth on page 13 of the Initial Decision. In addition, the Commissioner notes that the amount of detailed information C.W. provided about the

morning of January 1, 2005 could not be explained by respondent's assertion that he told C.W. by telephone about going to the CVS and taking his daughter to the Linden Motor Inn.

Respondent's story that he told C.W. the name of the motel does not explain why C.W. did not know its name in February 2007, but could direct the police to it when the police – with no prior warning – asked him to. Further, it is unlikely that, in addition to telling C.W. that he was bringing his daughter to the Linden Motor Inn, he would also have identified his daughter's address and described his daughter's dwelling, told C.W. how to get to the motel, and divulged the location of the room that he signed for – all facts which C.W. disclosed to the police in 2007 and at the OAL hearing.

In his sixth exception, respondent contends that the ALJ ignored the documentary evidence offered in this matter. Respondent's emphasis was on the phone records that he produced and a one-page police report concerning the January 1, 2005 incident at the apartment of his daughter. The Commissioner finds respondent's contention to be without merit.

On page 13 of the Initial Decision the ALJ specifically referred to the police report, and noted that there was no mention in the report of respondent's presence at the scene of the crime. The Commissioner agrees that the report supports the proposition that an altercation occurred at the daughter's apartment but does not prove that respondent went to the apartment.

As to the cell phone records produced by respondent, the ALJ specifically addressed them on page 10 of the Initial Decision. They add little to respondent's testimony, since no names or numbers are listed for the incoming calls. Respondent suggests that the absence of C.W.'s phone number on the sections of the bills identifying outgoing calls contradicts C.W.'s testimony that respondent called him on the morning of January 1, 2005. However, C.W. could not clearly remember the number of the cell phone he used during the time

period of the motel incident, and the presentation of two cell phone bills does not preclude the possibility that respondent contacted C.W. using a different telephone.

Thus, review of the Initial Decision reveals that the ALJ considered the phone bills, the police report concerning respondent's daughter, and the other material documents that had been entered into evidence – such as the statements by the school authorities to the police in February and March 2007 concerning C.W.'s disclosure about respondent, the motel receipt signed by respondent, the affectionate notes sent by C.W. to respondent, and the transcript of C.W.'s police interview. The Commissioner finds no arbitrariness in the ALJ's evaluation of the documentary evidence.

In respondent's last exception, he claims that the tenure charges should have been dismissed under *N.J.S.A.* 18A:6-7a.[11] The Commissioner agrees with the analysis in the Initial Decision, pages 18-19 that *N.J.S.A.* 18A:6-7a is inapposite to the instant matter. That statute requires that no action be taken against a school employee on the basis of a complaint of abuse made to the DCF if that agency determines that the complaint is unfounded. It also mandates that in the case of a DCF finding of 'unfounded,' all reference to the DCF complaint and investigation be removed from the employee's file.

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[11] *N.J.S.A.* 18A:6-7a provides:

> When a complaint made against a school employee alleging child abuse or neglect is investigated by the Department of Children and Families, the department shall notify the school district and the employee of its findings. Upon receipt of a finding by the department that such a complaint is unfounded, the school district shall remove any references to the complaint and investigation by the department from the employee's personnel records. A complaint made against a school employee that has been classified as unfounded by the department shall not be used against the employee for any purpose relating to employment, including but not limited to, discipline, salary, promotion, transfer, demotion, retention or continuance of employment, termination of employment or any right or privilege relating to employment.

In the present case, no action was taken against respondent as a result of the DCF investigation and apparently no reference to it remains in respondent's file. Thus, *N.J.S.A.* 18A:6-7a has been satisfied.

Respondent erroneously suggests that *N.J.S.A.* 18A:6-7a has been violated because the tenure charges are the same "complaint" as the school officials' mandatory call to the IAIU, and are consequently action against respondent despite a finding of "unfounded." (Respondent's Exceptions at 41) The IAIU investigation, the police investigation and the compilation of tenure charges were unquestionably all reactions to respondent's behavior. However, they were each based upon separate causes of action, pursuant to separate legal authority, and effectuated by separate proceedings. Adjudication of the tenure charges are no more barred by *N.J.S.A.* 18A:6-7a than criminal charges would have been, had the prosecutor decided to press same.

The present action is based on facts generated by an independent police investigation – which was clearly more thorough than the IAIU inquiry – and information collected by petitioner in anticipation of tenure charges. The tenure charges are not criminal or quasi-criminal, or brought pursuant to Title 9 of the New Jersey Statutes which authorizes DCF investigations, but rather are charges of violations of the school laws governing the conduct of teaching staff members. *See, e.g., N.J.S.A.* 18A:28-5 and accompanying case law.[12]

In summary, the Commissioner finds that 1) there is nothing but support in the record for the ALJ's determination that C.W. was credible, including the fact that there was no indication of animus by C.W. toward respondent or any other motive to offer false information

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[12] Respondent mistakenly contends that *In re L.R.*, 321 *N.J. Super.* 444 (App. Div. 1999) supports his position that *N.J.S.A. 18A*:6-7a bars the instant action. In *In re L.R.*, the court held that DYFS (predecessor agency to DCF) had the authority to make findings that respondents had not committed child abuse but had put children at risk. It also held that DYFS could not force school districts to implement its remedial suggestions concerning such respondents, and that the respondents had no right to a hearing to simply contest the results of an investigation.

about him; 2) there is no caprice in the ALJ's determination that respondent was not credible; 3) the evidence as a whole supports C.W.'s account of the events at the heart of this controversy; 4) the record supports the ALJ's finding that petitioner proved its charges of unbecoming conduct against respondent; and 5) respondent's contention that *N.J.S.A.* 18A:6-7a precludes the institution of tenure charges against him is without merit.

Accordingly, the Commissioner adopts the Initial Decision as the final decision in this case. The tenure charges are sustained and respondent's employment is terminated. Respondent is entitled to receive back pay from the 121st day following the filing of the tenure charges up to the date of this decision. A copy of this decision will be forwarded to the State Board of Examiners for action as that body deems appropriate.

The Commissioner further adopts the January 28, 2008 order of the ALJ sealing the IAIU records that were admitted into evidence at hearing.

IT IS SO ORDERED.[13]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 8/18/08

Date of Mailing: 8/19/08

Date of Mailing Corrected Decision: 8/22/08

[13] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11569-07
AGENCY DKT. NO. 295-10/07

IN THE MATTER OF THE TENURE HEARING OF GILBERT YOUNG, JR., SCHOOL DISTRICT OF THE BOROUGH OF ROSELLE, UNION COUNTY.

John E. Croot, Jr., Esq., for petitioner School District of the Borough of Roselle, Union County (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Louis P. Bucceri, Esq., for respondent Gilbert Young, Jr. (Bucceri and Pincus, attorneys)

Record Closed: April 25, 2008 Decided: May 27, 2008

BEFORE **J. HOWARD SOLOMON,** ALJ:

STATEMENT OF THE CASE

Petitioner School District of the Borough of Roselle, Union County, (District) brought charges of unbecoming conduct and other just cause for dismissal against respondent, Gilbert Young, Jr., a certificated and tenured employee holding the position of teacher within the District. N.J.S.A. 18A:6-10. The District contended that: (1) during or about December 2004 or January 2005, respondent drove C.W., a former student, and at the

time, a tenth grader at the District's high school, to the student's home; that before driving him home, respondent drove the student into a public park while dark, whereupon he kissed the student by placing his tongue in the student's mouth and caressed and touched his body, including his genitalia, over his clothing; and (2) during or about January or February 2005, respondent picked up C.W., who was staying at his grandmother's house, during the early morning hours and thereafter drove the student to a motor inn where both disrobed, started kissing and engaged in oral and anal sex. Respondent denied the allegations.

PROCEDURAL HISTORY

On or about February 16, 2007, the Department of Children and Families (DCF), through its Institutional Abuse Investigation Unit (IAIU), began its investigation of charges of sexual abuse alleged against respondent. By its letter dated May 9, 2007, the IAIU issued its finding that the charges were unfounded.

On October 11, 2007, the District filed with the Department of Education, Bureau of Controversies and Disputes, (Department) Sworn Tenure Charges, a Certificate of Determination for filing of tenure charges and Proof of Service. On October 25, 2007, respondent's answer was filed. The Department then transmitted this matter to the Office of Administrative Law (OAL), where it was filed on October 29, 2007, for hearing as a contested case pursuant to N.J.S.A. 18A:6-11 and N.J.S.A. 52:14B-2(b).

Prior to the hearing, respondent filed a motion to dismiss all charges pursuant to N.J.S.A. 18A:6-7a, claiming that the same factual basis investigated by the IAIU, which made a determination of unfounded, precluded the District from bringing tenure charges predicated upon the same allegations. I reserved decision on this motion until the completion of the hearing.

The hearing took place on February 20, 21 and March 7, 2008. The record remained open until April 25, 2008, to allow counsel to obtain the transcript of the hearing and to submit written summations.

FACTUAL DISCUSSION

The parties stipulated that respondent was a tenured teacher in the employ of the District and that his salary, which was suspended as of November 1, 2007, pursuant to N.J.S.A. 18A:6-14, would resume on February 29, 2008, the 121st day after his salary ceased. Essentially all other facts were in dispute.

The principal witness for the District was C.W., a nineteen-year-old student, born on December 3, 1988, and who, at the time of the hearing, was a twelfth-grade high school student in Roselle. In December 2001 he and his family moved to Roselle from Newark. He started in the Roselle public school system in January 2002 as a seventh grader and was assigned to the Leonard V. Moore Middle School (L. V. Moore), where respondent became his mathematics teacher.

During the 2004-2005 school year, when C.W. was in the tenth grade, he began having contact with respondent by visiting his classroom about two times a week after school. Other students were there. C.W. would usually do his homework and then walk home.

During or about the fall of 2004, C.W. asked respondent to drive him home. Although there was a school policy about not driving students, respondent complied. After that, respondent drove C.W. home about five to ten more times, usually stopping his vehicle away from the front of C.W.'s house. During one of the rides, respondent drove C.W. into Warinanco Park. He parked his vehicle and began groping C.W. by placing his hands on C.W.'s genitalia over C.W.'s clothing. He turned C.W.'s head towards his own, and kissed him, placing his tongue into C.W.'s mouth. After talking for a while, respondent drove C.W. home, again dropping him off away from the front of his house.

During the course of visiting respondent after regular school hours, C.W. left two handwritten notes for respondent, expressing his love for him. One was a short note (Exhibit P-10), and the other was a longer one (Exhibit P-11). Respondent never admonished C.W. for these notes.

During the early-morning hours of January 1, 2005, around 5 a.m. to 6 a.m., C.W. called respondent on his cell phone. Respondent, who had just arrived home from church, agreed to call him back. At the time, C.W. was staying at his grandmother's house in Irvington. Pursuant to a later discussion between the two that morning, respondent drove to C.W.'s grandmother's house around 6 a.m. and picked up C.W. Respondent then drove to a CVS drug store in Roselle, where he got medication for his daughter. He then drove to his home, while C.W. remained in his car. About five minutes later, respondent drove a short distance to his daughter's house to deliver the medication. His daughter lived in a "short" apartment building. C.W. stayed in the car while respondent met his daughter at the doorway and delivered the medication to her. Respondent then drove C.W. to the Linden Motor Inn on Routes 1 and 9.

Upon their arrival at the motor inn at approximately 7 a.m., C.W. remained in the car while respondent went inside to register. When respondent returned to the car he told C.W. to get out, and together they walked to a motel room located on the first floor. The room's door was on the outside of the building.

After they entered the room, C.W. sat on the edge of the bed and began to text his friend. Respondent then told C.W. to take his clothes off, which he did. Respondent then disrobed. Respondent then started to kiss C.W. and performed oral sex on him. Respondent then told C.W. to turn onto his stomach, at which time respondent put on a condom and performed anal sex. C.W. tried to resist, but respondent held him tightly. C.W. told him to stop and tried to push respondent away, but was unsuccessful. He did not cry out for help. Respondent then lay down on the bed for a while until C.W. said that he wanted to go home. Respondent then drove C.W. back to his grandmother's home. After this event, C.W. did not have any further contact with respondent, except a considerable time later when C.W. saw respondent at the high school and they had a brief conversation, and on an occasion when respondent was visiting C.W.'s school with lower-school students.

C.W. spoke to no one about his relationship with respondent until February 15, 2007, when he was visiting with the nurse in her office at the high school, which he frequently did. On this occasion, she noticed that something appeared to be bothering him

and asked if anything was wrong. C.W. then told her about the incident at the motel. After school officials were contacted, the police were notified and responded to the school.[1] C.W. gave a preliminary statement to the police (Exhibit P-1). Subsequently, C.W. again met with these officers when they came to his school, unannounced, and with permission from the school and his guardian, asked C.W. to take them to the motel involved. Although he could not recall its name, he directed the officers to the motel. He recalled a later interview with the police, which was recorded, but could not recall any other interviews, including one by an investigator from the IAIU.

C.W., who is bisexual, had not had any sexual experience with an adult male prior to the incident with respondent. Respondent, who knew that C.W. was gay, had previously urged him to talk with his parents about his sexuality. After his contact with respondent began, he and respondent exchanged cell phone numbers. During the early-morning hours before being taken to the motel, he recalled speaking with respondent by cell phone.

The District also called Colleen Scanielo, a detective with the Roselle Police Department, to testify. On February 15, 2007, she was directed to the Abraham Clark High School, where she met with vice principal Robin Bullock and the school nurse. She was referred to C.W., who told her of his involvement with respondent. Scanielo then transported C.W. to police headquarters for further questioning. His guardian was contacted, since C.W. was a minor. Thereafter, further questioning continued.

A few days later, Scanielo and another officer drove to C.W.'s school and, after getting permission from school officials and his guardian, took C.W. out of class and asked him to lead them to the motel. C.W. was not given any advance notice since, as Scanielo mentioned, credibility was always an issue in matters such as this and she wanted to be sure of his truthfulness. C.W. then directed them to the Linden Motor Inn, which was located about two or three miles from Roselle. While C.W. did not know the name of the motel, he knew where it was located. When the officers pulled into the motel driveway, C.W. directed them to the back parking lot. He then pointed to a room on the first floor

[1] C.W. recalled that one officer was female and the other male.

where the alleged incident occurred. Scanielo noticed that the entry into the room was from the outside of the building. C.W. was then transported back to Roselle.

On February 27, 2007, Scanielo conducted a videotaped interview of C.W. at the Union County Prosecutor's Office (Exhibit P-13). She then went to respondent's home to interview him, but was advised that he had a lawyer and, consequently, she did not interview him. She then obtained a subpoena from the Union County Prosecutor's Office for the receipts maintained by the Linden Motor Inn between January and February 2005, since that was the time frame of the incident as recalled by C.W.

After reviewing the motel's receipts, she found a receipt that bore the name of respondent, his driver's license number, the make of his motor vehicle and his license plate number (Exhibits P-8, P-9). This receipt was dated January 1, 2005, for room 106 for the time of 7:10 a.m. to 9:10 a.m. at a cost of $25. The license plate number on the receipt was later confirmed as belonging to respondent's vehicle.

Scanielo then contacted the prosecutor's office about filing criminal charges against respondent, but was subsequently advised that since C.W. was sixteen years old at the time, which was the age of consent, and respondent was not his current teacher, but a former one, he would not be charged criminally.[2]

No other witnesses were called by the District.

Respondent, age fifty years old, testified in his own behalf. Since 1992 he had been employed by the District in various instructional positions. On October 27, 2006, he took a medical leave of absence due to a back injury. On February 16, 2007, while still on medical leave, he was served with a notice of suspension with pay pertaining to the above allegations. Subsequently, he received another notice, which provided that, effective November 1, 2007, he was suspended without pay. Before this, he had never been disciplined by the District or ever received a complaint for sexual abuse.

[2] See N.J.S.A. 2C:14-2(c)(3)(b).

He first met C.W. in school year 2001-2002 when he was C.W.'s seventh-grade mathematics teacher. He recalled that C.W. seemed withdrawn and quiet, but also angry. Later in the school year, when C.W. was not performing well academically, respondent referred him to the Public Assistance Committee (PAC),[3] which consisted of teachers, the school nurse, administrative officials, and other school personnel. The committee was created to assist those students whose academic performance was unsatisfactory. Respondent, who was present at the PAC meeting with C.W., had not been aware of C.W.'s sexual orientation. When he brought C.W. into to the hallway to explain the purpose of the meeting, C.W., during the course of their conversation, told him that he was gay and that he had been having trouble with another male online. Respondent then cautioned C.W. about communicating online and urged him to disclose his sexual orientation to the committee, which he did. C.W. was about thirteen or fourteen years old at the time. Respondent then volunteered to tutor C.W. after school, without charge, which he did during the 2001-2002 school year and even into 2003 after C.W. left L. V. Moore to become an eighth grader at the high school.

Since tutoring was held after regular school hours, the door to the school, at times, was locked. Respondent gave his cell phone number to the students he was tutoring so that he could be called to let them into the building. He claimed that he had not given his cell phone number to C.W., but C.W. was able to get the number on an occasion when respondent left his cell phone on the desk when he left the classroom, and C.W. used respondent's cell phone to call his own cell phone. When C.W. called respondent later that day, respondent was angry about the way he got his number and told C.W. not to call him again.

Respondent claimed that during the fall of 2004 he started to drive C.W. home at the request of C.W.'s mother since C.W.'s parents were concerned about C.W. arriving home as late as 8 p.m., even though tutoring sessions were over by 4:15 p.m.

After one of the tutoring sessions, respondent was cleaning out his desk when he found a note left by C.W. in which C.W. expressed his love for respondent (Exhibit P-10).

[3] This committee was subsequently renamed the Intervention and Referral Services Committee (IRSC).

Respondent shared the note with Angela Robinson, a colleague, and wrote "Rec-d 10/22/04" on the note since it was undated. At his next tutoring session, he told C.W. that the note was inappropriate. When respondent received another note from C.W., this one dated November 5, 2004 (Exhibit P-11), once again expressing his love, respondent repeated his admonition and this time threatened to tell C.W.'s mother if he wrote another one. Respondent kept both notes rather than turn them over to school officials since he thought the matter was under control, stating that only alarming notes, such as the threat of suicide or the threat of personal injury or property damage, were to be disclosed to school officials.

Thereafter, respondent received a cell phone call from C.W. during which C.W. stated that he had just gotten out of the shower and had a towel wrapped around him. Respondent did not bring this telephone call to the attention of school officials. Respondent then began receiving text messages from C.W. Respondent stopped tutoring C.W. in November 2004 because C.W. was no longer coming to see him. The last time he drove C.W. home was in November 2004.

Respondent denied ever driving C.W. into Warinanco Park or any other park, or ever touching his genitals or kissing him, or ever driving him to his grandmother's home in Irvington, or ever going to the Linden Motor Inn with him. He also denied ever going to a CVS drugstore with C.W., or driving C.W. to his daughter's house, or ever stopping by his own house with C.W. in his car.

He then described the events of December 31, 2004. On that evening, respondent attended his church. While there, he received a cell phone call from his daughter asking if he would pick up a prescription for her son, who was ill. At 1:00 a.m., after locking the church, he left with deacon Sam Spears, Jr., and went home. Upon arriving home, he made telephone calls, including one to his daughter, and then went to the CVS pharmacy. Around 2:00 a.m. he received a cell phone call from C.W. asking for a ride to his grandmother's house in Irvington. Respondent refused, telling C.W. that he was on his way to the CVS pharmacy to pick up a prescription for his daughter. After picking up the prescription, he returned home and made telephone calls to a few friends to extend New Year's greetings. Respondent then went to bed around 3:30 a.m. At 6:15 a.m. he

received a telephone call from his daughter, NaTia Young, explaining that there had been a fight in her apartment between respondent's two nephews. His daughter had tried to stop the fight, and R.C., one of his nephews, accidentally hit her in her face. Respondent told his daughter to call 9-1-1 and that he would be right over.

When respondent arrived at his daughter's house, around 6:45 a.m., he spoke with a police officer who had been dispatched to the scene, who assured him that his daughter was okay.[4] Respondent then told his daughter that he was going take her to a motel, rather than to his home, which was only a five-minute drive away, so that she could rest and not be concerned about R.C. There were no visible bruises on his daughter, although she was crying and upset. If he took his daughter to a motel, his nephew would become calmer. He also mentioned that R.C., who had stayed at his house in the attic, could not enter his house because he had not been given a key.

His daughter then left her children with a neighbor and respondent drove her to the Linden Motor Inn. As they were pulling into the driveway of the motel, C.W. called again, asking respondent for a ride to his grandmother's home. Respondent was angry at the call, told C.W. the name of the motel where he was, stating that he was "in a crisis with his daughter," and ended the call. He then registered his daughter and paid $25 for her two-hour stay. Then respondent returned to the apartment of his daughter's neighbor, where he picked up his three grandchildren and brought them to his home, which was a short distance away. Respondent's daughter later picked up her children and was driven back to her apartment by respondent. The whereabouts of R.C. were still unknown.

Respondent maintained two cell phone accounts, one for himself and the other for his foster child, C.D. (Exhibits R-6, R-7). He produced the bills for these accounts, which showed several calls made and received during the early-morning hours of January 1, 2005. Respondent claimed that the call he received at 2:02 a.m. on January 1 was from C.W. asking for a ride while respondent was on his way to a CVS pharmacy. According to respondent, the call at 6:17 a.m., which was shown on the bill as "incoming" with no telephone number designated, came from his daughter, who was calling about the

altercation. He claimed that the call at 7:06 a.m., which again was shown only as "incoming" with no telephone number designated, came from C.W., who was asking for a ride. These records also showed that between 7:06 a.m. and 8:59 a.m. respondent neither made nor received any calls. He stated that after he received the telephone call from C.W. while pulling into the motel, he never again received either a telephone call or text message from C.W.

He did not see C.W. again until May 2006 when C.W. came to the Grace Wilday Junior High School, where respondent was then teaching, to pick up his sister, who had been involved in an altercation with another student. Respondent asked him why he was no longer coming for tutoring. C.W. told him that it was too far to walk.

Respondent denied calling C.W. on January 1, 2005, and stated that he is heterosexual, that he never had sex with a man or boy, and that he was previously married and is presently engaged. He has two daughters from his prior marriage and also has a foster child, C.D. Even though he knew C.W. was gay, he confirmed that he never referred to school officials the two notes in which C.W. had expressed his love. Instead, he kept the notes for several years.

He confirmed that C.W. had never threatened him, and further confirmed that his daughter's apartment building was only two stories high, with stores on the ground floor and her apartment on the second floor

NaTia Young, respondent's daughter, testified about the events of the night of December 31, 2004, and the early-morning hours of January 1, 2005. She was at home since two of her children were ill. During the evening of December 31, 2004, she called respondent to ask him to pick up a prescription. Later on, she was awakened by her two cousins, who were engaged in an altercation. In the process of breaking up the fight, she was inadvertently struck in the face by R.C., one of her cousins. While she was calling 9-1-1, R.C. grabbed the telephone from her and ran out of the apartment. The police responded at about the same time that respondent arrived. She stated that it was her idea

[4] The police officer prepared a report of the incident which made no mention of respondent being at the

to go to a motel rather than to her father's home since R.C.'s whereabouts were unknown. She asked her neighbor to care for her children and was then driven by respondent to the Linden Motor Inn.

She recalled that when she and respondent arrived at the motel, respondent received a cell phone call that seemed to annoy him. He then went inside to register while she remained in the car. She had never been to the Linden Motor Inn before and did not know how long she was going to stay there. She could not describe the exterior of the motel. About two hours later she called respondent, since there was no prearranged time when she was to be picked up. Respondent came to the motel and drove her to his home.

Sam Spears, Jr., a deacon at the church where respondent is a member, testified on respondent's behalf. Spears commented about respondent's involvement with his children and the church and said that he was not aware of any abusive conduct by respondent. He was at the church on December 31, 2004, and recalled that he left, along with respondent, around 1:00 a.m. on January 1, 2005. He further recalled that respondent had to pick up a prescription for his daughter at a CVS pharmacy.

LaTynia Wise, a friend and neighbor of NaTia Young, testified that she is very close with respondent, often referring to him as "Daddy." She considers him to be a father to her. She recalled that in the early-morning hours of January 1, 2005, there was banging on her door. It was NaTia Young, asking her to watch her children. She recalled that later in the morning respondent came to her apartment to pick up his grandchildren. She did not know why the children were left with her.

Judith Rocco, a retired teacher/learning consultant and former colleague of respondent, also testified for respondent. Both she and respondent served on the PAC team. The students adored him, and he was respectful to them as well as to their parents. She was not aware of any claim of abusive conduct and knew him to be truthful and honest. However, she was not aware that he had given rides to students.

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scene (Exhibit R-2).

Angela Robinson, a colleague of respondent, testified that she has known respondent for the past nineteen years and had worked with him on the PAC team. She recalled seeing the first note given to respondent by C.W. (Exhibit R-3), but did not consider it to be a concern. She described respondent as an exemplary teacher, adored by students, a "genuine" teacher, trustworthy and truthful. She also mentioned that giving rides to students was not prohibited until recently.

Respondent also produced two students, A.D. and A.E., who both testified that they had been tutored by him with positive results and felt that he was trustworthy.

Cheryl Lynn-Barton, the nurse at the L. V. Moore School since 1994, testified that respondent worked with at-risk students, giving them positive reinforcement. She noted that he stayed at school after regular hours to help students with their school work, often remaining after she left at 4:30 p.m. She felt that all students "loved" him and that their parents were appreciative of his efforts. She further stated that he enjoyed a good reputation for truthfulness and honesty. It was also her understanding that respondent had driven students home, although it was against school policy.

No further witnesses were called.

When facts are contested, the trier of fact must assess and weigh the credibility of the witnesses for purposes of making factual findings. Credibility is the value that a finder of fact gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality, its internal consistency, and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Based upon these principles, the testimony of C.W. was deemed credible and compelling. He was clear and straightforward in recounting the events involved. He had nothing to gain by his testimony and no evidence of ill will or ill motive was presented. Scanielo was also compelling and credible.

Respondent, conversely, was considered lacking in credibility. His accounts of disclosing his trips to C.W., one to the CVS pharmacy and the other to the Linden Motor Inn, were totally incredulous. His daughter's testimony was similarly not believable in light

of the several inconsistencies between her testimony and his. Both claimed it was his or her own idea for her to go to a motel, they were at odds about when she was to be picked up at the motel, and she could not recall the exterior of the motel, when, according to her, the events leading her to the motel were traumatic. Equally incredulous was that respondent, who only lived a short distance from his daughter's apartment, took his daughter to a motel rather than to his house, because of "concerns" about his nephew, R.C., who had accidentally hit his daughter and who had no key or other access to respondent's home.

Of compelling importance was the lack of testimony from the police officer who was present at NaTia Young's apartment during the early-morning hours of January 1, 2005. NaTia Young claimed that he had arrived at the same time as respondent. Respondent also claimed that while he was there, he spoke with the officer. Yet that officer never testified to corroborate respondent's presence at the apartment, nor was anything mentioned in his police report about respondent's presence.

FINDINGS OF FACT

Based upon consideration of the testimonial and documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following **FACTS**:

1. Respondent was a tenured teacher in the employ of the District and his salary, which was suspended as of November 1, 2007, pursuant to N.J.S.A. 18A:6-14, was to resume on February 29, 2008, the 121st day after his salary ceased.

2. C.W., a nineteen-year-old student, born on December 3, 1988, is presently a twelfth grader at the Abraham Clark High School in Roselle.

3. Respondent taught mathematics to C.W. when C.W. was in the seventh grade at the Leonard V. Moore School.

4. During a PAC meeting, respondent learned that C.W. was gay.

5. During 2004, C.W. began regular visits to respondent's classroom after school.

6. During or about the fall of 2004, respondent began driving C.W. home.

7. During one instance while driving C.W. home, respondent made a detour into Warinanco Park, where he parked his vehicle and groped C.W. by placing his hands on C.W.'s genitalia over C.W.'s clothing. He turned C.W.'s head towards his own, and kissed him, placing his tongue into C.W.'s mouth. Respondent then drove C.W. home, dropping him off away from the front of his house.

8. During the fall of 2004, C.W. had expressed his love for respondent in two written notes.

9. Respondent, knowing that C.W. was gay, failed to report either note to school officials, but instead kept these notes.

10. During the early-morning hours of January 1, 2005, respondent picked up C.W. at his grandmother's house in Livingston.

11. He drove to a CVS pharmacy, where he picked up medication requested by his daughter for one of her children, and then delivered the medication to his daughter.

12. Respondent's daughter resided in a two-story apartment building, with stores on the ground floor and apartments on the second floor.

13. After delivering the medication, respondent drove C.W. to his home, where C.W. remained in respondent's vehicle.

14. Then respondent drove C.W. to the Linden Motor Inn, which was a short distance from his daughter's apartment, arriving at or shortly after 7:00 a.m.

15. Respondent registered for a room at the motel office.

16. The motel receipt bore the name of respondent, a description of his motor vehicle, and his vehicle's license plate number.

17. The motel receipt was for room 106 from 7:10 a.m. to 9:10 a.m. at a cost of $25.

18. The motel room was located on the first floor, and access to the room was through an outside door.

19. Once inside the motel room, respondent performed oral and anal sex on C.W.

20. C.W. attempted to resist, but was unable. He did not seek help.

21. Respondent then drove C.W. back to his grandmother's house.

22. After this incident, there was no further communication between C.W. and respondent, except for a brief encounter when C.W. picked up his sister at school, and again when respondent was accompanying a class on a tour of the junior high school.

23. Detective Scanielo, after her investigation and interviews with C.W., sought to have criminal charges brought against respondent, but in light of C.W.'s age and the lack of a direct student-teacher relationship, respondent was not prosecuted.

24. The IAIU conducted an investigation and determined that the allegations against respondent of sexual abuse/sexual penetration, arising out of the events described above, were unfounded.

LEGAL ANALYSIS AND CONCLUSION

The issue to be decided is whether the District had just cause to remove respondent, a tenured educator.

In tenure matters, the District bears the burden of proving the charges upon which it relies by a preponderance of the competent, relevant and credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). Tenure protects educators from arbitrary dismissal for "unfounded, flimsy or political reasons."

Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 73 (1982). It is designed to aid in the establishment of "a competent and efficient school system" by affording to teachers a measure of security in the ranks they hold after years of service. Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215, 218 (App. Div. 1949). Accordingly, N.J.S.A. 18A:6-10 provides that no tenured person shall be dismissed or reduced in compensation "except for inefficiency, incapacity, unbecoming conduct, or other just cause."

One of the charges brought by the District was unbecoming conduct, which has been broadly defined to include any conduct "which has a tendency to destroy public respect for [government] employees and confidence in the operation of [public] services." Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998). Behavior rising to the level of unbecoming conduct need not "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960)). In the context of a school tenure case, "the touchstone is fitness to discharge the duties and functions of one's office or position." In re Tenure Hearing of Grossman, 127 N.J. Super. 13, 29 (App. Div.), certif. denied, 65 N.J. 292 (1974).

Teachers are held to certain prescribed standards of conduct because of the public trust placed in their positions. In that regard, the Commissioner has stated that

> they are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. . . . Those who teach do so by choice, and in this respect the teaching profession is more than a simple job; it is a calling.
>
> [In re Tenure Hearing of Sammons, Sch. Dist. of Black Horse Pike Reg., Camden County, 1972 S.L.D. 302, 321.]

In School District of the Township of Parsippany-Troy Hills v. Hess, 97 N.J.A.R.2d (EDU) 34, 43, it was stated that

> [i]n determining the appropriateness of . . . conduct, the Commissioner of Education has often stressed ". . . that those persons who enter the teaching profession exercise a significant influence upon those they teach and . . . must exercise a high degree of exemplary behavior." In re Tyler, 13 N.J.A.R. 297.

In In re Tenure Hearing of Ernest Tordo, School District of the Township of Jackson, 1974 S.L.D. 97, 98-99, the Commissioner also stated:

> Teachers are public employees who hold positions demanding public trust, and in such positions they teach, inform, and mold habits and attitudes, and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher. When a teacher . . . violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner.

Based upon the facts adduced and the legal principles cited above, I **CONCLUDE** that the District has met its burden of proof on the charges of conduct unbecoming and other just cause. While respondent was not prosecuted criminally, nor were the allegations of sexual abuse/sexual penetration substantiated by the IAIU, his actions were violative of the trust placed in him as a teacher. His conduct, both in the park and at the motel, was not the "high degree of exemplary behavior" expected of him. Sch. Dist. of Parsippany-Troy Hills v. Hess, supra, 97 N.J.A.R.2d (EDU) at 43. He took a minor whom he knew, or should have known, was vulnerable and who was homosexual, and subjected him to acts unbecoming a teacher. C.W. had already expressed his love and affection for respondent in two written notes which were not reported and which, for some inexplicable reason, were kept by respondent for years. C.W. continued to meet with respondent in his classroom after regular school hours, and had permitted respondent to drive him home. Even after respondent had groped and kissed C.W. in the park, C.W. kept up his interest in respondent. He was a minor romantically involved with

respondent. Rather than put an abrupt end to C.W.'s interest in him, respondent did nothing. He failed to report either the written notes to school officials or the cell phone call where C.W. reported that he was dressed in nothing but a towel.

Prior to the hearing, respondent moved for dismissal of the tenure charges, citing the provisions of N.J.S.A. 18A:6-7a, which provides as follows:

> When a complaint made against a school employee alleging child abuse or neglect is investigated by the Department of Children and Families, the department shall notify the school district and the employee of its findings. Upon receipt of a finding by the department that such a complaint is unfounded, the school district shall remove any references to the complaint and investigation by the department from the employee's personnel records. A complaint made against a school employee that has been classified as unfounded by the department shall not be used against the employee for any purpose relating to employment, including but not limited to, discipline, salary, promotion, transfer, demotion, retention or continuance of employment, termination of employment or any right or privilege relating to employment.

This statute safeguards a school employee's personnel file from any reference to allegations of child abuse or neglect when such charges have been investigated by the DCF and determined to be unfounded. A finding of "unfounded" means that no child abuse existed. In re Physical Abuse Concerning A.I., 393 N.J. Super. 114 (App. Div. 2007); N.J.A.C. 10:129-1.3. Accordingly, such unfounded allegations of abuse cannot be used against the employee as a basis for termination. However, nothing in the statute precludes charges separate and apart from "child abuse or neglect" as the basis for tenure charges. In other words, if the District pursued tenure charges based upon "child abuse or neglect," it likely would have been barred. However, the tenure charges alleged here were predicated upon conduct unbecoming and other just cause, not child abuse or neglect. The District's charges made no reference to the IAIU investigation, nor did the District at the hearing rely, in whole or in part, upon the IAIU's investigation. Rather, it produced its own witnesses and documents in support of its charges, focusing on the conduct of respondent, which had a tendency to destroy public respect and confidence. Karins, supra, 152 N.J. 532. For the foregoing reasons, I **CONCLUDE** that N.J.S.A. 18A:6-7a did

not preclude the District from bringing tenure charges for unbecoming conduct and other just cause.

The question that remains concerns the appropriate sanction, whether it should be suspension or removal. "When a teacher . . . violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner." Tordo, supra, 1974 S.L.D. at 99. Based upon the foregoing principles of trust and exemplary behavior required of teachers, cited in Parsippany-Troy Hills, supra, 97 N.J.A.R.2d (EDU) 34, and Sammons, supra, 1972 S.L.D. 302, I **CONCLUDE** that respondent should be removed.

ORDER

Based upon the foregoing, it is hereby **ORDERED** that the tenure charges brought by the District for dismissal be and are hereby **SUSTAINED**. It is further **ORDERED** that respondent be paid his back pay from the 121st day following the filing of tenure charges until the final decision of the Commissioner, less any compensation received during this period.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

5-27-08
DATE

J. HOWARD SOLOMON, ALJ

Date Received at Agency: 5/27/08

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAY 28 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

pb

APPENDIX

Witnesses

For Petitioner:

Det. Colleen Scanielo
C.W.

For Respondent:

Gilbert Young, Jr.
NaTia Young
Sam Spears, Jr.
LaTynia Wise
Judith Rocco
Angela Robinson
A.D.
A.E.
Cheryl Lynn-Barton

Exhibits

Joint:

J-1 IAIU Redacted Record
J-2 Stipulation of Facts

For Petitioner:

P-1 Written Statement of C.W.
P-2 Memorandum from Robin D. Bullock, vice-principal, to Katie LaMar, superintendent of schools, dated February 15, 2007
P-3 Voluntary Statement of Robin Bullock, dated March 7, 2007
P-4 Statement from Tonya McDowell regarding C.W., dated February 20, 2007
P-5 Voluntary Statement of Tonya McDowell, dated March 7, 2007
P-6 Investigation Report of Roselle Police Department
P-7 Driver Inquiry of Motor Vehicle Services concerning respondent
P-8 Motel receipts
P-9 Single motel receipt
P-10 Note from C.W.
P-11 Longer note from C.W.
P-13 Compact disc of interview of C.W.

For Respondent:

R-1 Roselle Public Schools process for referral
R-2 Student service list, L. V. Moore Middle School
R-3 Note, dated October 22, 2004
R-4 Note, dated November 5, 2004
R-5 Sprint cell phone bill of Gilbert Young, Jr., dated January 24, 2005
R-6 Sprint cell phone bill of Gilbert Young, Jr., dated February 23, 2005
R-7 Sprint cell phone bill of Gilbert Young, Jr., dated March 23, 2005
R-8 Final performance report of Gilbert Young, dated May 9, 2006
R-9 Final performance report of Gilbert Young, dated May 10, 2005
R-10 Classroom observation of Gilbert Young, dated January 12, 2005
R-11 Classroom observation of Gilbert Young, dated January 26, 2004
R-12 Final performance report of Gilbert Young, dated April 29, 2003
R-13 Lesson observation of Gilbert Young, dated February 19, 2003
R-14 Mid-year summary evaluation of Gilbert Young, dated January 13, 2003
R-15 Final performance report of Gilbert Young, dated April 15, 2002
R-16 Mid-year summary evaluation of Gilbert, young dated January 28, 2002
R-17 Classroom observation of Gilbert Young, dated December 12, 2001
R-18 Classroom observation of Gilbert Young, dated December 7, 2001
R-19 Classroom observation of Gilbert Young, dated September 28, 2001
R-20 Final performance report of Gilbert Young, dated April 25, 2001
R-21 Classroom observation of Gilbert Young, dated March 15, 2001
R-22 Mid-year summary evaluation of Gilbert Young, dated January 18, 2001
R-23 Classroom observation of Gilbert Young, dated December 8, 2000
R-24 Classroom observation of Gilbert Young, dated September 28, 2000
R-25 May 9, 2007, IAIU findings report
R-26 Police Department, Linden, N.J., Investigation Report, dated January 1, 2005

#348-08

348-0

OAL DKT. NO. EDU 11214-07
AGENCY DKT. NO. 240-8/07

PATRICK BRENNAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTHERN HIGHLANDS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENTS.	:	

The record of this matter, as transmitted to the Commissioner by the Office of Administrative Law, has been reviewed. Although characterized by the Initial Decision as a settlement pursuant to *N.J.A.C.* 1:1-19.1, the matter is, in fact, a withdrawal effectuated by operation of an agreement reached between the parties in a related matter before the Public Employment Relations Commission. Consequently, the Commissioner approves the withdrawal pursuant to *N.J.A.C.* 1:1-19.2, and dismisses the matter accordingly.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8/19/08

Date of Mailing: 8/20/08

349-08

#349-08

OAL DKT. NO. EDU 3965-07
AGENCY DKT. NO. 89-3/07

T.W.S. on behalf of minor child, K.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter, the parties' proposed "Confidential Settlement Agreement," and the Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 8/19/08

Date of Mailing: 8/20/08

350-0

OAL DKT. NO. EDU 2830-08
AGENCY DKT. NO. 99-4/08

IN THE MATTER OF THE TENURE	:	
HEARING OF CHRISTIAN JOHNSON,	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE JUVENILE	:	DECISION
JUSTICE COMMISSION.	:	

The record of this matter, the parties' proposed Stipulation of Settlement, and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon such review, the Commissioner concurs with the ALJ that the proposed settlement is consistent with established standards governing settlement of tenure matters. *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846.

Accordingly, the settlement is hereby approved and the tenure matter dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 8/21/08
Date of Mailing: 8/21/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 2830-08
AGENCY DKT. NO. 99-04/08

IN THE MATTER OF THE TENURE HEARING OF CHRISTIAN JOHNSON, NEW JERSEY STATE JUVENILE JUSTICE COMMISION.

Christopher C. Josephson, Deputy Attorney General, for petitioner New Jersey State Juvenile Justice Commission (Anne Milgram, Attorney General of New Jersey)

Patricia A. Barasch, Esq., for respondent Christian Johnson (Schall & Barasch, LLC, attorneys)

Record Closed: July 24, 2008 Decided: July 24, 2008

BEFORE **JOSEPH F. MARTONE**, ALJ:

The New Jersey State Juvenile Justice Commission brings tenure charges against the respondent, a tenured teacher assigned to the Pinelands Residential Community Program, alleging that he engaged in conduct unbecoming a teacher and Other Just Cause pursuant to N.J.S.A. 18A:6-10 and N.J.S.A. 18A:60-2. Charge One alleges that Christian Johnson engaged in conduct unbecoming and other just cause by

violating the New Jersey State Anti-Discrimination Policy. Specifically, it is alleged that he: (1) falsely accused a coworker of making obscene comments in the workplace in retaliation for engaging in protected activity; and (2) knowingly provided false information to investigators during the course of an Office of Equal Employment Opportunity investigation. The Juvenile Justice Commission asserts that the charge is sufficient to warrant a suspension of 30 days without pay as a penalty for these violations.

This matter was transmitted to the Office of Administrative Law on April 25, 2008, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The matter was scheduled for a telephone prehearing on May 22, 2008, and a Prehearing Order was entered on May 23, 2008, outlining the scheduling of discovery and confirming the hearing dates on July 10, 15, 17 and 22, 2008.

On July 8, 2008, the attorneys represented to me that the parties had negotiated a settlement in this matter and that a written Stipulation of Settlement conforming to the requirements of N.J.A.C. 6A:3-5.6 had been prepared for execution. On July 24, 2008, the parties delivered to me a fully executed Stipulation of Settlement, which is attached, indicating the terms of the settlement.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the parties' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and N.J.A.C. 6A:3-5.6 and that the settlement should be approved. I approve the

settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

July 24, 2008
DATE

JOSEPH F. MARTONE, ALJ

Date Received at Agency:

JUL 28 2008

DATE

Mailed to Parties:

CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

mph

ANNE MILGRAM
Attorney General of New Jersey
Attorney for Petitioner,
Juvenile Justice Commission
R.J. Hughes Justice Complex
PO BOX 112
Trenton, New Jersey 08625

By: Christopher C. Josephson
Deputy Attorney General
(609)984-2906

OFFICE OF ADMIN LAW

In the Matter of the Tenure Hearing of CHRISTIAN JOHNSON, Juvenile Justice Commission	OAL Dkt. No.: EDUTH 2830-08 Agency Docket No.: 99-04/08 STIPULATION OF SETTLEMENT

The Juvenile Justice Commission, Office of Education (JJC), with offices located at 1001 Spruce Street, Suite 202, Trenton, New Jersey 08625, represented by ANNE MILGRAM, Attorney General of New Jersey, Christopher C. Josephson, Deputy Attorney General, appearing; and Christian Johnson, a tenured employee of the JJC represented by Patricia A. Barasch, Esq. appearing; by way of this Stipulation of Settlement say:

WHEREAS, the JJC initiated the filing of tenure charges against Mr. Johnson, having filed the charges with the Commissioner of Education on or about April 4, 2008; and

WHEREAS, the tenure charges, a copy of which are attached hereto, alleged that Christian Johnson committed Conduct Unbecoming a Public Employee; and

WHEREAS, the JJC sought the suspension of Mr. Johnson on the

above charges for a period of thirty (30) days without pay; and

WHEREAS, Mr. Johnson disputed the charges of Conduct Unbecoming a Public Employee, and filed a response to the charges, a copy of which is attached hereto; and

WHEREAS, the matter was initially referred to the Office of Administrative Law for a hearing on April 25 2008; and

WHEREAS, the parties wish to enter into an amicable resolution of the tenure charges filed against Mr. Johnson; and

WHEREAS, it is in the best interest of the parties and the public to enter into this Stipulation of Settlement;

NOW, THEREFORE, in consideration of the mutual promises contained herein, the parties agree as follows:

1. Mr. Johnson agrees to serve a suspension for fifteen (15) days without pay to be served during a time period that is agreeable to the parties, but not prior to the date that the Commissioner of Education approves settlement of this matter.

2. This Agreement shall be part of Mr. Johnson's official personnel file and may be presented and considered in any subsequent disciplinary action against him.

3. This Agreement constitutes a final and complete resolution of the tenure charges in this matter and fully disposes of all issues in controversy between the parties hereto. Mr. Johnson agrees not to appeal the tenure action or the terms of this Agreement in any administrative, arbitral or judicial forum.

4. Settlement of this matter is justified and in the public interest because it imposes the desired discipline without the need for a contested tenure hearing. With regard to the penalty, Mr. Johnson has been employed by the Juvenile Justice Commission for over eleven (11) years and has had no prior disciplinary action taken against him. The reduction in the length of the suspension without pay from the proposed length to the agreed length is equitable in exchange for eliminating the expense and uncertainty connected with a contested tenure hearing.

5. This Agreement shall not constitute a precedent in any other matter involving Mr. Johnson or any other employee.

6. This Agreement shall only become effective when the Commissioner of Education approves it. Any disapproval by the Commissioner shall not interfere with the rights of either party to pursue this matter further.

This Agreement is made in good faith. The parties have read the Agreement and freely and voluntarily agree to its provisions.

For the Employee:

Christian Johnson — Dated: 7/16/08
Christian Johnson

Patricia A Barasch — Dated: 7/16/08
Patricia Barasch, Esq.
Attorney for Christian Johnson

For the Juvenile Justice Commission:

Margie B — Dated: 7/21/08
Margie Brown
Director of Education, JJC

ANNE MILGRAM
ATTORNEY GENERAL OF NEW JERSEY

Christopher C. Josephson — Dated: 7/21/08
By: Christopher C. Josephson
Deputy Attorney General

M.B., ~~on~~ behalf of minor children, E.B. and Y.B., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE, UNION COUNTY, : DECISION

RESPONDENT. :

SYNOPSIS

Petitioner contested respondent's determination that her sons, E.B. and Y.B., are ineligible to attend school in respondent's district, claiming that she was domiciled in the district until it became necessary for her to move to out of her apartment in Hillside in October 2007 and into her mother's home in Newark in order to provide care for her mother, who was sick. Petitioner later moved back to an apartment in Hillside, beginning May 2008. The Board counterclaimed for tuition reimbursement for the period of E.B. and Y.B.'s ineligible attendance.

The ALJ found that: petitioner intended to abandon her domicile in Hillside and make her home in Newark at least indefinitely; it is undisputed that E.B. and Y.B. are now, once again, domiciled in respondent's school district; a counterclaim for tuition reimbursement may be granted when there is a period of ineligible attendance in a public school pursuant to *N.J.S.A.* 18A:38-1(b)(2); petitioner and her children lived in Newark from November 23, 2007 to May 7, 2008; therefore, tuition is due to respondent Board for the period of ineligible attendance of E.B. and Y.B. in the amount of $12, 414.

Upon a full and independent review of this matter, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter. E.B. and Y.B. are deemed entitled to a free education in Hillside so long as there is no change in petitioner's circumstances that would alter such entitlement; petitioner is directed to pay the Board tuition in the amount of $12,414 for the period of ineligible attendance from November 23, 2007 to May 7, 2008.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

August 21, 2008

OAL DKT. NO. EDU 3351-08
AGENCY DKT. NO. 49-2/08

M.B., on behalf of minor children, E.B. and Y.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon such review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge (ALJ) that as of May 8, 2008, petitioner is a domiciliary of Hillside, thereby entitling her children to a free public education in the District's schools. The Commissioner further agrees that because petitioner admittedly gave up her apartment in Hillside and moved to her mother's home in Newark beginning November 23, 2007, and did not again reside in Hillside until May 8, 2008, her children were not entitled to a free public education in Hillside's schools during this period.

Accordingly, the recommended decision of the OAL is adopted for the reasons expressed therein. Petitioner is hereby directed to pay the Board tuition – in the amount of $12,414 – for the ineligible attendance of E.B. and Y.B. in the Board's schools for the period November 23, 2007 to May 7, 2008. Beginning May 8, 2008, however, as domiciliaries of the

District these children are deemed entitled to a free education in Hillside so long as there is no change in petitioner's circumstances that would alter such entitlement.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 8/21/08

Date of Mailing: 8/21/08

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3351-08
AGENCY DKT. NO. 49-2/08

M.B., ON BEHALF OF MINOR CHILDREN, E.B. AND Y.B.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE, UNION COUNTY,

Respondent.

M.B., pro se

John E. Croot, Esq., for respondent
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: July 9, 2007 Decided: July 25, 2008

BEFORE **RICHARD McGILL**, ALJ:

M.B. (hereinafter sometimes "petitioner") filed a petition with the Commissioner of Education challenging a residency determination by the Board of Education of the Township of Hillside (hereinafter "respondent") in regard to her sons, E.B. and Y.B., who

are attending school in respondent's district. Respondent counterclaims for tuition reimbursement for both E.B. and Y.B. for a period of ineligible attendance.

PROCEDURAL HISTORY

Petitioner filed her petition on February 13, 2008, invoking the Commissioner's authority to hear and determine controversies arising under the school laws pursuant to N.J.S.A. 18A:6-9. As a result of the timely filing of the petition, E.B. and Y.B. have continued to attend school in respondent's district. On March 4, 2008, respondent filed an answer and counterclaim.

The matter was transmitted to the Office of Administrative Law on March 7, 2008, for determination as a contested case. The hearing was initially scheduled for July 3, 2008, at the Office of Administrative Law in Newark, New Jersey. Petitioner did not appear for the hearing on July 3, 2008, but after a telephone conversation, the matter was rescheduled for July 9, 2008. The hearing was conducted on July 9, 2008, at the Office of Administrative Law in Newark, New Jersey, and the record closed on the date of the hearing.

ISSUES

Initially, the issues were whether E.B. and Y.B. should be removed from respondent's school district and whether M.B. should be required to pay tuition reimbursement for the period from September 7, 2007, to the present as a result of ineligible attendance. At the hearing, M.B. testified that she moved from Hillside to her mother's apartment in Newark on November 23, 2007, and that subsequently she rented an apartment in Hillside for a term beginning on May 8, 2008. In support of her testimony concerning the apartment in Hillside, M.B. presented an original lease and PSE&G bills for the new address.

After a review of the documents presented by M.B., respondent accepted that M.B., and therefore E.B. and Y.B., are now domiciled in Hillside. As a result, respondent withdrew the request for removal of E.B. and Y.B., provided that they remain domiciled in Hillside, and limited the request for tuition reimbursement to the period from November 23, 2007, to May 7, 2008.

With these developments, the first issue is whether E.B. and Y.B. were domiciled in respondent's school district from November 23, 2007, to May 7, 2008. The second issue is whether M.B. should be required to pay tuition reimbursement for the period from November 23, 2007, to May 7, 2008.

FINDINGS OF FACT

Petitioner testified on her own behalf, and after petitioner's presentation, respondent did not call any investigators but rather limited its case to testimony concerning the tuition calculation. At this point, there is no dispute as to the facts in this matter, and I **FIND** as follows:

1. In April 2006, M.B. moved to an apartment in Hillside, New Jersey.

2. M.B. enrolled her two sons, E.B. and Y.B., in respondent's school district to begin in September 2006.

3. On November 23, 2007, M.B. moved to her mother's home in Newark, because her mother was ill.

4. M.B. gave up her apartment in Hillside.

5. M.B. lived in her mother's home in Newark until May 7, 2008.

6. On May 7, 2008, M.B. entered into a lease for an apartment in Hillside for a term beginning on May 8, 2008.

7. M.B. and her sons are currently living in Hillside.

8. The per diem tuition rate applicable to E.B. and Y.B. for the 2007-2008 school year is $62.07.

9. The period from November 23, 2007, to May 7, 2008, included 100 school days.

10. The tuition for these 100 school days was $6,207 (100 x $62.07) per student for a total of $12,414 ($6,207 x 2) for E.B. and Y.B.

LAW AND ANALYSIS

A person who meets age requirements and is domiciled within a school district may attend its public schools free of charge. N.J.S.A. 18A:38-1(a). A child's domicile is normally that of his or her parents. Somerville Bd. v. Manville Bd., 332 N.J. Super. 6, 12 (App.Div. 2000), aff'd, 167 N.J. 55 (2001). The domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. Matter of Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991), aff'd, 311 N.J. Super. 589 (App. Div. 1998), certif. denied, 157 N.J. 541 (1998), cert. denied, 526 U.S. 1051, 119 S.Ct. 1357, 143 L.Ed.2d 518 (1999). The court further stated as follows:

> In considering whether a change of domicile has occurred, three elements must be considered: 1) whether there had been an actual and physical taking up of an abode in a particular state; 2) whether the subject had an intention to make his home there permanently or least indefinitely; and (3) whether the subject had an intention to abandon his old domicile. The court must evaluate all of the facts of the case to determine the place in

> which there is the necessary concurrence of physical presence and an intention to make that place one's home. [Matter of Unanue, 255 N.J. Super. at 376 (citations omitted)].

It is undisputed that E.B. and Y.B. are now domiciled in respondent's school district. It follows that removal is not warranted under present circumstances.

A counterclaim for tuition reimbursement may be granted when there is a period of ineligible attendance in a public school. N.J.S.A. 18A:38-1(b)(2). Here, M.B., E.B. and Y.B. lived in Newark during the period from November 23, 2007, to May 7, 2008. M.B. intended to abandon her domicile in Hillside and make her home in Newark at least indefinitely. It follows that E.B. and Y.B. were not domiciled in respondent's school district during this period of time and further that they were ineligible to attend respondent's public schools. Therefore, I **CONCLUDE** that petitioner must be assessed tuition for the period of ineligible attendance during the 2007-2008 school year. The amount of the tuition for the period of ineligible attendance is $12,414 for E.B. and Y.B.

Accordingly, it is **ORDERED** that:

1. Respondent shall not remove E.B. and Y.B. from its public schools.

2. Respondent's request for tuition reimbursement from M.B. is granted in the amount of $12,414.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless

such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 25, 2008
DATE

RICHARD McGILL, ALJ

Date Received at Agency: 7/25/08

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUL 28 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

cml

APPENDIX

WITNESS LIST

For petitioner:

M.B.

For respondent:

Matthew Leonardis

EXHIBIT LIST

P-1	House/Apartment Lease for the term from May 8, 2008, to April 30, 2008 (retained)	Evidence
P-2	PSE&G bill dated June 2, 2008 (retained)	Evidence
P-3	PSE&G bill for June 2008 (retained)	Evidence

352-

SHARON E. FORD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MANSFIELD, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner sought a determination that she was entitled to sick leave injury benefits under *N.J.S.A.* 18A:30-2.1 and reimbursement of the sick leave charged to her for the period from October 31, 2005, through January 30, 2006. The Board denied that petitioner's injury was work-related and that her leave time beginning on October 31, 2005 was due to any work-related injury. Petitioner's workers' compensation claim was settled without petitioner having asserted a claim for lost wages.

The ALJ dismissed the petition, concluding that: 1) the matter was appropriately decided on a summary basis, since there were no genuine issues of material fact; 2) petitioner failed to prove the existence of a causal connection between the injury in question and the prior work injury from which she contended it arose; and 3) petitioner waived any right she might have had under *N.J.S.A.* 18A:30-2.1 by failing to pursue a claim for lost wages in Workers' Compensation Court.

The Commissioner concurred with the ALJ's recommendations and adopted the Initial Decision as the final decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

August 21, 2008

OAL DKT. NO. EDU 3169-06
AGENCY DKT. NO. 394-12/05

SHARON E. FORD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MANSFIELD, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision have been reviewed. No exceptions were filed by the parties. For the reasons set forth therein, the Commissioner adopts the Initial Decision of the Office of Administrative Law as the final decision in this case.

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 8/21/08

Date of Mailing: 8/21/08

* This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 03169-06
AGENCY DKT. NO. 394-12-05

SHARON E. FORD,
Petitioner,
v.
MANSFIELD TOWNSHIP BOARD OF EDUCATION,
COUNTY OF WARREN,
Respondent.

Sanford R. Oxfeld, Esq., for petitioner (Oxfeld Cohen, attorneys)

Nathanya G. Simon, Esq., for respondent (Schwartz Simon Edelstein Celso & Kessler, attorneys)

Record Closed: June 12, 2008 Decided: July 14, 2008

BEFORE **CAROL I. COHEN**, ALJ:

PROCEDURAL HISTORY

On December 27, 2005, Ms. Ford (petitioner) filed a Petition of Appeal with the Commissioner of Education seeking a determination that she was entitled to sick leave injury benefits under N.J.S.A. 18A:30-2.1. She requested the reimbursement of her salary without charging her accumulated sick leave bank for the period from October 31,

2005, through January 30, 2006. On January 13, 2006, the District filed an answer denying the allegations of the petition including the fact that the petitioner's injury was a work-related injury and that her use of her accumulated sick bank beginning on October 31, 2005, was related to any work-related injury. The matter was forwarded to the Office of Administrative Law (OAL) on March 26, 2006, and assigned to ALJ Thomas E. Clancy. He placed the matter on the inactive list pending the outcome of the petitioner's workers' compensation petition. The workers' compensation matter was settled and approved by Hon. J. Michael Blake on August 17, 2007. Following a status conference on October 4, 2007, the petitioner's attorney informed ALJ Cohen that the workers' compensation case had been settled. Limited discovery was exchanged between the parties in an effort to resolve the dispute. However, the OAL matter failed to settle. A hearing was initially scheduled for March 24, 2008. After a conference call on March 18, 2008, it was decided that the parties should be given an opportunity to file Summary Decision motions and a new trial date was set for October 6, 2008. The respondent filed its Motion for Summary Decision on May 12, 2008. The petitioner's response was due on May 23; it was filed on June 6, 2008. The respondent filed a reply brief on June 12, 2008.

STATEMENT OF THE FACTS

The following facts are undisputed:

1. Sharon Ford is employed as a fourth-grade teacher at Mansfield Elementary School. At the time of the claimed injury she was similarly employed.
2. Ms. Ford claimed that she strained her lower back on May 17, 2005, while taking a Yoga class, which was required as part of her Professional Growth Requirements.
3. Ms. Ford filed an Employee's Report of Injury and Workers' Compensation claim on or about May 20, 2005.
4. The petitioner's medical expenses related to her injury up to October 21, 2005, were paid by Selectech, the District's third-party administrator for workers' compensation claims.

5. Ms. Ford took no sick time from the date of the injury through the end of the 2004-2005 school year. In addition, she took no sick days until October 31, 2005. This amounted to approximately 168 school days.[1]
6. Ms. Ford advised the District on October 28, 2005, that she was told to have surgery to remove a cyst from her back and would be out of work.
7. On October 21, 2005, the District received notification from Selectech that the petitioner had reached maximum medical benefit from treatment. However, the petitioner continued to seek treatment.
8. The petitioner was out of work from October 31, 2005, until she returned to work part-time on January 17, 2006, and full time on January 30, 2006. The petitioner's sick bank was charged forty-nine and a half days.
9. Ms. Ford settled her workers' compensation matter on August 17, 2007, in the amount of $10,680 with a finding of 10 percent partial disability. In the transcript from the Worker's Compensation matter the attorney for the carrier stated to the court that Ms. Ford had taken about fifty sick days, but "there was no compensable lost time as a result of this accident." Ms. Ford's attorney concurred in the representation.

LEGAL ISSUES

1. Whether this matter can be decided on Summary Motion?
2. Whether the petitioner is entitled to receive full salary without loss of sick time according to N.J.S.A. 18A:32-2.1?
3. Whether the workers' compensation award resulted in a waiver of the OAL claim?

ARGUMENTS OF THE PARTIES

In the first instance, the Board argued that the material facts established that the petitioner's absence during the 2005-2006 school year was as a result of the removal of

[1] There was a half day taken for an unrelated matter.

a cyst, which was not a work-related injury. Therefore, she did not qualify for the statutory benefits under N.J.S.A. 18A:30-2.1. In addition, the petitioner waived any right to relief by knowingly and intelligently settling her workers' compensation claim without any payment for lost wages.

Secondly, the respondent argued that the petitioner's injury did not meet the standard under N.J.S.A. 18A:30-2.1, because there is no causal connection between the petitioner's injury and her work duties. The District pointed out that the statute provides for compensation to employees injured in accidents arising out of and in the course of employment. The phrase "accident arising out of and in the course of his employment" was intended to have the same meaning as in the context of the Workers' Compensation Action under N.J.S.A. 34:15-31, which defines a "compensable occupational disease" as one which is due "in material degree to causes and conditions which are or were characteristic of or peculiar to a particular trade, occupation, process or place of employment." The respondent asserted that the petitioner failed to provide any evidence to connect her absence from work to the May 17, 2005, incident. Her treatment after October 21, 2005, was all related to the Tarlov cyst, which was never casually connected to the work injury. On the respondent's side, they had correspondence from the worker's compensation carrier specifically stating that the petitioner was no longer eligible for benefits as of October 21, 2005, based on medical documentation. The District also pointed out that the petitioner was never absent from work until she decided to have the Tarlov cyst surgically removed. Since the removal of the cyst was not related to the May 17, 2005, incident, it was not compensable under N.J.S.A. 18A:30-2.1. The petitioner's own neurosurgeon, Dr. Rudman, stated in his report that it was "unclear that the Tarlov cyst was causing Claimant's pain." Further, it was the opinion of Dr. Giordano, the workers' compensation orthopedist, that the cyst was not "of traumatic origin and clearly not related to the original work injury." Dr. Sarokhan stated that the cyst was not "related to the injury" and was not a "plausible explanation" for the claimant's pain complaints. Up until the time that the petitioner was released from workers' compensation, no treatment of any kind was found necessary for the cyst. It was only after Ms. Ford decided to have surgery for the cyst that she missed time from work.

The District also pointed out that Ms. Ford never submitted any claim for lost wages with the workers' compensation carrier for the time she was out of work due to the removal of the Tarlov cyst. Had she believed that the time she was taking from work was related to the May 17, 2005, incident, she would have made a claim with the carrier. In addition, she could have, in the settlement of her compensation claim, specifically reserved her right to recover for her lost time from work after October 21, 2005. However, as the District pointed out, she did not do so. There has been no proof presented that the lost time from work was related to the May 17, 2005, injury.

In addition, the District argued that the petitioner waived her claim for sick leave benefits by settling her workers' compensation case. The Division of Workers' Compensation has primary jurisdiction over work-related claims. A settlement of the workers' compensation claim can act as a waiver of the claim under N.J.S.A. 18A:30-2.1. The District acknowledged that, the waiver must be an "intentional relinquishment of a known right" and that there were cases in which the court found that the waiver was not knowing and intentional. However, they argued that in this case, it was a knowing and intentional waiver. Here the petitioner and her attorney did not specifically reserve her right to future sick leave benefits in the compensation case. In addition, Ms. Ford filed her claim for sick leave benefits twenty months prior to settling her workers' compensation claim. Therefore the petitioner had to be aware of her rights under the statute prior to her entering into the settlement. Further, during the settlement conference, her attorney acknowledged that there was no compensable lost time as a result of the injury. At the court hearing approving the settlement, the petitioner noted that she had missed fifty days from work, but still requested that the judge approve the settlement without any reimbursement for lost wages. Therefore, she had knowingly and intentionally waived her entitlement to sick leave benefits.

Finally, the respondent argued that the petitioner's claim should be barred because she failed to make any claim for lost wages in the workers' compensation matter. By failing to claim lost wages, she prejudiced the Board's right to off-set its full payment of the petitioner's salary. N.J.S.A. 18:30-2.1 provides that, if accrued sick leave is utilized, the salary paid by the District "shall be reduced by the amount of any workmen compensation award made for temporary disability." Had the petitioner

pursued a claim for the lost time and prevailed, the insurance carrier would have paid 70 percent of the claim and the Board only 30 percent. Because the petitioner failed to make a claim, the taxpayer is being asked to foot the bill for what should have been paid for by the carrier. If the petitioner was allowed to recover in this matter, then she would be getting a windfall. She has already recovered $10,680 from workers' compensation with full recognition of the fifty days she missed from work and now, without any offset, would be collecting from the District.

The petitioner argued that there was at the very least a dispute of material fact as to whether her condition arose out of and in the course of her employment. She pointed to the opinion of medical experts, which she said did not evidence a definitive finding. According to Ms. Ford, Dr. Rudman was unsure whether or not a cyst caused her pain; Dr. Giordano maintained that the cyst was not traumatic in nature. However, he was contradicted by Dr. Henderson who said that it might be. Dr. Sarokhan offered another opinion. (In fact, Dr. Sarokhan stated that the cyst was not "related to the injury" and was not "plausible explanation" for the claimant's pain complaints.) Therefore based on the physicians' reports, there was a factual dispute as to the nature of the injury and its causation. Therefore, the Board's claim was without merit.

As for the Board's argument that Ms. Ford had waived her rights to filing the claim when her workers' compensation case was settled, the petitioner stated that Marino v. Willingboro Township Board of Education, EDU 8580-98, State Board (March 1, 2000), <http://lawlibrary.rutgers.edu/oal/search.html>, stands for the proposition that, in order to waive all claims before the Commissioner of Education, a petitioner must intentionally relinquish all rights. Ford asserted that that was not the case here. When Ford settled her compensation case, she knowingly and specifically waived certain rights; these did not include her right to seek relief in this forum. While Ms. Ford's Petition of Appeal had been filed by the time she settled her workers' compensation case, there was no support for the claim that she waived her right to future sick leave. She pointed out that her workers' compensation case could be reopened within two years, therefore it defied logic that she could have waived her right to sick leave compensation at the Workers' Compensation settlement hearing. The fact that she mentioned at the settlement hearing that she had been out of work could not rise to the

level of a full and complete waiver of her claims for sick-day leave. Therefore, there was a genuine issue of fact and Summary Decision was not appropriate. In addition, since Ms. Ford can reopen her workers' compensation claim within the next two years, the Board is always free to request an offset from the carrier. Therefore, the Board's argument of prejudice is not viable.

In response to the petitioner's arguments, the Board asserted that it is well-established that the proper forum for resolution of whether an injury arose in and out of the course of employment is the Division of Workers' Compensation, not the Commissioner of Education. The Commissioner of Education only has jurisdiction to make a determination in the limited cases where the Division of Workers' Compensation lacks jurisdiction in accordance with N.J.S.A. 34:15-14 or when there is a settlement of the workers' compensation case. Exclusive jurisdiction is therefore vested with the Division of Workers' Compensation, not the Commissioner. See Schmidtke v. Bd. of Educ. of the Twp. of Woodbridge, Comm'r (November 8, 2000), <http://www.nj.gov/education/legal/commissioner.htm>. The respondent argued that the petitioner acknowledged this when she agreed to have the OAL matter placed on the inactive list pending the resolution of the workers' compensation claim.

As for the argument of the petitioner, that there was a dispute among the experts regarding whether the cyst was related to her work injury and therefore Summary Decision should be denied, the Board asserted that all three doctors were of the opinion that the cyst was not caused or contributed to the original injury. In addition, Dr. Henderson's report, which was not in evidence, only speculated that the cyst might be related to the original injury. This statement was insufficient as a matter of law to find the condition causally related. In addition, if there was a question of causality, the issue was decided during the course of the workers' compensation proceedings. Any claim for medical bills after October 21, 2005, was denied as not being causally related.

In the responsive papers the District argued further that the petitioner's failure to file a claim for lost wages in the workers' compensation matter precluded her recovery under N.J.S.A. 18A:30-2.1. The respondent cited to Russo v. Burlington Township Board of Education, Commissioner (September 29, 1997),

<http://www.nj.gov/education/legal/commissioner.htm>, which found that since a petitioner had voluntarily chosen not to pursue his workers' compensation claim, his claim under the sick leave statute would be dismissed with prejudice. Finally, the respondent argued that the petitioner's contention that the Board would be able to obtain an offset from the insurance carrier, if the court determined that the absences were work related, were neither procedurally nor legally accurate. Under this scenario, the burden of proof would be improperly shifted to the Board to prove that the absences were work related instead of on the petitioner having the burden to prove that the absences were work related. It would also place the Board in the position of having to pursue a claim against its own insurer. This runs contrary to the statutory language of N.J.S.A. 18A:30-2.1 and case law which places the education claim on hold pending the resolution of the workers' compensation matter.

DISCUSSION

1. Whether the matter can be decided by Summary Decision?

The rules governing practice in the Office of Administrative Law (OAL) provide that a Motion for Summary Decision may be granted, if there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. See N.J.A.C. 1:1-12.5(b). This provision mirrors the language of New Jersey Court Rule 4:46-2 and the Supreme Court's decision in Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67 (1954). Under N.J.A.C. 1:1-12.5(b), the determination to grant Summary Judgment should be based on the papers presented as well as any affidavits, which may have been filed with the application. In order for the adverse, i.e., the non-moving party to prevail in such an application, responding affidavits must be submitted showing that there is indeed a genuine issue of fact, which can only be determined in an evidentiary proceeding. The Court in Brill v. Guardian Life Insurance Company of America, 142 N.J. 520, 523 (1995), set the standard to be applied when deciding a Motion for Summary Judgment.

> [T]he determination whether there exists a genuine issue with respect to a material fact challenged requires the Motion Judge to consider whether the competent evidential

> materials presented, when viewed in the light most favorable to the non-moving party . . . are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.

If the non-moving party's evidence is merely colorable, or is not significantly probative, summary judgment should not be denied. See Bowles v. City of Camden, 993 F. Supp. 255, 261 (D.N.J. 1998).

2. **Causal connection between the Tarlov Cyst and work-related injury**

In order for the petitioner to be eligible for benefits under N.J.S.A. 18A:30-2.1 she must show a causal connection between the Tarlov cyst and the work-related incident. The statute provides that:

> Whenever any employee, entitled to sick leave under this chapter, is absent from his post of duty as a result of a personal injury caused by an accident arising out of and in the course of his employment, his employer shall pay to such employee the full salary or wages for the period of such absence for up to one calendar year without having such absence charged to the annual sick leave or the accumulated sick leave provided in N.J.S.A. 18A:30-2 and 18A:30-3.

The phrase "arising out of and in the course of employment" has been given the same meaning as that used in Worker's Compensation matters. See Theodore v. Dover Bd. of Educ., 183 N.J. Super. 407 (App. Div. 1982). The respondent has provided documentation from a number of sources that demonstrate that the cyst was not related to any "on the job" injury. As they pointed out, the worker's compensation carrier stated that the petitioner was no longer eligible for benefits as of October 21, 2005, based on medical documentation. The petitioner's chiropractor and physical therapist both stated that she could return to work by July 2005. Dr. Rudman, the petitioner's neurosurgeon, questioned the connection between the existence of the Tarlov cyst and the claimant's pain. Dr. Giordano opined that the cyst was not "of traumatic origin and clearly not related to the original work injury." Dr. Sarokhan stated that the cyst was not related to the injury and was not a plausible explanation for Ms. Ford's pain. While, Ms. Ford claimed that a review of the medicals did not evidence a

definitive finding of the cyst not being related to the incident and to the pain that the petitioner was experiencing, this is clearly not the information presented to the court. All of the doctors' reports either question the traumatic nature of the cyst or the connection between the cyst and the pain that Ms. Ford claimed she was experiencing. It should be noted that the petitioner claimed that there was a question of fact because Dr. Henderson, another neurosurgeon, opined that the cyst was traumatic in origin and the pain could be alleviated by surgery. However, the only mention of Dr. Henderson's report was a statement in Dr. Giordano's report stating that Dr. Henderson indicated that he is a neurosurgeon at Georgetown Medical Center and he believes that "this woman has a sacral cyst that is traumatic in origin and he believes he will be able to help this woman with resection of the cyst. Dr. Henderson believes that the benefit of this surgery would exceed the risk of the surgery." N.J.A.C. 1:1-12.4(a) states that:

> Motions and answering papers shall be accompanied by all necessary supporting affidavits and briefs or supporting statements. All motions and answering papers shall be supported by affidavits for facts relied upon which are not of record or which are not the subject of official notice. Such affidavits shall set forth only facts which are admissible in evidence under N.J.A.C. 1:1-15, and to which affiants are competent to testify. Properly verified copies of all papers or parts of papers referred to in such affidavits may be annexed thereto.

The petitioner has failed to present any documents from Dr. Henderson or any other medical expert that raises the question of a material fact regarding the correlation between the Tarlov cyst and Ms. Ford's injury.

In addition, the fact that the cyst was uncovered in June 2005 and yet the petitioner missed no time from work until she decided to have surgery at the end of October 2005 points to the lack of connection between the cyst and her manifestation of pain due to a work-related injury. As the respondent further pointed out, the petitioner continued to teach her fourth grade class from the date of her accident up through the end of the school year without missing one day because of her injury. Except for a half day of sick time the follow school year, Ms. Ford did not call in sick as a result of the injury until October 31, 2005, when she went in for surgery to remove the cyst. Ms.

Ford's work history up to the time of the surgery does not comport with her argument that the pain that she experienced following the work-related incident resulted from a traumatically induced Tarlov cyst.

3. **Workers' compensation claim and right to recovery under the education statute**

When a worker is injured on the job the primary jurisdiction over claims for work-related injuries is with the Division of Workers' Compensation. N.J.S.A. 18A:30-2.1 serves to complement compensation benefits for a strictly limited time period. See Forgash v. Lower Camden County Sch., 208 N.J. Super. 461, 466 (App. Div. 1985). For that reason, if there is a matter pending before Workers' Compensation Court, the OAL matter is placed on the inactive list until the resolution of the compensation matter. That is exactly what happened in this case, where the petitioner agreed to the placing of the OAL matter on the inactive list until the workers' compensation matter was resolved. The court found in Russo, supra, that since the petitioner had voluntarily chosen not to pursue his workers' compensation claim, his claim for sick leave under the school leave statute was barred. While the petitioner in this case filed a workers' compensation case, there is a real question as to whether she pursued her claim for lost wages in the compensation court. In addition, there is a question of whether the petitioner, in resolving the workers' compensation claim, intentionally waived a known right to seek reimbursement of sick leave pay under N.J.S.A. 18A:30-2.1. In Marino, supra, EDU 8580-98, the Commissioner found that the petitioner had not waived her right because her attorney had expressly stated that the settlement did not constitute a waiver of future claims. In applying the waiver standard, the State Board has stated that, in order to waive an entitlement to sick leave benefits, there must be awareness that a person has a right to seek benefits under N.J.S.A. 18:30-2.1 at the time of settlement. See Sheridan v. State Operated Sch. Dist. of the City of Paterson, EDU 3767-98, State Bd. (June 6, 2001), <http://lawlibrary.rutgers.edu/oal/search.html>. In that matter the petitioner settled a claim in Workers' Compensation Court prior to filing a petition with the Commissioner of Education.

Therefore, to see if there has been a failure to bring the loss of wages claim in the Compensation Court and/or a knowing waiver of a right to assert a claim, we must look at what occurred in this matter. As was mentioned previously, the petitioner was aware of her right to seek benefits, since she had filed her case before the OAL prior to the workers' compensation settlement and had placed the matter on the inactive list pending the outcome of the compensation matter. She could have asserted a claim for lost wages in the Compensation Court, but she did not do so. As for any reservation of rights, there is nothing in the Worker's Compensation transcript that mentions reserving her right to sue in another forum. In fact, there was a clear recognition in the settlement that she was settling the compensation claim, acknowledging that she had been out of work for fifty days, but was not getting any reimbursement from the carrier. The Division of Workers' Compensation has primary jurisdiction over matters involving "on the job injury." The Commissioner of Education has jurisdiction only in limited cases, where the workers' compensation lacks jurisdiction or when there has been a settlement of the Compensation claim. See Schmidtke, supra and Russo, supra. The petitioner went before the court that had primary jurisdiction and chose not to pursue her right to seek compensation for the days lost from work. Her attorney during the settlement conference on August 17, 2007, seven months after the petitioner had returned to work, acknowledged that there was no compensable lost time from work as a result of the injury. It is clear that the petitioner failed to assert her claim for lost wages in the court that had primary jurisdiction over that matter and knowingly waived her right to recovery under that claim.

The petitioner's assertion that the Board could offset any claim under the sick leave statute is equally unpersuasive. The petitioner was obliged to bring her claim under the workers' compensation statute in the first place. As Ms. Ford acknowledged, she could still reopen the compensation case and receive benefits, if she could prove that the cyst was work related and her loss of time from work was due to the injury. The burden is on her to prove those allegations. The Board should not be obligated to bear the burden of proving the opposite and of suing its own carrier for reimbursement, when the remedy of reopening the Compensation case is available to the petitioner.

CONCLUSION

Based on the arguments presented by the parties and the exhibits produced, I **CONCLUDE** that there are no issues of material fact that prevent this matter from being decided on Summary Decision.

Further, I **CONCLUDE** that the petitioner has failed to prove that there is a causal connection between her injury, i.e., the Tarlov cyst and her work duties.

In addition, I **CONCLUDE** that the petitioner waived any right she might have had under the present claim by failing to proceed on the claim in Workers' Compensation Court.

ORDER

It is hereby **ORDERED** that the respondent's Motion for Summary Decision is hereby **GRANTED**; the petitioner's motion is **DENIED** and Ms. Ford's petition is **DISMISSED** with prejudice.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

7/14/08
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Date Received at Agency: 7/14/08

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUL 15 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

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JOHN GALANTE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NORTH ARLINGTON, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning teacher, a longtime head football coach, appealed the Board of Education's decision not to certify the tenure charges he filed against the high school principal, wherein he alleged that such principal had prepared a false evaluation of his performance as coach at the behest of a Board member who was also the disgruntled parent of a student on the football team.

The ALJ found that the Board failed to meet the standard for consideration of tenure charges set forth in *Manalapan-Englishtown Education Association v. Board of Education of the Manalapan-Englishtown Regional School District*, in that no support was proffered for the Board's conclusory statements that petitioner's charges were not creditable and that they did not – even if assumed true – rise to the level of warranting the principal's dismissal or reduction in salary. The ALJ found that petitioner's allegations were true and directed the Board to certify tenure charges to the Commissioner for imposition of an appropriate penalty against the charged principal.

The Commissioner adopted in part, and rejected in part, the Initial Decision of the ALJ. The Commissioner concurred that the Board failed to meet the *Manalapan* standard, but rejected the ALJ's ultimate conclusion and order, stressing that the truth of petitioner's allegations could not lawfully be adjudicated absent tenure proceedings and that the principal – who vigorously disputed petitioner's allegations – was entitled to preliminary investigation at the local level and should not be subjected to certification of tenure charges solely because the Board failed to articulate the basis for its decision not to certify such charges. The Commissioner remanded petitioner's tenure charges to the Board with the direction that it make a determination on their certification within 45 days, after investigation and deliberation as necessary to make – and be able to articulate in the event of an appeal – a proper discretionary decision as to whether probable cause exists to credit the evidence in support of the charges, and, if so, whether the charges warrant dismissal or reduction in salary.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

August 21, 2008

OAL DKT. NO. EDU 11479-06
AGENCY DKT. NO. 373-10/06

JOHN GALANTE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NORTH ARLINGTON, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have exceptions filed by the respondent Board of Education (Board) to which petitioner did not reply.

In its exceptions, the Board contends that the Administrative Law Judge (ALJ) erred by failing to give appropriate consideration to the Board's resolution declining to certify the tenure charges filed by petitioner against high school principal Robert Kinloch and to the certification filed by Kinloch in response to such charges. According to the Board, the resolution memorializes the undisputed fact that it: 1) considered both petitioner's statement and Kinloch's reply disputing the charges against him, and determined based upon Kinloch's explanation – as it was entitled to do pursuant to the very case law (*Ridgefield Park, infra*) cited by petitioner – not to credit such charges; and 2) gave petitioner the benefit of assuming his factual allegations to be true, but concluded that they were insufficient to warrant Kinloch's dismissal or a reduction in his salary. Therefore, the Board asserts, it did everything required of it by

law, and, consequently, its discretionary decision – made after considering the submissions of both petitioner and Kinloch – cannot be found to have been arbitrary and unreasonable. (Board's Exceptions at 3-7)

The Board further contends that the ALJ additionally erred by: 1) considering petitioner's charges *de novo*, rather than according the Board's decision the presumption of correctness to which it was entitled and placing upon petitioner the burden of demonstrating that the Board acted arbitrarily, unreasonably or unlawfully; 2) misinterpreting case law (*Sheridan, infra*) that actually supports the Board's position, ignoring that the *Sheridan* decision stands for the proposition that discretionary Board personnel determinations cannot be upset where the Board has adhered to statutory procedural requirements; 3) concluding without analysis that petitioner's allegations met the "flagrant" offense standard, apparently accepting petitioner's (flawed) analogy to a case (*Astacio-Borja, infra*) where – unlike here – the charged party did *not* dispute the alleged conduct and the matter involved manifestation of racial discrimination rather than evaluation of teacher performance; and 4) making, in effect, a determination that Kinloch was guilty as charged, thereby exceeding her authority in this matter and denying Kinloch the due process to which he is entitled under the tenure laws. (Board's Exceptions at 7-11)

Upon review, the Commissioner adopts in part, and rejects in part, the Initial Decision of the OAL.

Initially, the Commissioner concurs with the ALJ that petitioner's appeal is not appropriately dismissed at this juncture on grounds of procedural deficiency in the tenure charges petitioner filed with the Board, since the Board accepted and acted upon

petitioner's filing and Kinloch could and did fully respond. (Initial Decision at 12) Moreover, the Commissioner concurs with the ALJ's discussion of the standard of review to be applied in this matter, to the extent that it identifies the arbitrary and capricious standard as appropriate and notes that the role of the ALJ and Commissioner is not to substitute their judgment for that of the Board. (*Id.* at 13-14)

Finally, the Commissioner concurs – as set forth more fully below – with the ALJ's determination that the Board has failed to meet the standard for consideration of tenure charges set forth in *Manalapan-Englishtown Education Association v. Board of Education of the Manalapan-Englishtown Regional School District*, 187 *N.J. Super.* 426 (App. Div. 1981), in that no support was proffered for the Board's conclusory statements that petitioner's charges were not creditable and that they did not – even if assumed true – rise to the level of warranting Kinloch's dismissal or reduction in salary. (Initial Decision at 15-17)

The Commissioner cannot, however, concur with the findings, conclusions and order that follow from the ALJ's determination in this regard, since – as contended by the Board – these constitute, in effect, a *de novo* determination wherein the ALJ has substituted her judgment for that of the Board and exceeded her authority by declaring petitioner's allegations to be true in fact. (Initial Decision at 12, 17-18)

As recognized by the parties, the central inquiry in this matter is whether the Board, in considering the tenure charges filed by petitioner, made the determination required of it by law – whether there was probable cause to credit the evidence in support of the charges, and, if so, whether the charges warranted Kinloch's dismissal or reduction in salary – and whether it did so properly. *Manapalan, supra*, at 429-30.

There is no dispute in this instance that the requisite determination was made by the Board; what is disputed is whether it was made *properly*. The Board argues in the affirmative, asserting that it considered petitioner's charges (Exhibit J-1) and Kinloch's reply (Exhibit J-2) and reached its stated conclusions (Exhibit J-3) based upon the two men's respective affidavits – as it was entitled to do pursuant to *Ridgefield Park Education Association v. Ridgefield Park Board of Education*, State Board of Education Decision, February 6, 1985, affirmed App. Div. December 24, 1985, No. A-2859-84T7 – with its determination entitled to a presumption of correctness pursuant to *David M. Sheridan v. Board of Education of the Borough of Pitman, Gloucester County, et al.*, Commissioner's Decision No. 476-04, decided December 1, 2004, affirmed State Board of Education, June 1, 2005.

In considering this position, the Commissioner finds the Board's reliance on *Ridgefield Park* and *Sheridan* to be misplaced. In the *Ridgefield Park* matter – while the board did, indeed, make its determination based upon affidavits – the record was clear as to precisely how and why the board reached the conclusions it did, and to the board's having acted after intense deliberations including briefing by counsel on applicable case law; in the *Sheridan* matter – while the board's action was, indeed, upheld despite a finding that it was motivated by considerations of "small-town politics" – the holding relied on the fact that boards have long been entitled in matters involving reemployment of nontenured teachers – to which, of course, the present matter bears no relation – to unfettered discretion so long as they act for reasons that are not statutorily or constitutionally prohibited.

In the present matter, though – *Sheridan* being inapplicable, and in marked contrast to *Ridgefield* – the record provides no indication whatsoever as to how and why the Board determined, based on Kinloch's affidavit, that probable cause did not exist to credit petitioner's allegations; nor is there any explanation – other than counsel's argument that allegations of a badly conducted evaluation are not on the same plane as the racially abusive remarks underlying the charges in *Rosa Astacio-Borja v. Board of Education of the Passaic County Technical-Vocational High School District, Passaic County,* Commissioner's Decision No. 148-98, decided March 30, 1998 – as to how and why the Board concluded that, even if true, petitioner's charges did not rise to the level of warranting tenure proceedings. In this regard, the Commissioner stresses that it is by no means self-evident from review of the two affidavits – which present diametrically opposed views of the circumstances and motivations underlying the charges – why Kinloch's view is to be credited over petitioner's; indeed, petitioner's statement of evidence sets forth very specific circumstances and events which – taken alone – would certainly lead a cautious person to conclude that Kinloch had acted as charged, while Kinloch's certification avoids addressing petitioner's specific points (other than failure to submit accident reports, and even here his "proofs" are disputed by petitioner) and is, in essence, a recitation of undisputed facts followed by a general denial that he did anything other than evaluate petitioner lawfully and in good faith consistent with petitioner's current level of performance. The Commissioner further stresses the serious nature of petitioner's allegation that Kinloch, in fulfilling his assigned duty as high school principal, conducted a bad faith performance evaluation at the behest of a Board member who was also a disgruntled parent; petitioner was not, as suggested by the

Board,[1] merely challenging a negative evaluation because he found it unwarranted and inconsistent with the positive ratings he had received in the past.

Thus, while the Board's actions herein are, indeed, entitled to a presumption of correctness and the Board did, in fact, make the specific determination required of it by law, the Commissioner finds that it is simply not possible to ascertain how – without inquiry or deliberation not reflected on the present record – the Board could have reasonably concluded that petitioner's charges should be halted at the local level rather than proceed to certification to the Commissioner for adjudication on the merits, and thus made a proper discretionary determination not to certify charges.

Notwithstanding this finding, however, the Commissioner cannot conclude – as did the ALJ – that petitioner's allegations are both true and sufficient to warrant Kinloch's dismissal or reduction in salary, and that the Board must, therefore, be ordered to certify charges so that the appropriate penalty may be imposed. Initially, the Board is entirely correct that the truth of petitioner's allegations absolutely cannot be adjudicated in this proceeding; the most that could result is a determination that the Board erred in finding no probable cause to credit them for purposes of certification to the Commissioner. Moreover, the Commissioner recognizes that, in this matter – in contrast to the prior matters cited by the parties and the ALJ involving a board's failure to certify tenure charges – the actual conduct alleged by petitioner, in addition to the sufficiency of such conduct to warrant tenure proceedings, is vigorously disputed by respondent; consequently, respondent is entitled to preliminary investigation at the local level as envisioned by the Tenure Employees Hearing Law, and should not be subjected to

[1] The Board argues that petitioner's stance would lead to the filing of endless tenure charges by teaching staff members whose evaluations are critical of their performance. (Post-hearing Brief at 12)

certification of tenure charges as a result of the present proceeding solely because the Board has failed to articulate the basis for its findings of insufficiency and no probable cause.

Under these circumstances, then, the Commissioner holds that the appropriate remedy in this matter is to remand petitioner's tenure charges to the Board of Education with the directive that it undertake such investigations and engage in such deliberations as are necessary for it to make a proper discretionary determination – and be able, should its determination again be challenged by petitioner, to articulate the specific bases therefor – as to whether there is probable cause to credit the evidence in support of petitioner's charges, and, if so, whether such charges warrant Kinloch's dismissal or reduction in salary.

Accordingly, for the reasons set forth above, the Initial Decision of the OAL is adopted in part and rejected in part, and the North Arlington Board of Education is directed to make the requisite determination within 45 days of the filing date of this decision pursuant to *N.J.S.A.* 18A:6-13.

IT IS SO ORDERED.[2]

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 8/21/08

Date of Mailing: 8/21/08

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11479-06
AGENCY DKT. NO. 373-10/06

JOHN GALANTE,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF NORTH ARLINGTON, BERGEN COUNTY,
Respondent.

Sanford R. Oxfeld, Esq., for petitioner (Oxfeld Cohen, attorneys)

Dennis McHeever, Esq., for respondent (Lindabury, McCormick, Estabrook & Cooper, attorneys)

Record Closed: April 11, 2008 Decided: June 2, 2008

BEFORE **LESLIE Z. CELENTANO**, ALJ:

STATEMENT OF CASE AND PROCEDURAL HISTORY

Petitioner John Galante contends that respondent Board of Education of North Arlington, Bergen County, (Board, BOE or District) failed to bring tenure charges against the principal who filed a dishonest and inaccurate evaluation of him, and maintains that such action was arbitrary, capricious and unreasonable. Petitioner filed his petition with

the Commissioner of Education on October 16, 2006. An answer on behalf of the District was filed on November 8, 2006. The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on November 30, 2006, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The matter was set down for hearing on August 30, 2007; however, that date was adjourned by joint request because respondent's counsel had been recently retained and petitioner's counsel was on a four-month sick leave. The hearing took place on March 17, 2008. The parties requested the opportunity to submit written summations, and following receipt of both briefs, the record was closed.

FACTUAL DISCUSSION

John Galante is a social studies teacher in the North Arlington school system. He has been employed in that capacity since 1980. When he began his career at North Arlington, Mr. Galante also became a football coach. In 1990 he became head football coach. This position was separate from his teaching contract, and was subject to a separate, annual renewable contract. This contract was traditionally renewed with no need to post and re-apply. His performance reviews were conducted by the athletic director, but if that position was vacant, he was reviewed by the principal or vice principal. Mr. Galante had generally favorable evaluations over the years.

In September 2005, after receiving a glowing letter of commendation from the superintendent of schools about a particularly well-won game against their chief rival, things began to change. After that big win, some of the players slacked off, and Mr. Galante tried to motivate them again by making them work harder. Some of the senior team members held a meeting culminating in a petition to remove the coach and his assistants. Two players resigned from the team. A father of one of the boys, Mr. Frato, was a school board member. When Mr. Galante encountered Mr. Frato, he was told that parents had been complaining about him. Subsequent to that conversation, Mr. Frato's son, Alex, and another boy asked to be reinstated to the team. Mr. Galante complied. However, when Alex was seen by an assistant coach in town during practice

time and advised to get to practice, he replied that he had no intention of going to practice. He missed two scheduled practices before the Thanksgiving-eve game. Consequently, Mr. Galante did not allow Alex and another boy to suit up or to play in that final game of the season, because they had missed practice. Alex Frato's absence from practice was not excused.

Several days later, Mr. Galante was summoned to the principal's office. He met with Mr. Kinloch and the vice principal, Mr. Jennings, and they asked for his resignation as head football coach. The following Monday Mr. Galante met with them again, but this time his union representative was present. Mr. Galante stated that he would not resign as head coach. Mr. Kinloch then asked him to devise a plan to improve the football program. He conditioned his development of a plan on Mr. Kinloch's evaluation of Mr. Galante's coaching.

When Mr. Galante received the evaluation, he was rated "needs improvement" in eight out of fifteen categories. Mr. Galante characterized the evaluation as dishonest and inaccurate. Mr. Galante asked the superintendent to recommend his reappointment. The superintendent stated that the BOE planned to post the position. The superintendent also advised Mr. Galante that he could reapply. He did not.

Mr. Galante then submitted a written statement of evidence in which he alleged that tenure charges should be brought against Mr. Kinloch for his unethical and dishonest behavior in falsifying his evaluation.

The BOE, which included Alex Frato's father with no indication that he recused himself from this matter, determined that, even though the charge was procedurally deficient, and even if the Board were to accept the charge as true, the evidence was insufficient to "warrant the dismissal or reduction of Kinloch's salary." J-3. No charge was certified to the Commissioner.

TESTIMONY

John Michael Galante

John Galante has been employed by the North Arlington Board of Education since 1980. He holds a certificate as a social studies teacher for grades K-12. Petitioner has a bachelor's degree and has an additional thirty-two credits.

In September 1990 he became the head football coach and was evaluated annually by the athletic director or by the principal or vice principal if there was not an athletic director in the position at the time. Galante testified that he has had favorable evaluations each year and only on one occasion was there one checkmark in the column indicating "needs improvement," which he believes was in the year 2001 in the category of "locker room and building care." Otherwise his evaluations have always had a rating of "competent" in every category listed. J-1.

Galante also testified that on September 19, 2005, he received a glowing memo from Dr. Stringham, the superintendent of schools, congratulating him on winning the game against the school's biggest rival in football. Galante testified that after that big win some of the older boys on the team seemed to lose some of their focus and enthusiasm, and practices were not too productive. Petitioner testified that he told the players that if things did not improve they were going to do more running, in order to motivate them to work harder.

Towards the end of September the seniors held a team meeting over a weekend which resulted in a petition being filed seeking to remove the coach and his assistants. At the same time two players resigned from the team, one of whom was Alex Frato, whose father was a school board member. Galante testified that he told the two boys that they were making a mistake by quitting the team. As he was leaving the field he saw Alex's father, who said that parents had been complaining about him. Sometime later, Alex and the other player who had quit the team asked to be reinstated, which petitioner agreed to do.

Following these events, principal/athletic director Mr. Kinloch attended every football game, whereas prior to the incident with Mr. Frato he had only attended occasionally. Petitioner testified that although the season ended with a 2-8 record he felt it had been a successful season, as the players played competitively despite a number of player injuries.

The last game of the season was scheduled for the Wednesday night before Thanksgiving. The Friday before the next-to-last game and the following Monday Alex Frato was seen by an assistant coach in town, and was told to get to practice. Alex indicated that he would not be attending practice, and he did not attend either of the two practices immediately before the final game of the season. As a result, Alex was not permitted to suit or dress for the game, and did not play. Petitioner testified that if a player has an excused absence then it is permissible to miss practice; however, if his absence is not excused, he cannot play in the following game.

On December 2, 2005, at the end of the school day at 2:15 p.m., petitioner was summoned to Mr. Kinloch's office. He had no idea why he had been summoned and eventually met with Mr. Kinloch and vice principal Jennings, at which time Kinloch asked for petitioner's resignation as head football coach. When called to the meeting petitioner was not told to have union representation with him, and he arrived at the meeting alone because he had no idea why he was being summoned. Petitioner testified that he was shocked and had no idea he would be asked for his resignation. Kinloch told him that he no longer had the respect of his players and that he should resign. Petitioner left the meeting without indicating what his intentions were and went to the weight room, where forty-five players were waiting. He told them what had happened and that he had been asked to resign. Petitioner testified that Kinloch never asked him to keep the meeting confidential.

The following Monday morning, December 5, 2005, petitioner met with Kinloch and Jennings again and this time was accompanied by his union representative, Joe Spaccavento. Petitioner testified that he advised Mr. Kinloch that he would not resign,

and Kinloch then asked him to come up with a plan to improve the football program. Petitioner testified that he would not put a plan in writing until he received an evaluation, which he received the following day. The evaluation was prepared by Kinloch as principal and athletic director. In eight categories "need improvement" was checked. One of the items that was indicated as needing improvement was "accident reports filed on time." Petitioner testified that he had no idea why this item had been checked off, as he always filed accident reports the day after an injury occurred. He also did not understand why any of the other categories had been checked off. With regard to individual and team discipline "needing improvement," petitioner had no idea what that meant. As to "running organized practices," petitioner also had no idea why that item had been checked as needing improvement since Kinloch had never been to a practice.

The remaining categories and the addendum to the evaluation also made no sense to petitioner. It was noted that Kinloch had discussed with petitioner leaving practice early, which petitioner testified he did only once in his history as football coach due to a family emergency. Another issue raised was comments about discipline at an awards ceremony, and petitioner testified that he had made a remark about a player who had left the team and ultimately determined to come back. As for delegating too much authority, petitioner testified that you have to delegate some things to assistant coaches so that they are a part of the team effort. Another item reflected on the addendum was lack of discipline, which petitioner did not understand at all. The final item listed was talking to vendors directly without consulting the athletic director, and petitioner testified that this involved one incident where a vendor, who has been a friend of his for twenty years and who supplied the team jerseys, was asked what it would cost if each player wanted to buy a second jersey for himself. Petitioner testified that Kinloch "went crazy in front of the whole office," and yelled at petitioner, asking, "where are we getting money from," obviously not having heard that petitioner's question related to the players buying themselves a second jersey if they wanted one.

On December 14, 2005, petitioner submitted his response to the evaluation, wherein he referred to the evaluation as, among other things, arbitrary, unethical and dishonest. As Kinloch had requested, petitioner did submit a plan (J-1); however, he

never had any response to that submission. As a result, petitioner did not go into the weight room any longer, as he had no word as to whether he was going to be rehired or reappointed as head coach. Petitioner testified that he asked the superintendent to recommend him for reappointment and the superintendent said the Board was looking to repost the position and advised petitioner that he could reapply. Petitioner found this to be unacceptable. He testified that there had never been any posting of any positions previously, but that after this time all positions were posted and continue to be posted to this day. This was the first time in approximately twelve years that all positions were posted. After the superintendent's indication that the position was going to be reposted and that petitioner could apply along with any others who chose to do so, petitioner testified that he told Superintendent Stringham that he would not apply.

Petitioner is still the softball coach. He testified that the following April, two Board members asked him to reconsider his intention to not reapply.

After filing his petition, petitioner submitted an affidavit (J-1) dated June 21, 2006, and ultimately received a reply from the Board to those charges (J-3). The Board determined by unanimous vote that there was no support for petitioner's charges and that no tenure charges would be brought against Kinloch.

On cross-examination, petitioner agreed that his affidavit (J-1) is his statement of the case. He agrees that there is no statutory tenure as head football coach.

Petitioner testified that he served as head softball coach from 1980–1996, and during that time won numerous conference and state championships. In 1996 he left that position because he had "too much on his plate," including serving as the president of the union and as head football coach; however, in 2000 he resumed the position as head softball coach after he had been voted out as president of the union, and had the necessary time to devote to the softball coach position.

Petitioner testified that as of February 2006 he still had not heard whether he was being reappointed and no off-season training was going on. All he was doing was

college recommendation letters. Petitioner testified that he was not going to start training if someone else was going to be appointed to the head coach position. After he was told to submit a plan of action he did so; however, he did not reapply for the position as had been suggested to him. Petitioner asked Superintendent Stringham to get Board approval to reappoint him; however, the superintendent stated that the Board wanted to post the position, so petitioner knew that others would be considered and made a decision to not reapply.

DISCUSSION

The local BOE first argues that the appeal should be dismissed on procedural grounds because Mr. Galante did not specify the tenure charges. He only described the behavior and actions of Mr. Kinloch that gave rise to the tenure charges. The BOE also argues that the BOE's reasonableness at accepting the procedurally deficient charge demonstrates accommodation, and defeats any allegation of arbitrary and capricious action on behalf of the BOE. The last argument the BOE makes is that insufficient evidence was presented to withstand the flagrant-offense standard of review as articulated in In re Fulcomer, 93 N.J. Super. 404, 421 (App. Div. 1967).[1]

[1] The standard of review is described by the Fulcomer court thus:

> We hold no brief for the teacher's conduct in this case. Other proper means were available to him to maintain discipline or compel obedience. Nor have we any doubt that unfitness to remain a teacher may be demonstrated by a single incident if sufficiently flagrant. See Redcay v. State Bd. of Educ., 130 N.J.L. 369 (Sup. Ct. 1943), affirmed o.b., 131 N.J.L. 326 (E. & A. 1944).
>
> Here, however, there is no indication in the record that the teacher's acts were premeditated, cruel or vicious, or done with intent to punish or to inflict corporal punishment. Rather, they bespeak a hasty and misguided effort to restrain the pupil in order to maintain discipline.
>
> Although such conduct certainly warrants disciplinary action, the forfeiture of the teacher's rights after serving for a great many years in the New Jersey school system is, in our view, an unduly harsh penalty to be imposed under the circumstances. The Commissioner noted that the teacher received his full salary during his suspension by the township board. However, consideration should be given to the impact of the penalty on petitioner's teaching career, including the difficulty which would confront him, as a teacher dismissed for unbecoming conduct, in obtaining a teaching position in this State, with the resultant jeopardy to his equity rights in the Teachers' Pension Fund accruing from his nineteen years credit.

The Action of the BOE

The Tenure Act

The procedures to be followed when written charges are received are set forth in N.J.S.A. 18A:6-11, which is the enabling statute for N.J.A.C. 6A:3-5.1.

N.J.S.A. 18A:6-11 reads:

> Any charge made against any employee of a board of education under tenure during good behavior and efficiency shall be filed with the secretary of the board in writing, and a written statement of evidence under oath to support such charge shall be presented to the board. The board of education shall forthwith provide such employee with a copy of the charge, a copy of the statement of the evidence and an opportunity to submit a written statement of position and a written statement of evidence under oath with respect thereto. After consideration of the charge, statement of position and statements of evidence presented to it, the board shall determine by majority vote of its full membership whether there is probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to warrant a dismissal or reduction of salary. The board of education shall forthwith notify the employee against whom the charge has been made of its determination, personally or by certified mail directed to his last known address. In the event the board finds that such probable cause exists and that the charge, if credited, is sufficient to warrant a dismissal or reduction of salary, then it shall forward such written charge to the commissioner for a hearing pursuant to N.J.S. 18A:6-16, together with a certificate of such determination. Provided, however, that if the charge is inefficiency, prior to making its determination as to certification, the board shall provide the employee with written notice of the alleged inefficiency, specifying the nature thereto, and allow at least 90 days in which to correct and overcome the inefficiency. The consideration and actions of the board as to any charge shall not take place at a public meeting.

N.J.A.C. 6A:3-5.1 reads:

(a) In a case of charges preferred before the Commissioner against an employee of a district board of education or of a State-operated school district pursuant to the Tenure Employees' Hearing Act, N.J.A.C. 6A:3-1.3, filing and service of petition, shall not apply. In place of the usual petition, the district board of education or the State district superintendent shall file the original and two copies of the written charges and the required certificate of determination with the Commissioner together with the name of the attorney who it is anticipated for administrative purposes will be representing the district board of education or State district superintendent and proof of service upon the employee and the employee's representative, if known. Such service shall be at the same time and in the same manner as charges are filed with the Commissioner.

1. In accordance with N.J.S.A. 34:13A-24, fines and suspensions imposed as minor discipline shall not constitute a reduction in compensation pursuant to the provisions of N.J.S.A. 18A:6-10 where the negotiated agreement between a district board of education and the majority representative of the employees in the appropriate collective bargaining unit provides for such discipline. In these cases, tenure charges shall not be filed in order to impose minor discipline on a person serving under tenure.

(b) In all instances of the filing and certification of tenure charges, other than for reasons of inefficiency, the following procedures and timelines shall be observed:

1. Charges shall be stated with specificity as to the action or behavior underlying the charges and shall be filed in writing with the secretary of the district board of education or with the State district superintendent, accompanied by a supporting statement of evidence, both of which shall be executed under oath by the person or persons instituting such charges.

2. Charges along with the required sworn statement of evidence shall be transmitted to the affected tenured employee and the employee's representative, if known, within three working days of the date they were filed with the secretary of the district board of education or the State

district superintendent. Proof of mailing or hand delivery shall constitute proof of transmittal.

3. The affected tenured employee shall have an opportunity to submit to the district board of education or the State district superintendent a written statement of position and a written statement of evidence both of which shall be executed under oath with respect thereto within 15 days of receipt of the tenure charges.

4. Upon receipt of the tenured employee's written statements of position and evidence under oath, or upon expiration of the allotted 15-day time period, the district board of education shall determine by a majority vote of its full membership, or the State district superintendent shall determine, within 45 days whether there is probable cause to credit the evidence in support of the charges and whether such charges, if credited, are sufficient to warrant a dismissal or reduction of salary.

5. The district board of education or the State district superintendent shall, within three working days, provide written notification of the determination to the employee against whom the charge has been made, in person or by certified mail to the last known address of the employee and the employee's representative, if known.

6. In the event the district board of education or the State district superintendent finds that such probable cause exists and that the charges, if credited, are sufficient to warrant a dismissal or reduction of salary, then the board or the State district superintendent shall, within 15 days, file such written charges with the Commissioner. The charges shall be stated with specificity as to the action or behavior underlying the charges and shall be accompanied by the required certificate of determination together with the name of the attorney who it is anticipated for administrative purposes will be representing the board or State district superintendent and proof of service upon the employee and the employee's representative, if known. Such service shall be at the same time and in the same manner as the filing of charges with the Commissioner.

7. Pursuant to N.J.S.A. 18A:6-11, all deliberations and actions of the district board of education with respect to such charges shall take place at a closed meeting.

In this case, the BOE accepted the written statement from Mr. Galante, and considered it in closed session, as it is bound to do. It would appear that the BOE followed the Tenure Act, with the possible exception of allowing Mr. Galante's written statement under oath to stand in for the specific charges required by N.J.S.A. 18A:6-11 and N.J.A.C. 6A:3-5.1.

The BOE accepted the sworn statement of Mr. Galante, even though it is now argued that this was procedurally deficient because specific tenure charges were not set forth. In cases in which charges have been found to have been procedurally deficient, the respondent is usually unable to respond because the charges are not specific enough. See In re Dinich, 1980 S.L.D. 729. That was not the case here. Mr. Galante's sworn statement was so specific as to the offensive acts that Mr. Kinloch not only could respond to the charges, he did. The resolution issued by the BOE stated:

> WHEREAS, despite the procedural deficiency, the Board has now met and considered the Charge, together with the evidence in support thereof and Kinloch's written response thereto.
>
> BE IT FURTHER RESOLVED that even assuming the evidence presented in support of the Charge is true, the Board has determined the Charge is insufficient to warrant the dismissal or reduction of Kinloch's salary.
>
> [J-3.]

Mr. Kinloch responded to the charges, and the BOE acted on them, and did not reject them, without prejudice, as procedurally deficient. In any event, any procedural defect is cured by this de novo hearing, and I so **FIND**. Hearing a case de novo means that no special deference will be given to the BOE's findings of fact, conclusions of law, or view of the evidence. See Farmingdale Supermarket v. United States, 336 F. Supp. 534, 536 (D. N.J. 1971).

The Arbitrary-and-Capricious Standard

This controversy involves the action of the school principal, Mr. Kinloch, subsequent to Mr. Galante's disciplining of the son of a BOE member. Mr. Galante maintains that his negative review stemmed from the influence exerted by the boy's father over the principal. When it came time to consider the tenure charges against Kinloch, it would appear that the full BOE, including the BOE member in question, considered the sworn statement of Mr. Galante, but found the charge insufficient to warrant a dismissal or reduction in Mr. Kinloch's salary. There is no indication from the record whether or not Mr. Frato participated in the vote or recused himself. The end result may have been the same without Mr. Frato's participation, but the appearance of a conflict of interest gives rise to questions of arbitrary, capricious and unreasonable action on the part of the BOE. The standards for determining arbitrary and capricious action were articulated in Bayshore Sewerage Co. v. Department of Environmental Protection, 122 N.J. Super. 184, 199-200 (Ch. Div. 1973) (citations omitted), aff'd, 131 N.J. Super. 37 (App. Div. 1974):

> In the law, "arbitrary" and "capricious" means having no rational basis. The terms "arbitrary" and "capricious" embrace a concept which emerges from the due process clauses of the 5th and 14th Amendments of the United States Constitution and operate to guarantee that acts of government will be grounded on established legal principles. Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached. Moreover, the court should not substitute its judgment for that of an administrative or legislative body if there is substantial evidence to support the ruling.

Here, the key is in the notion of "substantial evidence to support the ruling." The basis for the ruling is not explained by the BOE. It is not the function of this tribunal to substitute judgment for the action of the BOE, but rather to determine if there was a

rational basis for that conclusion. Kopera v. Bd. of Educ., 60 N.J. Super. 288, 297 (App. Div. 1960).

In a case ultimately dismissed for other reasons, Sheridan v. Pitman Board of Education, EDU 8068-03, Initial Decision (October 18, 2004), modified, Commissioner (December 1, 2004), affirmed, State Board (June 3, 2005), <http://lawlibrary.rutgers.edu/oal/search.html>, a non-tenured teacher alleged that his contract was not renewed because of improper, unfair, arbitrary and capricious reasons that had little to do with his accomplishments and skills as a teaching staff member. He was an experienced and competent teacher who came to the Pitman schools after the principal in the school in which he had been teaching left that school for employment with the Pitman BOE. The principal knew Mr. Sheridan to be a fine teacher, and over the course of his employment from 2001 to 2003 that confidence was borne out by the excellent performance reviews from his supervisors. Mr. Sheridan received only one negative review, prepared by an assistant superintendent just days before the superintendent decided not to renew Mr. Sheridan's contract.

Mr. Sheridan participated in a number of extracurricular activities, including functioning as girls' varsity soccer coach, boys' varsity track coach, Student Council advisor, SAT prep course instructor, and National Honor Society (NHS) advisor. In the 2003 academic year a controversy arose concerning the selection process for the National Honor Society, and parents of several students who did not make the cut complained bitterly. As a result of this furor, the principal advised Mr. Sheridan that the superintendent was "gunning" for him, and planned to make him the "fall guy" for the NHS debacle. ALJ Miller reasoned:

> This matter has much more to do with small town politics than it has to do with fairly and impartially evaluating a probationary teacher. Sheridan was a tenured teacher at Salem High School. He has been teaching for approximately fourteen years in several different school systems. His teaching skills are not in question. He received ten evaluations during the period January 2001 to June 2003. Nine of those evaluations were excellent and one was average. Former principal Grennor testified that

> Sheridan was one of his top teaching staff members. He was a "go-to guy." He would fill in or substitute for other teachers on a minute's notice. He participated in numerous extracurricular sports and academic activities. He was dedicated and well liked by his peers and students. It is obvious from the testimony and documentary evidence that had Sheridan not been involved in the NHS, a job he inherited from his predecessor, his teaching contract would have been renewed in 2003-2004. The narrow issue, therefore, is whether a small town parental-political controversy, involving an extracurricular program, provides a sufficient basis not to renew a non-tenured teaching contract? If it does not form a sufficient basis to terminate the contract, is the District's decision unreasonable, arbitrary and capricious?
>
> [Ibid.]

While the Sheridan case is distinguishable because it deals with a tenure issue, the same principles of bad faith that are at work here were noted by the ALJ in that case, who had the opportunity to hear the witnesses and make a credibility determination.

Mr. Galante argues that the BOE did not supply sufficient reasons for not certifying the charges against Mr. Kinloch, and relies upon Manalapan-Englishtown Education Association v. Board of Education of the Manalapan-Englishtown Regional School District, 187 N.J. Super. 426 (App. Div. 1981).

The Manalapan case reversed and remanded the State Board's decision affirming the Commissioner's decision that the local board did not err in refusing to certify disciplinary charges against a principal. On remand, the court required the BOE to make a specific determination as to whether or not there was probable cause to credit the evidence against the principal, and whether the charges, if credited, warranted dismissal or a reduction in salary. The court held:

> Simply enough, the problem implicates only questions expressly projected by the statute, N.J.S.A. 18A:6-11: (1) Is there probable cause to credit the evidence in support of the charge and (2) is such a charge, if credited, sufficient to

> warrant the dismissal of a tenured principal or a reduction of his salary? These are the questions which the local board should have answered. Whether it did and, if so, whether it did so properly is the question which the Commissioner was called on to decide by the appeal of the Association to him. Irrespective of whether the local board had a factfinding function, it was certainly not theirs to decide any issues at that point except (1) and (2) above. Nor was it for the Commissioner then to determine the merits of the complaints. He does not do that until after a certification. N.J.S.A. 18A:6-16.
>
> Our review is of the action of the Commissioner to see if he performed that duty correctly, for the appeal to us is from the action of the State Board which summarily affirmed the Commissioner.
>
> We are satisfied that the Commissioner recognized the task set for him. He stated his obligation in terms of a purported determination by the local board, "that there was not probable cause to credit the evidence in support of [the] charges," a statement repeated at least twice in his opinion. The difficulty is that the conclusion of the Commissioner thereby implied revolves around a discussion of the limits, if any, of the local board's factfinding prerogative and nowhere addresses that which the local board in fact did. The Commissioner has supplied us with no findings at all to aid us in a review of whether he reasonably reached his conclusion that the local board determined there was not probable cause to credit the evidence. His further bare conclusion that the local board "did not abuse its discretionary authority as alleged" is also otherwise unsupported. Without such findings an intelligent assessment of the conclusionary statements of the Commissioner is impossible. Van Realty v. Passaic, 117 N.J. Super. 425, 429 (App. Div. 1971).
>
> [Manalapan-Englishtown Educ. Ass'n, supra, 187 N.J. Super. at 429-430.]

In the instant case, the BOE did not make any findings to support the bald conclusion that if the conduct happened, it did not rise to the level of requiring dismissal or a reduction in Kinloch's salary. N.J.A.C. 6A:3-5.1(b)(1) requires that the charges be stated with specificity. Here, the BOE allowed that the sworn statement of Mr. Galante, while not using terms of art such as "conduct unbecoming," set forth the grounds for the

tenure charges in such a detailed manner that the BOE determined to accept it despite the procedural defect. In the closed-session deliberations, the Board determined that probable cause did not exist to credit the evidence in support of the charge and that the charge, if credited, was insufficient to warrant the dismissal of the tenured principal or a reduction of his salary. It is entirely unclear what evidence, if any, existed to support the ruling of the BOE, and whether any deliberations were conducted at all. What is clear, however, is that Mr. Kinloch improperly relied upon input from Mr. Frato in preparing petitioner's evaluation, and I so **FIND**.

All of the foregoing, including the lack of specific findings on the part of the BOE, coupled with the absolute appearance of a conflict of interest, establish that the BOE acted unreasonably, and has met the threshold for arbitrary and capricious action. Petitioner had received favorable evaluations since becoming head football coach in 1990. In 2005, a few short months after winning a huge game against the school's biggest rival, for which he received a letter of commendation from the superintendent, petitioner was summarily asked for his resignation. This request came a few days after the incident with the Board member's son, and the first negative evaluation petitioner had ever received followed a few days later.

Not a scintilla of evidence was presented to remotely suggest that any of the criticisms in the December 2005 evaluation were legitimate; indeed, petitioner was the only individual to testify. I **FIND** that the December 2005 evaluation of petitioner was arbitrary, capricious and dishonest, and had no rational basis, and accordingly **CONCLUDE** that the arbitrary-and-capricious standard of review has been satisfied. What was crystal clear in this case is petitioner's dedication, conscientiousness and genuine commitment to the football program. His only negative review came after he properly benched a Board member's son for skipping practices before a major game. The request for petitioner to resign almost immediately thereafter was obviously an effort to try and replace him with a new coach who would be more deferential to Board members' sons who choose to play football, hardly the way to run a team. I further **CONCLUDE** that the flagrant-offense standard of review has been satisfied.

ORDER

Based upon all of the foregoing, I **ORDER** that the Commissioner direct the Board to certify charges for determination of an appropriate penalty to be imposed in this matter.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 2, 2008

DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency: 6/2/08

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE JUN 5 2008

OFFICE OF ADMINISTRATIVE LAW

dh/sej

APPENDIX

Witnesses

For Petitioner:

John Galante

For Respondent:

None

Exhibits

Joint:

J-1 Affidavit of John Galante

J-2 Certification of Robert Kinloch

J-3 Certification of Kathleen McEwin-Marano

For Petitioner:

P-1 North Arlington High School Coaching Evaluation notes and comment sheet used for John Galante's renewal of appointment

For Respondent:

R-1 Accident Report

354-0

OAL DKT. NO. EDU 8073-08
AGENCY DKT. NO. 162-6/08

AMENDED DECISION

R.W., ON BEHALF OF MINOR CHILD, A.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, GLOUCESTER COUNTY,	:	DECISION ON APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

On August 5, 2008, the Commissioner rendered a decision in this emergent matter, adopting the finding of the Administrative Law Judge (ALJ) that there had been no change in circumstances that would permit petitioner to seek re-adjudication of her claims. Those claims arose out of a December 11, 2007 decision by the respondent Board of Education (Board) regarding an incident that occurred in October 2007 and had previously been dismissed as moot due to petitioner's decision to disenroll A.W. from the district and provide him with home schooling rather than have him attend alternative school as directed by the Board. In so holding, the Commissioner noted that the matter had been docketed and transmitted to the OAL based on petitioner's representation that she had re-enrolled A.W. in the district, but that it was established during proceedings at the Office of Administrative Law (OAL) that this was not, in fact, the case. The Commissioner also went on to hold that – even if petitioner's appeal were properly before her – petitioner could not be found to have met the requisite standards for granting of emergent relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) and *N.J.A.C.* 6A:3-1.6.

Subsequent to issuance of the Commissioner's decision, counsel for the Board wrote to the Commissioner seeking correction of the record to reflect that, although the ALJ and Commissioner evidently misunderstood petitioner's statements at hearing, petitioner had, in fact, enrolled A.W. in the district at the end of May, notwithstanding that she then took her family on vacation and A.W. never attended a district school following his re-enrollment.[1]

As a result of the Board's clarification, it is necessary for the Commissioner to issue the within amended decision, recognizing that this matter is, indeed, properly before her, and reaffirming that – for the reasons fully set forth in her August 5, 2008 decision – emergent relief is not warranted in this matter.

Accordingly, with the clarification noted above, the Order of the ALJ – DENYING petitioner's application for relief – is again adopted as the final decision in this emergent matter, which shall be returned to the OAL for such proceedings as are necessary to bring it to closure.

IT IS SO ORDERED.[2]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 8/21/08

Date of Mailing: 8/21/08

[1] Letter from Board Counsel dated August 14, 2008.

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

355-0

#358-08

OAL DKT. NO. EDU 254-08
AGENCY DKT. NO. 365-11/07

DESMOND E. NEWBILL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

This matter was returned to the Department of Education as a withdrawal. Upon review of the record, the Commissioner notes that the parties entered into a settlement. Pursuant to *N.J.A.C.* 1:1-19.1, the Settlement Agreement should have been reviewed in the Office of Administrative Law (OAL) and an Initial Decision should have been issued with a determination as to the conformance, *vel non,* of the settlement with the terms of *N.J.A.C.* 6A:3- 1.13

In the interest of efficiency, the Commissioner has examined the Settlement Agreement and found it to be in compliance with the regulatory requirements. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 9/04/08

Date of Mailing: 9/05/08

CERTIFICATION

RECEIVED
2008 JUL 25 A 11:49
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

I, **LEON FREEMAN**, INTERIM SCHOOL BUSINESS ADMINISTRATOR/ BOARD SECRETARY OF THE BOARD OF EDUCATION OF THE CITY OF CAMDEN, IN THE COUNTY OF CAMDEN, STATE OF NEW JERSEY, **HEREBY CERTIFY** THAT THE FOREGOING ANNEXED EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF SAID CITY DULY CALLED AND HELD ON **TUESDAY, JULY 22, 2008**, HAS BEEN COMPARED BY ME WITH THE ORIGINAL MINUTES AS OFFICIALLY RECORDED IN MY OFFICE IN THE MINUTE BOOK OF SAID BOARD OF EDUCATION AND IS A TRUE, COMPLETE AND CORRECT COPY THEREOF AND OF THE WHOLE OF SAID ORIGINAL MINUTES SO FAR AS THE SAME RELATES TO THE SUBJECT MATTERS REFERRED TO IN SAID EXTRACT.

IN WITNESS WHEREOF, *I HAVE SET MY HAND AND AFFIXED THE CORPORATE SEAL OF SAID BOARD OF EDUCATION THIS 23rd DAY OF JULY, 2008*

Interim School Business Administrator/
Board Secretary

RESOLUTION
 # 17 SY '08
RESOLUTION OF THE CAMDEN CITY BOARD OF EDUCATION TO CONFIRM THE AGREEMENT WITH DESMOND E. NEWBILL

RECEIVED
2008 OCT 25 A 11: 49
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE

WHEREAS, The Camden Board of Education (hereinafter the "Board") and Desmond E. Newbill (hereinafter "Newbill") are involved in a matter before the Commissioner of Education entitled Desmond E. Newbill v. Camden City Board of Education, Docket No. EDUOA 00254-2008S, Agency Ref. No. 365-11/07; and

WHEREAS, the Board and Newbill believe, it is in the best interest of all parties to amicably resolve the above-referenced matter; and

WHEREAS, the parties have reached a settlement agreement and now the Board wishes to conclude this matter in its entirety with Newbill; and

WHEREAS, with the authorization of the Board, this agreement has been reached as expressed in the document attached hereto as Exhibit "A;"

NOW, THEREFORE, BE IT RESOLVED, that the Board hereby agrees to enter into the settlement agreement.

BE IT FURTHER RESOLVED, that as a result of the foregoing action, the matter Desmond E. Newbill v. Camden City Board of Education, Docket No. EDUOA 00254-2008S, Agency Ref. No. 365-11/07, shall be dismissed.

ROLL CALL VOTE:

Yes: 7

Nay: _____

Abstentions: _____

SETTLEMENT AGREEMENT

RECEIVED
2008 JUL 25 A 11: 49
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

This Agreement is made by and between Petitioner, Desmond E. Newbill ("Petitioner") and the Camden City Board of Education (referred to herein as "Board") to resolve the matter filed with the Commissioner of Education entitled *Desmond E. Newbill v. Camden City Board of Education*, under Docket No. EDUOA 00254-2008S, Agency Ref. No. 365-11/07. The Parties hereby agree as follows:

1. The Board recognizes Petitioner as a tenured attendance officer pursuant to *N.J.S.A.* 18A:38-33. Accordingly, Petitioner is entitled to return to work in his position at his appropriate salary level with all benefits and emoluments afforded employees in that position, unless there is a reduction in force, in which event paragraph two (2) below will apply.

2. The Board is considering a reduction in force effective beginning in the 2008-2009 school year, and Petitioner may be subject to that reduction in force. In this regard, any decision with regard to Petitioner's employment and whether he is to be subject to the reduction in force, shall be made based solely on his seniority status, i.e., years of service as compared to other employees in the position or any other position for which he may have rights. Furthermore, Petitioner is to be accorded full recall rights based on his seniority in the event that the Board seeks to rehire to the position. Accordingly, Petitioner understands that if he is subject to the reduction in force, that he may not be employed beginning in the 2008-2009 school year. The Board will cooperate with Petitioner and respond to any requests made by him with regard to his seniority status/years of service as well as others in the same position so that the basis of any decision as to whether or not he is properly subject to the reduction in force can be ascertained.

In the event that Petitioner does return to work, then the following provisions shall be observed:

a). The Professional Improvement Plan put into effect for Petitioner shall remain in effect for a period of ninety (90) days from the date of his return. While Petitioner does not agree with the criticisms implied by the plan, he understands that it will be in effect for that period. Should the Board assert he has not complied with any provision thereof, he reserves his right to assert defenses thereto.

b). The Board will not withhold the salary or adjustment increments of Petitioner based on some act that occurred prior to his return to work.

c). In an effort to avoid possible conflict issues, the Board will make every effort to see that Petitioner is not partnered with employees, J.M., M.H. or N.V. It is recognized, however, that there may be circumstances where this cannot be avoided.

3. The Board shall reimburse Petitioner for the four (4) days salary he lost as a result of being docked in the Fall of 2007. Such reimbursement shall be made within thirty (30) days of the date of this agreement.

4. In the event that Petitioner is subject to a reduction in force, Petitioner's personnel file will reflect that. Petitioner shall be accorded the same rights as any other employee who is subject to a reduction in force. In this regard, the Board will afford him COBRA rights and also recognizes his right to apply for Unemployment benefits based upon that reduction in force.

5. The parties agree that the above captioned Petition of Appeal filed in this matter is to be dismissed and the Petitioner agrees to cooperate to whatever extent necessary to facilitate that dismissal.

6. The parties agree that this Agreement may be signed in counterparts and that facsimiles of signatures will have the same force and effect as original signatures.

7. This Agreement has been entered into voluntarily and without coercion by each of the parties with a full understanding of the rights and ramifications of this Agreement.

8. The parties understand that this agreement is subject to the approval of the Commissioner of Education.

9. By signing this Agreement, each signatory represents that he or she is a Party or has been duly authorized by a Party to sign on that Party's behalf.

Intending to be legally bound hereby, Petitioner, Desmond E. Newbill and the Camden City Board of Education execute the foregoing Agreement as indicated below.

WITNESS:

Michael C. Damm

DESMOND E. NEWBILL
DATED: 7-3-08

SELIKOFF & COHEN, P.A.

MICHAEL C. DAMM, ESQ.
Attorney for Petitioner
DATED: 7-3-08

WITNESS:

CAMDEN CITY
BOARD OF EDUCATION

BOARD PRESIDENT

BOARD SECRETARY
DATED:

The Camden City Board of Education has authorized and consented to the terms of this settlement agreement.

BROWN & CONNERY, LLP

_____

LOUIS R. LESSIG, ESQ.
ATTORNEYS FOR RESPONDENT,
CAMDEN CITY BOARD OF EDUCATION
DATED: _____

#363-08A

STATE BOARD OF EXAMINERS DKT. NO. 0607-200
STATE BOARD DOCKET #34-08
AGENCY DKT. NO. 6-7/08A

IN THE MATTER OF THE REVOCATION OF THE TEACHING CERTIFICATE OF CHERYL TEDESCO BY THE STATE BOARD OF EXAMINERS.	COMMISSIONER OF EDUCATION DECISION

Decided by the New Jersey State Board of Examiners, May 1, 2008

For the Respondent-Appellant, Cheryl Tedesco, pro se

For the Petitioner-Respondent, State Board of Examiners, Sookie Bae, Deputy Attorney General (Anne Milgram, Attorney General of of New Jersey)

On June 9, 2008, appellant filed a notice of appeal with the Office of the New Jersey State Board of Education (State Board). By letter dated June 30, 2008, the State Board notified appellant that her appeal could not proceed until she had submitted proof that she had served her notice of appeal on the Attorney General. Appellant produced said proof of service on June 25, 2008.

The Deputy Attorney General assigned to the case filed a Certification and Statement of Items Comprising the Record on July 1, 2008. By way of a letter dated July 3, 2008, the State Board advised appellant that – pursuant to *N.J.A.C.* 6A:4-2.7(a) – the brief supporting her appeal was due on or before July 24, 2008.

On July 7, 2008, Governor Corzine signed into law *P.L.* 2008, c.36, which eliminated the appellate function of the State Board. Appellant was apprised of this fact by letter dated July 8, 2008, and advised that all appeals from State Board of Examiner decisions that had been pending before the State Board of Education would "be transferred to the Commissioner for

review and determination." A telephone number was provided for persons with questions about their appeals.

The record of this matter was forwarded to the Commissioner on July 10, 2008. The deadline for appellant's brief in support of her appeal – *i.e.,* July 24, 2008 – has passed but appellant has failed to file a brief. In light of appellant's failure to perfect the appeal or provide any explanation for the failure to file, the Commissioner dismisses the appeal. *See Paszamant v. Board of Education of the Borough of Highland Park,* State Board of Education Decision No. 4-92, decided April 1, 1992, *aff'd*, Docket #A-4812-91-3 (App. Div. 1993).

IT IS SO ORDERED.*

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 9/08/08

Date of Mailing: 9/08/08

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

357-08

#357-08R

OAL DKT. NO. EDU 3197-08
AGENCY DKT. NO. 267-8/02

JOHN VANDERBAS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF VERONA, ESSEX COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record of this matter on remand, transmitted to the Commissioner by the Office of Administrative Law (OAL) as a withdrawal pursuant to *N.J.A.C.* 1:1-19.2, has been reviewed.

Upon initial review, it was noted that: 1) The matter had been, by decision dated June 12, 2007, remanded to the OAL for either processing as a withdrawal or proper execution of the parties' proposed settlement agreement, which – although signed by petitioner – lacked evidence of approval by the Board of Education; 2) In March 2008, the Administrative Law Judge had contacted the parties asking that a properly executed settlement be brought to the record on remand; 3) Counsel for petitioner had replied by requesting that such agreement be provided by the Board, since he was not representing petitioner at the time of the prior proceeding and did not have documentation pertaining to the settlement; 4) No settlement agreement was included in the record on remand; and 5) The record provided neither an explanation of the settlement's absence nor any indication that the parties wished the matter to be deemed withdrawn. Consequently, by

July 28, 2008 notice from the Department of Education, the parties were afforded until August 8, 2008 to submit a properly executed settlement agreement to the Commissioner for review and approval. They were further advised that – if no agreement were received by that date – the matter would be deemed to have been withdrawn and the file would be closed accordingly.

Petitioner responded to the Department's notice with a letter dated August 6, 2008, indicating that neither he nor the counsel to whom the Department's notice had been directed had knowledge of the matters addressed therein, since said counsel was representing him only in his workers' compensation case – not in the matter before the Commissioner – and petitioner himself was uncertain as to how to proceed but would welcome anything that was due him financially.* The Board did not respond to the Department's notice, and neither petitioner nor his counsel copied Board counsel with their respective communications.

Based upon the representations of petitioner, the record of the prior matter was examined, whereupon it was discovered that the counsel identified in the ALJ's April 30, 2007 decision as representing petitioner was not, in fact, petitioner's counsel of record – notwithstanding that it was said counsel who had submitted to the ALJ the settlement document that served as the basis for the ALJ's decision as reviewed by the Commissioner in her decision of June 12, 2007. It was further discovered that – notwithstanding the ALJ's March 6, 2008 letter to the parties requesting a copy of the Board resolution approving settlement so as to satisfy the Commissioner's June 12, 2007 remand directive – such resolution had, in fact, been provided to the ALJ by the Board

* Petitioner appended counsel's July 30, 2008 letter to this effect, sent to him upon counsel's receipt of the Department's notice.

attorney on June 28, 2007; however, because it was included in the case file of the prior matter rather than the file of proceedings on remand, it apparently was not seen by the ALJ, and the Department did not see it upon initial review of the file on remand.

Accordingly, the deficiency identified in the Commissioner's June 12, 2007 decision having been rectified and an appropriately executed settlement now being on record, the Commissioner approves such settlement pursuant to *N.J.A.C.* 1:1-19.1 and adopts it as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 9/04/08
Date of Mailing: 9/05/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 09083-02
AGENCY DKT. NO. 267-8/02

JOHN VANDERBAS,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF VERONA, ESSEX COUNTY,

Respondent.

Bernard J. Recenello, Esq., for petitioner

Michael J. Gross, Esq., for respondent (Kenney, Gross, Kovats & Campbell, attorneys)

Record Closed: April 30, 2007 Decided: April 30, 2007

BEFORE **J. HOWARD SOLOMON,** ALJ:

This matter was transmitted to the Office of Administrative Law on October 15, 2002, for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The matter was placed on the inactive list pending outcome of a companion Workers' Compensation case by ALJ Thomas E. Clancy on November 20, 2002.

By letter dated April 25, 2007, counsel for petitioner advised that the matter was settled and forwarded the enclosed Stipulation of Settlement indicating the terms of settlement.

I have reviewed the record and the settlement terms and I **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

4/30/07
DATE

J. HOWARD SOLOMON ALJ

Date Received at Agency: 5-8-07

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

MAY 8 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

pb

Stipulation of Settlement

This Agreement between John VanDerBas and the Verona Board of Education made this 23 day of September 2003, sets forth the obligations of the parties to each other.

Whereas, prior to his announced resignation (and retirement), which resignation was accepted with regret by the Verona Board of Education, Mr. VanDerBas enjoyed an excellent reputation for his job performance and had sixteen years of positive evaluations;

Whereas, now that his retirement has become effective, Mr. VanDerBas and the Board of Education wish to resolve any and all potential outstanding issues that remain between them;

To this end Mr. VanDerBas is willing to waive all rights he may have against the Verona Board of Education and its individual members and employees for any violation of his rights of tenure in employment and in exchange the Board is willing to make certain adjustments to Mr. VanDerBas's compensation, in accordance with arrangements in existence with similar employees;

Mr. VanDerBas will receive pay for thirty-five and one half accumulated vacation days, which payment totals eleven thousand, seven hundred and fifteen dollars and zero cents ($11,715.00)

Mr. VanDerBas will receive payment for twenty-two sick days at forty dollars and zero cents for a total of eight hundred, eighty dollars and zero cents ($880.00).

The payments outlined above shall be made by the Board of Education within thirty days of receipt of a properly executed release, in a form acceptable to Board counsel.

Nothing contained in this agreement shall be construed to mean that Mr. VanDerBas has waived any right he has against Dr. Robert Rosado, Individually for acts or omissions taken with regard to Mr. VanDerBas, and any invasion of Mr. VanDerBas's rights.

Witness

CHRISTINE A. MUZZILLO
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires JUNE 05, 2006

John VanDerBas

Witness

For the Board of Education

356-0

OAL DKT. NO. EDU 2820-08
AGENCY DKT. NO. 102-4/08

IN THE MATTER OF THE TENURE	:	
HEARING OF ALONZO KITTRELS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF WILLINGBORO, BURLINGTON COUNTY.	:	

The record of this matter and the Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed pursuant to *N.J.A.C.* 1:1-19.1, together with the Stipulation of Settlement subsequently submitted by the parties for review by the Commissioner.[1]

Upon such review, the Commissioner finds the present record insufficient to ascertain whether the parties' proposed settlement is consistent with established standards governing settlement of tenure matters. *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846. While the parties have brought this matter in the posture that the Commissioner's scope of review is limited to settlement of the present tenure charges against respondent and does not extend to the parties' separate agreement for settlement of the multiple litigations pending between them elsewhere, it

[1] During tenure proceedings at the OAL, the parties advised the ALJ that they had – through a mediation conducted by retired Superior Court Judge Peter Ciolino – reached, in principle, a "global" settlement of all matters in dispute between them; however, they were unable to complete the settlement process prior to the OAL hearing date set pursuant to *N.J.A.C.* 1:6B-9.1 in recognition of the strict statutory requirement for expedition of tenure matters. Accordingly, rather than move forward with the scheduled tenure hearing, the parties submitted – and the ALJ approved for purposes of Initial Decision – an incompletely executed Settlement Agreement and General Release, which did not specifically address the tenure matter or the standards for approval of tenure settlements. Subsequently, on July 24, 2008, the Board submitted to the Commissioner the parties' proposed stipulation of settlement for the tenure matter, which did attempt to address the requisite standards and was perfected by July 25, 2008 submission of a Board resolution approving the settlement and August 7, 2008 submission of a fully executed document signed by both respondent and the Board President and Board Secretary.

is clear from the two documents on their face that the tenure settlement – which provides for salary and benefits limited solely to contractual entitlements totaling $74,511.06[2] – is inextricably intertwined with, and mutually contingent upon, the aforementioned "global" settlement – which provides for a far more substantial payment ($225,488.94) as "compensatory damages...for alleged personal injury" in exchange for respondent's agreement to waive the multiple claims he has made against the Board in various State and federal forums over the past several years, claims the Board itself recognizes as integrally related to its efforts to remove respondent from the position of Superintendent.[3] (Board Resolution at paragraph 3) Thus, notwithstanding the parties' attempt to bifurcate the terms of their agreement so as to insulate portions of it from review herein, it is clear that the proposed tenure settlement does not, in itself, entirely resolve this matter and cannot be reviewed by the Commissioner apart from its companion agreement. Therefore, in order to ensure that the *Cardonick* standard is satisfied, the Commissioner must insist that the parties provide a more specific explication as to the nature and scope of the litigation addressed by the "global" agreement, as well as particularized reasons – beyond the Board's general statement that it desires to move forward without the costs and threat of ongoing litigation hindering its efforts to establish new leadership in the district and provide a quality education for students – that the *entire settlement package* is in the public interest.

Accordingly, the proposed tenure settlement and the Initial Decision of the OAL recommending its approval are hereby rejected, and this matter is remanded to the OAL for

---

[2] Respondent is to receive $31,197.40 in salary withheld from him following certification of the present tenure charges, back pay of $12,535.58 for increases withheld during the 2005-06, 2006-07 and 2007-08 school years, pay for accumulated unused vacation (36 days) in the amount of $20,278.08, and pension reimbursement of $10,500.00 for the three years in which such reimbursement was withheld.

[3] It also provides for payment of the difference between the $20, 278 allocated by the tenure settlement for unused vacation time (see note 2 above) and any lesser amount that may be dictated by subsequent enactment of legislation limiting such payments.

further proceedings consistent with the concerns set forth above. If the parties are unable or unwilling to expand the record, or to modify their agreement, in accordance with the Commissioner's directive, the tenure charges shall duly proceed to hearing.

IT IS SO ORDERED.[4]

Lucille Davy

COMMISSIONER OF EDUCATION

Date of Decision: 8/26/08

Date of Mailing: 8/26/08

[4] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

Szaferman, Lakind, Blumstein & Blader, P.C.
101 Grovers Mill Road
Suite 104
Lawrenceville, New Jersey 08648
(609) 779-6031
Attorneys for the Willingboro Board of Education

IN THE MATTER OF THE TENURE CHARGES AGAINST ALONZO KITTRELS, WILLINGBORO TOWNSHIP BOARD OF EDUCATION, BURLINGTON COUNTY.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY AGENCY DOCKET NO. 120-4/08 OAL DOCKET NO. EDU-00099-06S ADMINISTRATIVE ACTION **STIPULATION OF SETTLEMENT**

WHEREAS, the Board of Education of the Township of Willingboro ("the Board") is a body politic and corporate, organized and existing by virtue of the laws of the State of New Jersey, N.J.S.A. 18A:11-1, which is entrusted with maintaining and conducting the public schools of the Willingboro Public School District; and

WHEREAS, Alonzo Kittrels ("Respondent") commenced employment with the Board as its Superintendent of Schools on or about July 1, 2002; and

WHEREAS, on or about March 31, 2008, sworn tenure charges against Respondent, together with a certificate of determination and certificate of service, were certified by the Board to and filed with the Commissioner of Education, and Respondent was simultaneously served with the sworn tenure charges, sworn statement of evidence, certificate of determination and certificate of service, pursuant to N.J.A.C. 6A:3-5.1 *et seq.*; and

WHEREAS, the Department of Education thereafter transmitted the matter to the Office of Administrative Law as a contested case, which was assigned to Administrative Law Judge John R. Futey under Docket No.: EDU-00099-06S, Agency Docket No.: 120-4/08; and

WHEREAS, the parties, wishing to resolve the within matter amicably without the need for further, protracted litigation, while achieving the goals of both parties, hereby stipulate to settle same, subject to the terms and conditions set forth herein, upon approval by the Court and the Commissioner of Education;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the legal sufficiency of which is hereby acknowledged by the parties, they agree as follows:

1. Tenure Charges to be Moot/No Further Board Action

This Stipulation is expressly contingent upon and subject to approval by the Commissioner of Education of New Jersey. The Board agrees that upon approval of this Stipulation of Settlement by the Commissioner, the subject tenure charges shall be moot and shall be withdrawn by the Board, and that no further action shall be initiated by the Board regarding the underlying charges. Both parties agree, however, that in the event this agreement is not approved by the Commissioner of Education, they fully reserve their rights to proceed with this litigation and/or any other cause of action that they might have against one another and that their obligations under this agreement shall be null and void.

2. Contract Termination

The parties agree as part of their settlement that as a result of the expiration of his contract, Respondent's employment with the Board as Superintendent terminated effective June 30, 2008 pursuant to the terms of his contract. As a result of this contract termination, as of June 30, 2008, Respondent shall have no duties, responsibilities or authority whatsoever as an employee, agent or representative of the Board.

3. Payment

In full and final satisfaction of all claims by respondent relating to his employment contract only, the Board shall pay respondent as follows (in each case less applicable statutory deductions and authorized withholdings):

a. Respondent will receive his final salary and benefits as Superintendent through June 30, 2008 including for the period from April 1, 2008 through and including June 30, 2008. Respondent will be paid salary for this period in the amount of $31,197.40.

b. Respondent shall receive back pay for salary increases he was contractually entitled to in the amount of $12,535.58 which shall be appropriately reported and credited for pension purposes with the Division of Pensions for the 2005-2006, 2006-2007 and the 2007-2008 school years.

c. Respondent shall receive, pursuant to his contract, his accumulated vacation time which represents 36 days of pay in the amount of $20,278.08. The parties recognize that there is pending State legislation which may impact the amount allowable for payment of unused vacation days, and have dealt with this contingency in their settlement of Superior Court and federal District Court litigation between the

parties referenced in Paragraph 5 below. For purposes of this Stipulation, any limitation on the reimbursable amount of accumulated unused vacation days will be controlled by such legislation if applicable.

d. Respondent shall receive, pursuant to his contract, $3,500 per year as pension reimbursement. This represents $10,500 for the three years this has been withheld.

4. Referral to State Board of Examiners

Respondent acknowledges that he has been apprised of the Commissioner's duty to refer tenure matters, pursuant to N.J.A.C. 6A:3-5.6(a)(6), to the State Board of Examiners for possible suspension or revocation of his certificate.

5. Public Interest

The Tenure charges are a part of a protracted series of contested matters by and between the Respondent and the Board of Education for the past three years. These matters include an original set of tenure charges filed in 2005, which were substantially the same as the instant Charges. The original charges were dismissed by the Commissioner on December 14, 2007, following a Superior Court decision finding a fatal violation of the Open Public Meetings Act pertaining to the certification of the original charges. In addition to the current Tenure Charges, the various matters include a claim by Respondent in Superior Court of the State of New Jersey claiming improper non-renewal of his employment contract for an additional three year period, a federal civil rights claim by Respondent against the Board and Board members, and ethics charges by Respondent against several Board members.

The Parties entered into a mediation conducted by the Honorable Peter Ciolino, R.J.S.C. in order to resolve all of the pending matters as a part of a global settlement between the Board of Education and the Respondent. As a result of the mediation, the parties determined that the settlement terms represent a fair compromise of the tenure charges and other outstanding litigation between the parties.

Settlement of the tenure charges is furthermore in the public interest as it avoids the financial, legal and administrative burden which will result from continued litigation of the charges and the other legal actions; and allows the Board and the District to hire a new superintendent and move forward without the threat of the litigation hindering the efforts to provide a quality education for the children of Willingboro.

This Stipulation addresses those matters in the parties' global settlement over which the Commissioner has jurisdiction pursuant to N.J.S.A. 18A:17-20.2. This Stipulation is expressly contingent on the approval by the Board and Respondent

of the global Settlement Agreement and Release as to all other matters in litigation between the parties.

6. Release

In exchange for the mutual promises and consideration set forth in this Stipulation, each party and his or its successors, heirs and assigns hereby irrevocably and unconditionally waives, releases and forever discharges any claims or rights, whether known or unknown, which either party has or may have against the other and which could have been raised in the within matter. This Release is in addition to and not in replacement of the Release provisions contained in the parties' global Settlement Agreement and Release.

7. Board Approval

The Board President has been duly authorized by the Board to execute this Agreement on behalf of the Board of Education.

8. Assent to Terms

Respondent hereby acknowledges that he enters into this Agreement with a full understanding of his rights and that he was fully informed of the implications of this Agreement by his legal counsel. Respondent also enters into same without duress and of his own free will and volition.

Respondent acknowledges that he was given the opportunity to fully consider this Stipulation for a period of up to twenty-one (21) days and if he chooses to execute this Agreement before the end of the 21 day period, such early execution is completely voluntary. Respondent further acknowledges that he may revoke his consent to this Stipulation within seven (7) days from the execution of this document by delivering written notification of revocation to the Board's School Business Administrator/Board Secretary. It is understood that if this Agreement is revoked, it will not be effective or enforceable and Respondent will be entitled to none of the consideration described herein.

9. Entire Agreement

This Agreement, together with the global Settlement Agreement and Release, represents the entire understanding of the parties as to the settlement and withdrawal of the tenure charges against Respondent and all other litigation between the parties, and may be modified only in a subsequent written instrument, duly executed by the parties. As set forth above, the parties have entered into a separate global Settlement Agreement and Release fully disposing of all other issues between them in other legal proceedings. No other representations of any kind except as contained in this Agreement and the global Settlement Agreement and Release shall be binding upon the parties.

10. Severability

In the event that a court or agency of competent jurisdiction shall deem any part of this Agreement to be contrary to law, then this Agreement shall be void and of no force and effect.

11. Governing Law

This Agreement and all provisions hereof shall be governed by and construed under the laws of the State of New Jersey.

12. Separate Counterparts

This Agreement may be signed by the parties in one or more counterparts, each of which shall be deemed an original.

IN WITNESS WHEREOF, the parties have knowingly and voluntarily executed and delivered this Stipulation of Settlement on the dates set forth below.

RESPONDENT

ALONZO KITTRELS

DATED:

WILLINGBORO BOARD OF EDUCATION

By _____
KEN J. GORDON, Jr., President

ATTEST:

By _____
KELVIN L. SMITH, Board Secretary

DATED: 7/24/08

s

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 2820-08
AGENCY DKT. 102-4/08

IN THE MATTER OF THE TENURE HEARING OF ALONZO KITTRELS, SUPERINTENDENT, WILLINGBORO SCHOOL DISTRICT, BURLINGTON COUNTY.

Sidney H. Lehmann, Esq., appearing for petitioner, Willingboro Board of Education, (Szaferman, Lakind, Blumstein, Blader & Lehmann, attorneys)

Salvatore Perillo, Esq., appearing for respondent, Alonzo Kittrels, (Nehmad, Perillo & Davis, attorneys)

Record Closed: July 9, 2008 Decided: July 10, 2008

BEFORE **JOHN R. FUTEY**, ALJ:

This matter was transmitted to the Office of Administrative Law on April 25, 2008, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. On May 6, 2008 a telephone conference was scheduled and held in the above captioned matter; after which the case was scheduled for hearing on

July 7, 14, 21, and 22. July 7 and 14 were adjourned due to the representation of counsel that the matter was completely settled.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein. (J-1) The agreement was signed by Rocky L. Peterson, Esq., on behalf of Willingboro and by Mr. Kittrels, respondent.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

July 10, 2008
DATE

JOHN R. FUTEY, ALJ

Date Received at Agency:

JUL 11 2008
DATE

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/mamf

EXHIBITS

Jointly submitted

J-1 Settlement Agreement

HILL WALLACK LLP
202 Carnegie Center
Princeton, New Jersey 08543-5226
(609) 924-0808
Attorneys for School District of the Township of Willingboro, Burlington County

RECEIVED
2008 JUL -2 P 12: 06
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

IN THE MATTER OF THE TENURE HEARING OF ALONZO KITTRELS, SCHOOL DISTRICT OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY Agency Dkt. No. 387-12/05 OAL Docket No. EDU 99-2006S

CERTIFICATION OF

ROCKY L. PETERSON, ESQ.

I, Rocky L. Peterson, Esq., of full age, hereby certifies as follows:

1. I am an attorney at law, admitted in the State of New Jersey.

2. On June 23, 2008, I attended the Executive Session of the Willingboro Township Board of Education. During that Executive Session meeting, the within matter was discussed and settlement was approved pursuant to the terms of the attached Settlement Agreement contingent upon approval of the Commissioner of Education.

3. The Board recognized that the Settlement Agreement is contingent upon approval of same by the Commissioner and must be submitted to the Administrative Law Judge responsible for this matter.

4. Upon approval of this matter by the Commissioner and/or his/her designee, the Board will formally approve the settlement by resolution.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Rocky L. Peterson, Esq.

Dated: June 24, 2008

RECEIVED
2008 JUL -9 A 10: 55
NEW JERSEY
OFFICE OF ADMIN LAW

SETTLEMENT AGREEMENT AND GENERAL RELEASE

SETTLEMENT AGREEMENT AND GENERAL RELEASE (the "Agreement"), dated May 2008, by and between ALONZO KITTRELS ("KITTRELS") and BOARD OF EDUCATION BOROUGH OF WILLINGBORO ("BOARD") for the good and sufficient consideration set forth below, as follows:

1. BOARD, when used in this Agreement, shall mean the Board of Education Borough of Willingboro, its Board members, their predecessors and successors; the current and former officers, directors, representatives, employees and agents of all of them, in their individual or official capacities; and the current and former elected or appointed officials, whether in their individual or official capacities.

2. KITTRELS as used herein means Alonzo Kittrels, his heirs, assigns, representatives, successors-in-interest and predecessors-in-interest.

3. As a result of the expiration of his contract KITTRELS employment with the BOARD as Superintendent is terminated effective June 30, 2008 pursuant to the terms of his contract. ("Termination Date"). As a result of this contract termination, as of June 30, 2008, KITTRELS shall have no duties, responsibilities or authority whatsoever as an employee, agent or representative of BOARD.

4. KITTRELS' unconditional compensation, payments and benefits from BOARD shall be as follows (in each case less applicable statutory deductions and authorized withholdings):

a. KITTRELS will receive his final salary and benefits as Superintendent through the Termination Date including for the period from April 1, 2008 through and including June 30, 2008. KITTRELS will be paid salary for this period in the amount of

$31,197.40.

b. KITTRELS shall receive back pay for salary increases he was contractually entitled to in the amount of $12,535.58 which shall be appropriately reported and credited for pension purposes with the Division of Pensions for the 2005-2006, 2006-2007 and the 2007-2008 school years.

c. KITTRELS shall receive, pursuant to his contract, his accumulated vacation time which represents 36 days of pay in the amount of $20,278.08. The parties recognize that there is pending State legislation which may impact the amount allowable for payment of unused vacation days. Should it be determined that the amount allowable by law to be paid for unused vacation days is less than the amount indicated herein ($20,278.08), then Kittrels shall be entitled to the difference between the amount of $20,278.08 and the amount allowed by statute. Said sum shall be payable and made a part of Paragraph 5 below. In no event, however, shall the amount of unused vacation pay payable to Kittrels exceed $20,278.08.

d. KITTRELS shall receive, pursuant to his contract, $3,500 per year as pension reimbursement. This represents $10,500 for the three years this has been withheld.

5. Upon Kittrels' agreement and acceptance of the terms of the Agreement and his waiver of all claims against the Board or members of the Board past and present, he will receive within thirty (30) days of BOARD'S receipt of this Agreement executed by KITTRELS a gross lump sum payout of Two Hundred and Twenty-five thousand four hundred eighty-eight and 94/100 dollars ($225,488.94). The lump sum

payout will be described throughout this Agreement as the Settlement Payment. In the event that the Settlement payments are not paid in a timely fashion and KITTRELS successfully brings an action to enforce this provision, KITTRELS shall be entitled to reasonable attorney's fees.

6. The parties expressly understand and agree that the Settlement Payments are for compensatory damages and do not constitute backpay and include any and all amounts that may be claimed by KITTRELS or on his behalf against the BOARD, and that the said payment shall include all attorneys' fees that may be claimed by KITTRELS or on his behalf. It is the belief and intent of the parties that no part of the amount payable to Kittrels under this Agreement above is compensation for lost earnings, such as salary or benefits but rather is intended to compensate Kittrels for alleged personal injury, including emotional distress.

7. KITTRELS acknowledges that the Settlement Payments constitute additional consideration not otherwise owed to KITTRELS and that KITTRELS is able to receive the SETTLEMENT PAYMENTS only if he signs this Agreement and does not timely revoke his assent to the Agreement, and expressly waives all claims that he has asserted against the Board or past or present members of the Board. KITTRELS further acknowledges that BOARD owes him no wages, bonuses, vacation pay, sick pay, compensatory time or other compensation or payments of any kind or nature except as set forth in this Agreement. Nothing in this Agreement precludes KITTRELS from participating in and/or receiving any and all vested retirement plan benefits that he is eligible for.

8. (a) In consideration of the SETTLEMENT PAYMENTS and the entry into this Agreement by BOARD, and all payments received under Paragraph 4,

KITTRELS hereby releases and forever discharges BOARD, and all of its or their current and former Board members, officers, directors, employees, attorneys, agents, predecessors, successors, assigns, and legal representatives, whether acting as agents for BOARD or in an individual capacity of and from any and all actions or causes of action, suits, debts, claims, complaints, contracts, controversies, agreements, promises, damages, cross-claims, claims for contribution and/or indemnity, claims for costs and/or attorneys' fees, judgments, and demands whatsoever, in law or equity, which KITTRELS ever had, now has, or may have, as of the date of the execution of this Agreement including, but not limited to: (1) all wrongful discharge claims (including claims based on breach of contract or implied contract, breach of the covenant of good faith and fair dealing, constructive discharge or violation of public policy); (2) claims under Title VII of the Civil Rights Act of 1964 as amended (which prohibits discrimination on the basis of color, national origin, race, religion, and sex); (3) claims under the Age Discrimination in Employment Act (which prohibits discrimination against persons 40 years of age or older because of age); (4) claims under the Employee Retirement Income Security Act of 1974; (5) claims under the Older Workers Benefit Protection Act of 1990; (6) claims under the Civil Rights Act of 1866; (7) claims under the New Jersey Law Against Discrimination (which prohibits discrimination on the basis of age, color, handicap, national origin, race, sex, sexual orientation, or marital or familial status); (8) claims under the Americans With Disabilities Act (which prohibits discrimination on the basis of disabilities); (9) claims under the New Jersey Family Leave Act, New Jersey Equal Pay Act, and New Jersey Wage and Hour law; (10) all whistle-blowing claims (including claims under the New Jersey Conscientious Employee Protection Act); (11) claims under any other federal or state statute, common

law, or decisional law, as well as (12) tort claims such as negligent and/or intentional infliction of emotional distress, libel and slander, retaliation, interference in any contract, economic opportunity or prospective economic advantage, or for alleged violation of any federal, state or local law, regulation, ordinance or common-law duty relating to, arising out of, or having any bearing whatsoever on, KITTRELS former employment by the BOARD, including KITTRELS separation thereof.

(b) KITTRELS acknowledges that by signing and not timely revoking his assent to this Agreement, he is releasing the BOARD and all of its current and former members from any and all claims, whether known, suspected, or unknown, that KITTRELS has or has had against the BOARD and all of its current and former members as of the date of the execution of this Agreement, including, but not limited to, claims related in any way to KITTRELS employment by the BOARD or separation thereof.

9. Neither this Agreement, nor the payment of the SETTLEMENT PAYMENTS, shall be construed as an admission by the BOARD of any liability or unlawful or unethical conduct whatsoever.

10. KITTRELS, through his attorney, and the Board through their attorneys, agree to dismiss with prejudice and in writing , and agree to no longer pursue the matters captioned Kittrels v. Board of Education Borough of Willingboro et al. Docket No. BUR-L-1938-06 and/or BUR-L-261-06, Kittrels v. Board of Education Borough of WillinqboroBUR-L-1883-07. Kittrels v. School District of the Township of Willingboro, Burlington Co.. et al, Docket No. 06-cv-3814, Kittrels v. Sarah Holley, Teresa Owens and Kelly Logan, Docket No. L-27-07, and the tenure charges which are pending before the Commissioner of Education by executing a Stipulation and Order of Dismissal with

Prejudice dismissing the balance of the claims contained therein not previously decided by the Court. Notwithstanding any language to the contrary, this Agreement is contingent upon the dismissal of all of the legal actions referred to above by court order and/or approval of the dismissal by the Commissioner of the New Jersey Department of Education.

11. In consideration of KITTRELS resignation, the BOARD all of its or their current and former Board members, officers, directors, employees, attorneys, agents, predecessors, successors, assigns, and legal representatives, whether acting as agents for BOARD or in an individual capacity hereby releases and forever discharges KITTRELS, and of and from any and all actions or causes of action, suits, debts, claims, complaints, contracts, controversies, agreements, promises, damages, cross-claims, claims for contribution and/or indemnity, claims for costs and/or attorneys' fees, judgments, and demands whatsoever, in law or equity, which the BOARD ever had, now has, or may have, as of the date of the execution of this Agreement relating to KITTRELS.

12. KITTRELS acknowledges that he has returned all of the BOARD'S property. The BOARD and KITTRELS shall agree, within ten (10) days of the execution of this Agreement, the personal property belonging to KITTRELS as described in Exhibit "A" annexed hereto still in the Board's possession shall be returned to KITTRELS.

13. This Agreement is made and entered into in the State of New Jersey and shall in all respects be interpreted, enforced and governed under the laws of said state, irrespective of the principles of conflict of law. Any disputes involving the enforcement of this Agreement shall be venued in the Superior Court of New Jersey, Burlington

County, or in the United States District Court for the District of New Jersey, Camden Vicinage.

14. This Agreement shall be binding upon, and shall inure to the benefit of, the Parties and their respective heirs, administrators, executors, representatives, successors and assigns.

15. Kittrels understands that the BOARD may file whatever forms with the appropriate taxing authorities relating to this Agreement it believes are necessary. Kittrels agrees to assume full liability for applicable state, federal and local taxes, if any, that may be required by law to be paid by him with respect to any settlement payment described herein. The BOARD will be responsible for any applicable state, federal and local taxes which would be the BOARD's responsibility as the employer. Kittrels further agrees that in the event that the Internal Revenue Service or any other taxing authority deems any tax, interest, penalties or other amounts to be due from the Board with respect to this settlement, Kittrels will indemnify the Board for any sums the Board may be required to pay.

16. Kittrels certifies and warrants to the Board that he has no outstanding judgments for child support and that an appropriate judgment search has been conducted. Kittrels agrees to provide a copy of said judgment searches to the Board in accordance with the applicable statute as part of the settlement. In the event Kittrels does have outstanding child support judgments, Kittrels hereby agrees that he will satisfy all such outstanding judgments out of the proceeds of this settlement and that he will fully and completely indemnify the Board for any sums the Board may be required to pay, including reasonable attorneys' fees and costs, with respect to any such outstanding

judgments. The payments set forth in this Settlement Agreement and Release will be paid by the Board in the form of one or more checks. Payments shall be made within thirty (30) days of receipt by Richard L. Goldstein, Esq. of Marshall, Dennehey, Warner, Coleman & Goggin and Kelvin Smith, Business Administrator, Willingboro Board of Education of an original of this Confidential Release and Settlement Agreement executed by Kittrels, signed originals of Stipulations of Dismissal with Prejudice ("Stipulation") in the matters Kittrels vs. Board of Education, Borough of Willingboro, et al., Docket No. BUR-L-261-06; Kittrels vs. Board of Education Borough of Willingboro, Docket No. BUR-L-1883-07, and Kittrels vs. School District for the Township of Willingboro, Burlington County, et al., Docket No. 06-cv-3814, a W-9 executed by Kittrels' counsel and a child support ;judgment search for Kittrels as required by the applicable statute.

17. **Dismissal of Action**: Kittrels understands and agrees that counsel for the Board will file with the Superior Court of New Jersey, Burlington County, the executed original of the Stipulation of Dismissal with Prejudice. Kittrels understands and agrees that the terms of the aforesaid dismissal are expressly incorporated by reference within this Release and Settlement Agreement as if fully set forth herein.

18. **No Claims Permitted/Covenant Not To Sue**: Kittrels waives his right to file any charge or complaint on his own behalf and/or to participate as a complainant, a plaintiff, or charging party in any charge or complaint which may be made by any other person or organization on his behalf, with respect to anything which has happened up to the execution of this Agreement before any federal, state or local court or administrative agency against the Board, except if such waiver is prohibited by law. Should any charge or complaint be filed, Kittrels agrees that he will not accept any relief or recovery therefrom. Kittrels confirms that no such charge, complaint or action exists in any forum

or form other than the Complaints bearing Docket No. BUR-L-261-06, Docket No. BUR-L-1883-07 and Docket No. 06-cv-3814 and covenants not to file any charge, complaint or action in any forum or form against the Board based upon anything which is encompassed by the terms of this Agreement. Except as prohibited by law, in the event that any such charge, complaint or action is filed by Kittrels, it shall be dismissed with prejudice upon presentation of this Agreement and Kittrels shall reimburse the Board for the cost, including attorneys' fees of defending any such action.

19. **Non-disparagement**: The BOARD and KITTRELS agree that they shall not disparage each other whether to any current or former employee of the Board, the press, general public, media, or any other business entity or third party. The parties also agree not to authorize any person to make any disparaging statements about the other or to defame them to any person, entity or third party.

20. **No Cooperation/Participation**: Kittrels covenants and agrees that he will not provide information or consulting advice or counsel to, or otherwise cooperate with or assist in any manner, any entity or person, including, but not limited to, any employee or former employee of the Board asserting, or seeking to assert any cause of action, charge for any claim whatsoever against the Board unless compelled to do so by force of law or subpoena, with respect to any matter that is the subject of this action. Kittrels agrees to cooperate with the Board and its attorneys in defense of Salter, et al v. WBOE, Docket No. BUR-L-80-06. Such cooperation shall include meeting with the Board and its attorneys as necessary upon reasonable notice. In the event KITTRELS incurs any out of pocket expenses such as travel costs,

21. **Entire Agreement**: This Release and Settlement Agreement contains the sole and entire agreement between the parties hereto and fully supersedes

any and all prior agreements and understandings pertaining to the subject matter hereof. Kittrels represents and acknowledges that, prior to executing this Release and Settlement Agreement, he consulted his attorney, that he had ample time to do so, that he obtained the advice of counsel prior to making the decision to execute the Release and Settlement Agreement and that he had not relied upon any representation or statement not set forth in this Release and Settlement Agreement made by any other party thereto, or their counsel or representatives, with regard to the subject matter of this Release and Settlement Agreement. No other promises or agreements shall be binding unless in writing, signed by Kittrels and/or the parties hereto and expressly stated to represent an amendment to this Release and Settlement Agreement.

22. **Severability**: Kittrels and the BOARD agree that if any court declares any portion of this Release and Settlement Agreement unenforceable, the remaining portions shall be fully enforceable.

23. **Liens**: In accordance with Perreira v. Rediger, 330 N.J. Super. 445 (App. Div. 2000) and all applicable law, Kittrels personally guarantees and warrants that all liens and/or monetary obligations owed, whether public, private or otherwise, for any medical, wage, or other benefits received ;by Kittrels or paid by any third party on Kittrels' behalf have been satisfied and paid off in their entirety by Kittrels and/or an authorized agent out of the funds received pursuant to this Release and Settlement Agreement.

24. **Strict Adherence**: The failure of the parties to insist upon strict adherence to any term of this Agreement on any occasion shall not be considered a waiver thereof or deprive that party of the right thereafter to insist upon strict adherence to that term or any other term of the Agreement.

25. **No Assignment**: No party to this Agreement may assign any of its

benefits or delegate any of its duties thereunder without the express written consent of all other parties evidenced by a duly authorized and executed written instrument.

26. **No Waiver of Breach**: The waiver of any provision of this Agreement shall not be construed or operate as a waiver of any subsequent breach.

27 **No Future Employment**: Kittrels agrees that he has no right to employment or re-employment with the Board after the requirements of this Release are met. Kittrels further agrees and warrants that he will not apply to, seek out employment with, or remain employed by the Board at any time after June 30, 2008.

28. BY SIGNING THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE, KITTRELS STATES THAT HE:

(A) Has carefully read this Agreement.

(B) Has had an opportunity to consider this Agreement for 21 days and if he chooses to execute this Agreement before the end of the 21 day period, such early execution is completely voluntary. Has discussed the terms of this Agreement with his attorney before signing this Agreement.

(C) Does understand this Agreement will become final and binding in seven (7) days from when it is signed ("Revocation Period") unless he notifies the Board Business Administrator, via letter, return receipt requested, within this Revocation Period. This Agreement will not become effective and enforceable until after the Revocation Period.

(E) Does understand that his acceptance of any of the SETTLEMENT PAYMENTS at any time after the Revocation Period confirms that he did not revoke his assent to this Agreement and, therefore, it is fully effective and enforceable.

(F) Has agreed that in executing this Agreement, he has not relied and does not rely on any representation or statement made by BOARD, except as contained herein.

(G) Has signed this Agreement voluntarily, without duress or coercion.

(H) Is capable of fully understanding, and does fully understand and agree to, the terms of this Agreement and knows that he is giving up important rights.

29 This Agreement contains the full agreement of the Parties and may not be modified, altered, changed or terminated except upon the express prior written consent of the Parties, which consent must be signed by the Parties or their duly authorized agents.

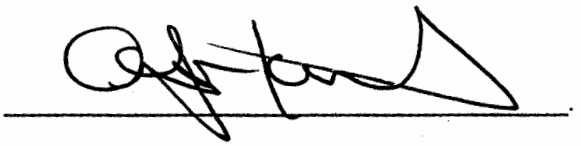
KITTRELS ACKNOWLEDGES THAT HE HAS HAD AMPLE TIME TO CONSIDER THIS AGREEMENT AND GENERAL RELEASE AND CONFIRMS THAT HE HAS CONSULTED WITH HIS ATTORNEY BEFORE EXECUTING THE AGREEMENT.

HAVING ELECTED TO EXECUTE THIS AGREEMENT AND GENERAL RELEASE, TO FULFILL THE PROMISES SET FORTH HEREIN, AND TO RECEIVE THEREBY THE SETTLEMENT PAYMENTS, KITTRELS FREELY AND KNOWINGLY, AND AFTER DUE CONSIDERATION ENTERS INTO THIS AGREEMENT AND GENERAL RELEASE INTENDING TO WAIVE, SETTLE AND RELEASE ALL CLAIMS HE HAS OR MIGHT HAVE AGAINST THE BOARD.

IN WITNESS WHEREOF, the parties knowingly and voluntarily executed and delivered this Agreement as of the date set forth below:

Dated:

ALONZO KITTRELS



WILLINGBORO BOARD OF EDUCATION

By:_____.

Dated:

Ken J. Gordon, Jr.

Date

359-08

#359-08

OAL DKT. NO. EDU 1641-99
AGENCY DKT. NO. 543-12/98

MARIE ASHMEADE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HUDSON COUNTY SCHOOLS OF TECHNOLOGY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed Stipulation of Settlement, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille Edg

COMMISSIONER OF EDUCATION

Date of Decision: 9/04/08

Date of Mailing: 9/05/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 01641-99

AGENCY DKT. NO. 543-12/98

MARIE ASHMEADE,

Petitioner,

v.

BOARD OF EDUCATION OF THE HUDSON COUNTY SCHOOLS OF TECHNOLOGY, HUDSON COUNTY,

Respondent.

Gregory T. Syrek, Esq., for petitioner (Bucceri & Pincus, attorneys)

George B. Campen, Esq. for respondent

Record Closed: July 21, 2008 Decided: July 21, 2008

BEFORE **KEN R. SPRINGER**, ALJ:

This matter was transmitted to the Office of Administrative Law on February 8, 1999 for hearing pursuant to N.J.S.A. 52:14B-1 to -13 and N.J.S.A. 52:14F1 to -15.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

I have reviewed the record and the settlement terms and **FIND**:

1. The parties have agreed to settle this matter and have prepared the attached agreement indicating the terms of settlement.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

3. The individuals signing this agreement on behalf of the Board acknowledge that they have been duly authorized to do so and bind the Board by their action.

I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement shall be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms and that it is further ordered that the proceedings in this matter hereby are **CONCLUDED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

July 21, 2008
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Date Received at Agency: 7-24-08

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUL 24 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

db

BUCCERI & PINCUS, ESQS.
1200 Route 46
Clifton, NJ 07013-2440
(973) 773-5665
Counsel for Petitioner

MARIE ASHMEADE	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	
v.	:	AGENCY DOCKET NO. 543-12/98 O.A.L. DOCKET NO. EDU 1641-99
BOARD OF EDUCATION OF THE HUDSON COUNTY SCHOOLS OF TECHNOLOGY,	:	
Respondent.		STIPULATION OF SETTLEMENT

The petitioner, Marie Ashmeade, and the respondent, Board of Education of the Hudson County Schools of Technology, agree as follows:

1. The respondent shall pay to the petitioner the sum of $10,000.00 in satisfaction of all claims raised, or which could have been raised, in the above-captioned matter.

2. The petitioner agrees to dismiss the above-captioned matter with prejudice.

3. This Agreement shall not in any way be construed as an admission by either party of any liability, or of any wrongful acts whatsoever against the other party or any other person.

4. The parties acknowledge that each has been represented by legal counsel of her or its own choosing, that they sign the Agreement as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein.

5. The individuals signing this agreement on behalf of the Board acknowledge that they have been duly authorized to do so and bind the Board by their action.

6. This Agreement shall be subject to and construed under the laws of the State of New Jersey.

7. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year set forth below.

BOARD OF EDUCATION OF THE HUDSON COUNTY SCHOOLS OF TECHNOLOGY

By: _____
Board President

Dated:

ATTEST:

_____
Board Secretary/Business Administrator

Dated:

MARIE ASHMEADE

_____
Marie Ashmeade

_____
Gregory T. Syrek

#360-08

360-08

THOMAS MORRIS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE OPERATED DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a tenured teaching staff member employed by the District since February 1995 – contended that the Board failed to properly adjust his salary following the withholding of his increment for the 2005-2006 school year. Petitioner argues that the District must properly adjust his salary in accordance with the school laws and commensurate with the step he attained by longevity, and that he is entitled to the salary for that step minus the increment withheld in 2005-2006.

The ALJ found, *inter alia*, that: the decision in *Probst v. Board of Education of the Borough of Haddonfield, Camden County,* 127 *N.J.* 518 (1992) is controlling in this matter; the withholding of an increment is a one-year penalty and if the teacher's performance in subsequent years is satisfactory, the teacher earns the increment for the year in which performance is acceptable; and a teacher's salary who has had an increment withheld is determined by taking the salary earned during the prior year and adding the increment for the current year. The ALJ concluded that an increment withholding does not equal the loss of a step on a teachers' salary guide, and ordered that petitioner's salary for the years subsequent to the withholding should be recalculated and the difference paid to petitioner.

The Commissioner adopted – with supplementation – the Initial Decision of the OAL as the final decision in this matter, and ordered that the petitioner's salary be recalculated for the 2006-2007 and 2007-2008 school years in accordance with the method outlined in the Commissioner's decision and any difference be paid to petitioner.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

September 4, 2008

OAL DKT. NO.EDU 5914-07
AGENCY DKT. NO. 135-5/07

THOMAS MORRIS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE OPERATED DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record in this case, the Initial Decision of the Office of Administrative Law (OAL) and the parties' exceptions and reply exceptions have been thoroughly and independently reviewed. The Commissioner finds that *Probst v. Board of Education of the Borough of Haddonfield, Camden County,* 127 *N.J.* 518 (1992), controls the issues raised herein, and that the Administrative Law Judge (ALJ) correctly construed the *Probst* guidance concerning the salaries of employees who have had increments withheld for a given year, but whose job performances have become sufficient to warrant increments for subsequent years.

The case proceeded in the OAL by way of summary decision, as the facts are not in dispute. Petitioner is a tenured teacher in respondent's district, whose performance during the 2004-2005 school year (his eleventh year of service in the district) was considered deficient, and whose increment was consequently withheld for the 2005-2006 school year. In that year petitioner's performance was considered satisfactory, allowing him to receive an increment for the next school year – 2006-2007. The parties disagree on what petitioner's 2006-2007 salary should have been and how it should have been established.

Below is a chart reflecting respondent's salary guide covering the time period in question, and illustrating increments based on step level[1] and school year.

	2003-2004	2004-2005	2005-2006	2006-2007	2007-2008
10	**52,654**	**53,524**	**54,196**	**54,623**	**55,186**
11	**53,708**	**55,448**	**56,466**	**57,000**	**57,500**
12	**55,283**	**56,554**	**58,387**	**59,900**	**63,400**
13	**71,909**	**74,813**	**77,827**	**79,900**	**79,900***
14					**82,200**

As the ALJ explained, petitioner was on Step 11, *i.e.,* in his eleventh year, during the term 2004-2005 and earned $55,448. For his twelfth year/step, petitioner would have earned $58,387, had his increment not been withheld. However, since his increment for the term 2005-2006 was withheld, his salary for that school year remained at $55,448. The amount of the withheld increment was $2,939 ($58,387 minus $55,448).

Petitioner asserts in his reply exceptions that for the school year 2006-2007, his thirteenth year in the district, he was entitled to a salary of $76,961 – arrived at by subtracting $2,939 (the amount of the increment that was withheld from him for the 2005-2006 school year) from $79,900, the Step 13 wage for the 2006-2007 school year. Respondent agrees that petitioner's salary for the 2005-2006 school year was $55,448 but disagrees about how the compensation for petitioner's thirteenth year (the 2006-2007 school year) should be calculated. In its exceptions it urges that the increment-withholding after petitioner's eleventh year (2004-2005) required him to remain on Step 11 during the 2005-2006 school year. Petitioner could, in respondent's view, progress to Step 12 for the following school year (2006-2007), with the resulting salary of $59,900 – as listed on the district salary guide. Thus, respondent contends

[1] The step level, in general, corresponds to the amount of years of service an employee has achieved in a district.

that the withholding of petitioner's employment and adjustment increments for the 2005-2006 school year barred him in that year from progressing to step 12 on the salary guide, and kept him on the salary grid a step lower than his years of service would otherwise dictate.[2]

Both parties acknowledge that the Supreme Court's holding in *Probst* controls the present case. *Probst* clearly directs that an employee – who has been denied an increment but whose performance for the year during which the increment is withheld is satisfactory – should subsequently receive the increment shown on the salary guide for his or her next year of service. However, that increase is to be added to his or her actual current salary which – by virtue of the prior increment withholding – is lower than the figure set forth on the grid for the employee's current year of service. (*Probst, supra* at 528) *Probst* acknowledges and confirms that as a result of this procedure, the actual salary for a teacher after an increment withholding will not appear on the regular salary schedule/grid for the employee's year of service. (*Ibid)*

Application of the *Probst* holding to the present case results in the following calculations. First, going into the 2006-2007 school year, the district salary guide shows an increase of $21,513 for district employees with petitioner's years of service. Adding this increment to the salary petitioner actually made in 2005-2006 (*i.e.,* $55,448), as opposed to the salary guide figure for twelve-year employees in 2005-2006 ($58,387), results in wages of $76,961 for petitioner's 2006-2007 school year. That is clearly less than the $79,900 that petitioner would have made in the 2006-2007 school year, had no increments been withheld from him.

---

[2] *Probst v. BOE Haddonfield, supra,* at 521-22 explains that employment increments are increases awarded after the successful completion of each year of service, while adjustment increments are instituted for such items as cost of living, achievement of advanced academic credentials, etc. The terms had been defined in *N.J.S.A.* 18A:29-6, but that statute was repealed in 1985.

Contrary to respondent's contentions, *Probst* does not hold that the penalty to an employee whose increment is withheld is relegation to a place in the salary guide that does not reflect his or her years of service. In arguing that *Probst* advocates such a methodology, respondent states – citing to page 523 of the *Probst* decision – that in the 1988-89 school year Probst "was given a raise consistent with the board's salary schedule, but one step behind her peers." (Respondent's exceptions at 2) That is, however, incorrect. As the *Probst* Court stated:

> Probst's salary was established by the board at $27,100 for the 1988-89 school year. That amount represented a $2,100 increase from her previous salary and was based on an employment increment of $800 and an adjustment increment of $1,300. Although those increments were consistent with the compensation progression established in the Haddonfield salary schedule, $27,100 does not appear on the guide for the 1988-89 school year.
>
> *Probst, supra,* at 522. Emphasis added.

Had Probst been "given a raise consistent with the board's salary schedule [for 1988-89], but one step behind her peers," as respondent suggests, she would have received $28,400. Ironically, this is what Probst had demanded, *see, e.g. Probst* at 523, and what the Court ultimately denied. (*Probst* at 528) Moreover, the *Probst* Court specifically found that "continued off-guide compensation does not amount to a continuing punishment," clearly implying that there was no legal impediment to paying employees salaries that are not specifically set forth on the district's compensation guide.

Respondent argues that there is nothing in *Probst* that would support the proposition that employees whose increments have been withheld can be automatically "returned" to their original steps. (Respondent's Exceptions at 2) That argument must be rejected, since there is nothing in *Probst* that holds that an employee who loses an increment automatically forfeits his or her step progression – the element which reflects the number of

years he or she has served in the district. No restoration is necessary where there has been no forfeiture.

Additionally, the Commissioner concurs with the ALJ that respondent's position is not supported by dictum in *North Plainfield Educational Assoc. v. Board of Education of the Borough of North Plainfield*, 96 *N.J.* 587 (1984). Respondent places heavy reliance on the last sentence in *North Plainfield,* which was also mentioned in *Probst*:

> Furthermore, the fact that teachers will always lag one step behind is not attributable to a new violation each year, but to the effect of an earlier employment decision, one that is protected by the regulatory period of limitations.
>
> *North Plainfield* at 595.

As the ALJ explained, there is nothing in *North Plainfield* to suggest that the word "step" in the foregoing quote was intended as a term of art meaning a specific salary allotted to employees who successfully achieve a fixed number of years of service.

The sentence, to the contrary, was intended to reinforce the Supreme Court's prior sentence advising that the withholding of an increment – notwithstanding the fact that it results each year in a salary lower than the one listed on the district salary guide – cannot be characterized as a continuing violation for purposes of the application of a regulatory limitations period. Indeed, the gravamen of the controversy presented in *North Plainfield* was the question of whether the limitations period then set forth in *N.J.A.C.* 6:24-1.2, now *N.J.A.C.* 6A:3-1.3(i), applied to the petitioner's appeal of the respondent's action of withholding an increment from her.

In summary, the Initial Decision is adopted as the final decision in this case, for the reasons expressed therein and supplemented herein. Petitioner's salary shall be recalculated for the 2006-2007 and the 2007-2008 school years in accordance with the method outlined

herein, and any difference between the result and that which petitioner has already received shall be paid to him.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 9/04/08

Date of Mailing: 9/05/08

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
ON MOTION FOR
SUMMARY DECISION
OAL DKT. NO. EDU 05914-07
AGENCY DKT. NO. 135-5/07

THOMAS MORRIS,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF NEWARK, ESSEX COUNTY,

Respondent.

Sanford R. Oxfeld, Esq., and **Ariel S. Peikes**, Esq., for petitioner Thomas Morris (Oxfeld Cohen, attorneys)

Arsen Zartarian, Esq., Senior Associate Counsel, for respondent State-Operated School District of the City of Newark (Perry Lattiboudere, Esq., General Counsel, attorney)

Record Closed: March 14, 2008 Decided: June 23, 2008

BEFORE: **JEFFREY A. GERSON**, ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Morris is a tenured teaching staff member employed by the State-Operated School District of the City of Newark.

Morris has been employed by the School District in a permanent capacity since February 1995.

For the school year of 2005-2006, Morris's salary increment was withheld.

Respondent contends that the withholding of Morris's increment results in his loss of a step on the salary guide.

Morris contends that he should continue to get credit for his yearly service and receive a salary equal to that which appears on the salary guide for the step he has attained, less the amount of the increment withheld.

DISCUSSION

Cross-motions for summary decision were filed. There are no facts in dispute but the interpretation of case law and statutes are in dispute.

Below is reproduced a chart reflecting the salary guide covering the time period in question illustrating increments based on step level and school year.

	2003-2004	2004-2005	2005-2006	2006-2007	2007-2008
10	**52,654**	**53,524**	**54,196**	**54,623**	**55,186**
11	**53,708**	**55,448**	**56,466**	**57,000**	**57,500**
12	**55,283**	**56,554**	**58,387**	**59,900**	**63,400**
13	**71,909**	**74,813**	**77,827**	**79,900**	**79,900***
14					**82,200**

Morris was on Step 11 during the term 2004-2005 and earned $55,448.

For year twelve, had Morris's increment not been withheld, he would have earned $58,387.

Since Morris's increment for the term 2005-2006 was withheld, his salary for the school year 2005-2006 remained at $55,448. The amount of the increment withheld was $2,939 ($58,387 minus $55,448).

For the school year 2006-2007, Morris contends he is entitled to $79,900 (Step 13) minus $2,939 (increment withheld) resulting in a salary of $76,961.

Respondent contends that Morris's salary for the 2005-2006 school year is $55,448 ($58,387 minus $2,939) and for the 2006-2007 school year, Morris would remain at Step 12 resulting in a salary of $59,900.

The Newark Public Schools contend that the withholding of both Morris's employment increment and adjustment increment deprives Morris of the benefits of a step on the salary guide.

Morris contends that he does not get penalized a step on the salary guide but does forfeit the withheld increment amount on a yearly basis unless or until his return to the appropriate remuneration reflected in the salary guide.

LAW

N.J.S.A. 18A:29-14 provides that "any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year . . . ." The statute goes on to state that "it shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment." Ibid.

Morris unsuccessfully contested the withholding of the increment but contends that the Newark Public Schools are misapplying the law regarding a withholding of an increment.

Both sides cite Probst v. Board of Education of the Borough of Haddonfield, 127 N.J. 518 (1992) in support of their positions.

The Newark Board cites North Plainfield Education Association v. The Board of Education, 96 N.J. 587 (1984), in which the Court noted that teachers who have been subject to withholding "will always lag one step behind" their colleagues due to the effect of an earlier employment decision.

Morris contends that he is entitled to a salary commensurate with the step he attained by longevity and that he is entitled to the salary for that step minus the increment which had been withheld.

DISCUSSION

Probst resolved the question of whether or not a teacher whose increment had been withheld could be paid a salary not appearing on the salary guide. Probst also clarified what should occur in subsequent years after the withholding of an increment. The logic was simple and compelling. The withholding of an increment was a one-year penalty and if the teacher's performance in subsequent years was found to be satisfactory, the teacher had earned the increment for the year in which performance was acceptable.

Probst indicated that ". . . a satisfactorily-performing teacher is entitled only to a yearly increase in salary. That increase should equal the annual salary progression reflected for that year in the schedule in place at the teacher's district."

A teacher's salary who has had an increment withheld is determined by taking the salary earned during the prior year and adding the increment for the current year.

Thus, in this case, though Morris's salary for the school year of 2005-2006 remained at the $55,448 level, this was as a result of a computation which placed him at Step 12 and deducted the amount of the withheld increment.

For the year 2006-2007, Morris would have been on Step 13 and entitled to earn $79,900 if there had been no increment withholding. The increment for the year 2006-2007 was $21,513. Morris's salary for 2006-2007 should have been calculated by

taking his salary for the previous year ($55,448) and adding the increment ($21,513). Morris's salary for 2006-2007 should be $76,961. The same calculation method should be applied to 2007-2008.

The language from North Plainfield Education Association v. The Board of Education, supra, referring to how a teacher would ". . . always lag one step behind" is turning a colloquialism into a legalism. If the Legislature intended to deprive a teacher of a step on the salary guide, the statute would have been so constructed. The "step" referred to in North Plainfield Education Association did not mean a salary guide step but was merely a descriptive term used to describe the long-term detriment of an increment withholding.

CONCLUSION

I **CONCLUDE**, therefore, that an increment withholding does not equal the loss of a step on a teachers' salary guide. Salary for subsequent years after the withholding is determined by taking the salary for the previous year and adding the amount of the increment for the year in which the teacher performed satisfactorily after the withholding.

ORDER

I **ORDER** that Morris's salary for the years subsequent to the withholding (2006-2007) (2007-2008) should be recalculated and the difference paid to Morris.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and

unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

JUNE 23 08
DATE

JEFFREY A. GERSON, ALJ

Date Received at Agency: 6/23/08

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUN 24 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

sej

364-08

#364-08

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
S.K. AND R.C.,	:	
RESPONDENTS.	:	

SYNOPSIS

Petitioning Board filed a complaint seeking reimbursement from respondents, S.K. and R.C., of the costs of tuition pertinent to the period of ineligible attendance of R.C.'s children, J.B. and Z.B., during the 2007-08 school year. Respondents failed to appeal the Board's residency decision, and failed to answer the petition seeking payment of tuition.

The Commissioner directed respondents to submit an answer to the petition pursuant to *N.J.A.C.* 6A:3-1.5, and informed respondents that if no answer was submitted, each count of the petition would be deemed admitted and the matter could then be decided on a summary basis. As no answer was subsequently submitted, the Commissioner granted summary decision in favor of the Board, and ordered respondents – jointly, severally or in the alternative – to remit to the Board tuition in the amount of $38,252.24.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

September 10, 2008

AGENCY DKT. NO. 157-6/08

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
S.K. AND R.C.,	:	
RESPONDENTS.	:	

For Petitioner, Dennis M. DeSantis, Esq. (Destribats, Campbell, DeSantis, Magee & Staub)

No appearance by or on behalf of Respondents

This matter came before the Commissioner of Education by way of a verified petition of appeal filed on June 3, 2008 by the Hamilton Township Board of Education (Board), seeking an order directing respondents to pay the Board $38,252.24 in tuition it has assessed for the 2007-08 school year based on respondent R.C. having falsely represented to the Board that she was residing in the Board's district and respondent S.K. having falsely represented that R.C. and her child, J.B., were living in his home in the district, causing the Board to have assumed responsibility for the education of J.B. and R.C.'s other child, Z.B., who was attending school in an out-of-district placement due to special needs.[1]

By notice dated June 3, 2008, the Bureau of Controversies and Disputes (the Bureau) directed respondents, via regular mail, to file an answer to the petition; on June 24, 2008, the

[1] $6,649.20 of this amount is attributable to J.B., and $31,603.20 to Z.B. Respondent R.C. was presented with notice of her children's ineligibility on January 18, 2008; a Board hearing was held on March 6, 2008, and on March 17, 2008 the Board resolved to disenroll the students. Demands for back tuition were sent to R.C. on March 19, 2008 and to S.K. on April 9, 2008.

Bureau so directed respondents for a second time, via both regular and certified mail. The certified notice sent to S.K. was confirmed as delivered on the United States Postal Service's tracking system, while the notice to R.C. was returned as refused; the notices sent by regular mail were not returned. The first communication from the Bureau clearly provided respondents with notice that, pursuant to *N.J.A.C.* 6A:3-1.5, an individual against whom a petition is filed shall have 20 days from receipt of the petition to file an answer; the second notice advised that if respondents did not file an answer within ten days of the notice's receipt, each count of the petition would be deemed admitted and the Commissioner might decide the matter on a summary basis.

Notwithstanding the above, neither respondent nor any attorney(s) purporting to represent them individually or jointly has filed an answer to the Board's allegations, which the Board's Director of Secondary Education has certified to be true – including the fact that $38,252.24 is the amount of tuition due for the time R.C.'s children were improperly enrolled in the Board's district. The Commissioner, therefore, concludes that the Board's allegations – which respondents have chosen not to deny – may be deemed admitted pursuant to *N.J.A.C.* 6A:3-1.5(e), and are sufficient to justify an order directing respondents to pay the tuition assessed.

Accordingly, it is ORDERED that summary decision shall be granted to the Board, and that respondents shall – jointly, severally or in the alternative – remit to the Board tuition in the amount of $38,252.24 for the period of time in which R.C.'s children were enrolled in the district notwithstanding their ineligibility for a free education therein.[2]

Lucille Wray

COMMISSIONER OF EDUCATION

Date of Decision: 9/10/08
Date of Mailing: 9/10/08

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

361-0

#361-08

OAL DKT. NO. EDU 3962-08
AGENCY DKT. NO. 82-3/08

K.E. on behalf of minor child X.K.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the June 19, 2008 resolution of the respondent board of education (the Resolution), and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. The Commissioner notes that there is nothing in the record from petitioner memorializing her consent to the terms set forth in the Resolution.

Accordingly, the Commissioner is constrained to reject the Initial Decision, and remand the case to the OAL for further proceedings to perfect a settlement or adjudicate the issues.

IT IS SO ORDERED.

Lucilla E Day

COMMISSIONER OF EDUCATION

Date of Decision: 9/08/08

Date of Mailing: 9/08/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 03962-08
AGENCY DKT. NO. 82-3/08

K.E. o/b/o minor child, X.K.E.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE, UNION COUNTY,

Respondent.

K.E., pro se

John E. Croot, Esq., for respondent (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: July 11, 2008 Decided: July 22, 2008

BEFORE **GAIL M. COOKSON,** ALJ:

This matter was transmitted to the Office of Administrative Law on April 4, 2008, for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

A hearing was scheduled for May 28, 2008. The parties appeared and reached an agreement which was put on the record. On July 11, 2008, the undersigned received the attached Board Resolution approving settlement.

I have reviewed the record and the settlement terms and I **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

July 22, 2008
DATE

Gail M. Cookson
GAIL M. COOKSON, ALJ

Receipt Acknowledged:

7-24-08
DEPARTMENT OF EDUCATION

DATE

Mailed to Parties:

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUL 24 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

pb

10. Motion to approve the attached resolution concerning the settlement for non-residency for Pupil #70746559639 (Attachment ED#4-06/08)

Motion: Yafet Second: Menza

Daniels	Y	Menza	Y
Garretson	Absent	Smith	Y
Humphrey	Y	Yafet	Y
Isaac	Y	Sileem	Y
Korzeneski	Y		

Motion 10 carried. 8 Yes 0 No

I hereby certify that this is a true copy of the minutes of the Regular Meeting of the Hillside Board of Education held on June 19, 2008.

Kenneth R. Weinheimer
Business Administrator/Board Secretary

2008 JUL 16 A 8:04
OFFICE OF ADMINISTRATION

Shading indicates additions since Committee Meeting
Underlining indicates additions since initially sent to board.

Hillside Board of Education
Settlement of Pending Action Pertaining to the Determination of
Non-Residency of Pupil #7074659639
June 19, 2008

WHEREAS, a residency hearing concerning pupil #7074659639 was held before a committee of the Hillside Board of Education on February 27, 2008; and

WHEREAS, on February 28, 2008 the Board of Education adopted a resolution accepting the committee's recommendation that #7074659639 be removed from the District because she was not domiciled in Hillside; and

WHEREAS, the parent of pupil #7074659639, filed a petition of appeal with the Commissioner of Education; and

WHEREAS, the appeal was transferred to the Office of Administrative Law, Agency Ref. No. 82-3/08; and

WHEREAS, the appeal was scheduled for a hearing on May 28, 2008 before the Hon. Gail M. Cookson, OAL; and

WHEREAS, the parties conferred and agreed to a settlement of the matter; and

WHEREAS, the terms of the settlement were placed on the record on May 28, 2008: and

WHEREAS, the Board of Education, having reviewed the terms of the proposed settlement, has determined that the resolution of this matter without further litigation is in the best interests of the District;

NOW, THEREFORE, BE IT RESOLVED, that the Board approves settlement of the pending action according to the following terms:

- Pupil #7074659639 will be permitted to complete the 2007-08 school year in the Hillside School District;
- At the end of the 2007-08 school year, pupil #7074659639 will be dis-enrolled from the District;
- Pupil #7074659639 will not be permitted to re-enroll in the District unless it is demonstrated that she is properly domiciled in Hillside;
- Parent of pupil #7074659639 will pay to the District the sum of $2,000.00 within sixty (60) days of May 28, 2008;
- If the payment is not made on time, the District may enter a judgment against parent of pupil #7074659639 in the amount of $7,138.31; and
- The Board President and Secretary are authorized to execute any documents required to complete the settlement.

362-0

#362-08

AGENCY DKT. NO. 228-7/08

ALIZAH CHOMSKY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

On June 5, 2008 petitioner filed an appeal asking the Commissioner to order respondent to "restore" eleven sick days to her accumulated leave time for an absence which she contends was due to a work related injury. The Office of Controversies and Disputes of the Department of Education (C&D) advised petitioner's counsel that the Commissioner does not accept petitions invoking *N.J.S.A.* 18A:30-2.1 until a determination has been made by the Workers' Compensation Court (WC Court) that the subject injury was incurred in the line of duty, or a settlement has been reached in the WC Court by the parties without a determination of work-related causation, or a determination has been made that the claim constitutes an exception to the rule that the Commissioner defer jurisdiction until the WC Court makes its findings. *See N.J.A.C.* 6A:3-1.3(c).

By letter filed on July 23, 2008, petitioner – through her attorney – challenged C&D's advice, stating that she does "not believe anything in the Agency's enabling legislation requires an employee to file a workers compensation claim before the Commissioner can

exercise jurisdiction over a claim under *N.J.S.A.* 18A:30-2.1." C&D docketed the petition and invited respondent to reply to petitioner's contentions concerning the jurisdictional issue.[1]

The Commissioner has considered petitioner's opinion, and rejects it. For decades it has been the rule in New Jersey that the Commissioner accept the determination of the Workers' Compensation Court as to whether an injury is classifiable as work related:

> [A]s the express function of *N.J.S.A.* 18A:30-2.1 is to complement workers' compensation benefits for a strictly limited time period, a proceeding pursuant to that statute may not be utilized to supplant the function of the compensation court. By its terms, this statute contemplates a prior determination of a compensable injury by the compensation court before consideration by the commissioner of the eligibility of the injured employee for the additional benefits provided by the statute.
>
> *Forgash v. Lower Camden County School,* 208 *N.J. Super.* 461, 466-67 (App. Div. 1985).

See, also, Jaques Verneret v. Board of Education of the City of Elizabeth, 95 *N.J.A.R.*2d (EDU) 134, 135.

Accordingly, the petition is dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 9/08/08

Date of Mailing: 9/08/08

[1] No reply was forthcoming from respondent.

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

366-08

DEBORAH PERRI,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner contends that she was tenured in the position of Director of Student Services, the title under which she was employed from 1998 until 2006. Petitioner alleges that her tenure rights were violated when the Board 1) reassigned her to the title of Supervisor of Pupil Personnel Service/Guidance following a review of certificated staff assignments/titles by the New Jersey Department of Education in the Fall of 2006, and 2) reduced her salary although her duties remained the same.

The ALJ found, *inter alia,* that: the title of Director of Student Services is not a recognized title; "director" is not a position enumerated in *N.J.S.A.* 18A:28-5, and therefore is not separately tenurable; regulations clearly distinguish between the endorsements for director of school counseling services and director of student personnel services – which are endorsements on the educational services certificate – and the separate and distinct endorsements for a school administrator or principal, which are endorsements on the administrative certificate; and petitioner did not (and does not) hold the endorsement required to serve in a director position with district-wide supervisory responsibility over a guidance department while employed as the Director of Student Services. The ALJ concluded that petitioner could not have acquired tenure because tenure protection is limited to staff members who hold the appropriate certificate issued for their position by the State Board of Examiners, and that the Board's actions – eliminating petitioner's former unrecognized title, appointing her to a newly created supervisory position for which she was properly certified, and determining her compensation in accordance with the supervisor's salary guide based on her length of service – were consistent with the tenure/seniority requirements and other applicable law. The ALJ recommended that the petition be dismissed.

The Commissioner adopted the Initial Decision with modification. The Commissioner concurred that the petition should be dismissed for the reasons stated by the ALJ; however, the Commissioner also found that petitioner's duties in the new position of Supervisor of Student Personnel Services/Guidance continue to fall within the scope of the director of school counseling services endorsement – which petitioner does not hold – and ordered the Board to take action as is necessary to conform its provision of student personnel/guidance services to applicable law governing staff certification, subject to review and approval by the Acting Executive County Superintendent.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

September 10, 2008

OAL DKT. NO. EDU 01395-07
AGENCY DKT. NO. 416-11/06

DEBORAH PERRI, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have timely exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4. The respondent Board of Education (Board) did not reply to petitioner's exceptions.

In her exceptions, petitioner asserts that the conclusions of the Administrative Law Judge (ALJ) are in error, reiterating her contention that the title of director is a recognized one which she was (and is) qualified to hold by virtue of her initial principal/supervisor and subsequent school administrator certification, so that she attained tenure in the position of director and the Board could not simply change her title from director to supervisor and reduce her salary. Petitioner again contends that the position of director is clearly addressed – and treated as tenurable – in certification and seniority rules, and a director's specific assignment to "student services" can alter neither the basic scope of the position's tenure rights (as opposed to seniority rights) nor the certification required to hold it, i.e., the principal or school administrator endorsement on the administrative certificate. Petitioner also objects to the

Initial Decision's failure to address the fact that she is performing the same duties as supervisor that she did as director, asserting that the "title gamesmanship" at work here enabled the Board to "strip petitioner of the protections afforded by tenure and reduce her salary by $5,850.00 while requiring her to work the same 12-month contract and perform the same duties that she performed as a director." (Petitioner's Exceptions at 1-11, quotation at 10)

Upon review, the Commissioner adopts the Initial Decision of the OAL with modification as set forth below.

Initially – for the reasons set forth at length in the Initial Decision – the Commissioner fully concurs with the ALJ that petitioner's service as Director of Student Services was in an unrecognized title and that petitioner did not possess the requisite certification for the appropriate recognized title, so that she could not obtain tenure and has no entitlement to the relief she seeks in this matter. The Commissioner further concurs that the Board was required by applicable law to eliminate its unrecognized directorship, and that creating the recognized position of Supervisor of Student Personnel Services/Guidance and assigning petitioner to it was – on its face – a permissible option for the Board in seeking to address the concerns raised by the County Superintendent.

However, the Commissioner cannot ignore that – as observed by petitioner, albeit for different reasons – the duties of the district's newly created supervisory position (Exhibit J-7) are identical to those of the abolished directorship (Exhibit J-4). Consequently, under the circumstances operative herein, such duties – notwithstanding the title of the position – continue to fall substantially within the scope of the director of school counseling services endorsement and cannot be performed by staff without the requisite certification. Therefore, in order to comply with applicable rules and regulations – as set forth in the Initial Decision at 11-13 – the

Board must either reform the duties of its Supervisor of Student Personnel Services/Guidance position to be consistent with the lesser levels of responsibility appropriate to nonspecialized certification, or – if the Board wishes to maintain a position embodying the higher-level duties previously assigned to the Director of Student Services and now assigned to the Supervisor of Student Personnel Services/Guidance – such position must be appropriately titled and staffed.

Accordingly, for the reasons expressed herein, the Initial Decision of the OAL is adopted, with modification, as the final decision in this matter. The petition of appeal is dismissed, and the Belleville Township Board of Education is directed to take such action as is necessary to conform its provision of student personnel/guidance services to applicable law governing staff certification, subject to review and approval by the Acting Executive County Superintendent.

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 9/10/08

Date of Mailing: 9/10/08

* This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 01395-07
AGENCY DKT. NO. 416-11/06

DEBORAH PERRI,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,
Respondent.

Robert M. Schwartz, Esq., for petitioner

Mark A. Wenczel, Esq., for respondent (Gaccione, Pomaco & Malanga, attorneys)

Record Closed: January 29, 2008 Decided: June 12, 2008

BEFORE **MARGARET M. MONACO**, ALJ:

STATEMENT OF THE CASE

Petitioner Deborah Perri claims that she achieved tenure status in her position of Director of Student Services and respondent Board of Education of the Township of Belleville (the Board) violated her tenure rights when it reassigned her to the position of

Supervisor of Pupil Personnel Services/Guidance with a resulting decrease in salary. The Board controverts petitioner's tenure claim.

PROCEDURAL HISTORY

On November 1, 2006, petitioner filed a Petition of Appeal with the Commissioner of Education. Petitioner asserts that she achieved tenure in her position of director and the Board's reassignment of petitioner to the job title of Supervisor of Pupil Personnel Services/Guidance, which resulted in a decrease in petitioner's salary, violated her tenure rights. Petitioner seeks reinstatement to the title of director at petitioner's rate of compensation prior to her reassignment together with retroactive relief. On December 13, 2006, the Board filed an Answer to the Petition of Appeal. The Department of Education transmitted the contested case to the Office of Administrative Law, where it was filed on January 16, 2007. A hearing was held on November 2, 2007, after which the record remained open for the receipt of a transcript of the hearing and post-hearing briefs. The parties submitted briefs and reply briefs in support of their respective positions. The record closed upon receipt of the last submission.

FINDINGS OF FACT

The essential facts surrounding this matter are not in dispute. At the commencement of the hearing, the parties submitted a Joint Stipulation of Facts memorializing the parties' agreement with respect to certain facts and the admission of various documents in evidence. J-18. Based upon a review of the testimony and the documentary evidence presented, including the Joint Stipulation of Facts (Stip), and having had the opportunity to observe the demeanor and to assess the credibility of the witnesses, I **FIND** the following **FACTS**:

Petitioner has been employed by the Board since January 1977. Stip at ¶1. Petitioner was initially employed by the Board as a physical and health education teacher in or about January of 1977. Stip at ¶2. In or about September 1988, petitioner

was appointed to the position of substance awareness coordinator in which she continued through the conclusion of the 1997-1998 school year. Ibid.

On November 18, 1997, the then Superintendent of Schools for the Board, Michael Lally, corresponded with the Essex County Superintendent of Schools, Mary Lou Malyska, requesting on behalf of petitioner a certification for the title of Director of Student Personnel Services from the Office of Licensing and Academic Credentials in the Department of Education. Stip at ¶3; J-1. Petitioner signed at that time an Application for Licensure seeking a Director of Student Personnel Services endorsement. By memorandum dated December 17, 1997, the Department of Education informed the Essex County Office of Education that petitioner needed to present (1) a regular New Jersey Student Personnel Services endorsement, (2) official evidence of three years of successful experience in school personnel work, and (3) eighteen additional semester-hour credits in guidance to be eligible for a "regular New Jersey Director of Student Personnel Services endorsement." Stip at ¶4; J-3. Although this correspondence was not sent directly to petitioner, petitioner was made aware at the time that she needed to fulfill the above additional requirements in order to be eligible for the requested endorsement. Petitioner did not later take any additional semester-hour credits in guidance.

Subsequent to this correspondence, on or about July 27, 1998, the Board approved a job description for the title of Director of Student Services. The qualifications for the position were listed as a "Principal or Administrator's Certification," and five years experience in administrative/student related services. Stip at ¶5; J-4. By letter dated September 1, 1998, the Acting Superintendent of Schools, Dr Joseph Ciccone, informed petitioner that she was appointed by the Board to the position of Director of Student Services effective September 1, 1998. Stip at ¶6; J-5.

At the time the Board created and appointed petitioner to the position of Director of Student Services, the Board also employed an individual, Dr. Richard Benninger, as the Director of Pupil Personnel Services. Dr. Benninger supervised guidance counselors as Director of Pupil Personnel Services. Petitioner was also responsible for supervising guidance counselors as Director of Student Services. In addition, petitioner

supervised the Substance Awareness Coordinator, the Crisis Intervention Specialist and social workers. Dr. Benninger retired within a matter of months after petitioner became the Director of Student Services. The Board did not hire another individual to serve in the role of Director of Pupil Personnel Services after Dr. Benninger's retirement.

Petitioner served as a Director of Student Services from in around September 1, 1998, to October 16, 2006. Petitioner held a Principal/Supervisor endorsement, which was issued in or around October 1982, at the time of her appointment to this title. She also held endorsements to serve as a Substance Awareness Coordinator, a Teacher of Driver Education and a Teacher of Health/Physical Education. Subsequently, petitioner obtained a School Administrator endorsement in May 2003. J-15. Petitioner did not ever hold a Director of Student Personnel Services endorsement or a Director of School Counseling Services endorsement.

Dr. Edward Kliszus has served as the Superintendent of Schools for the Board since February 2005. Dr. Kliszus's responsibilities in this position include, among others, ensuring that every staff member in the district is appropriately certified for his/her title and job description.

The Acting Director of the Office of Licensure and Credentials, Dr. Robert Higgins, forwarded a memorandum to all "Chief School Administrators" dated July 27, 2006, which advised that the Department of Education was reviewing all district certificated staff assignments to assure that all New Jersey districts have properly certified staff assigned to appropriate teaching, educational support and administrated positions. Dr. Higgins also attached a printout of State positions certification requirements. Stip at ¶ 11; J-10. The memorandum further stated that the Department "was resuming the practice of issuing a Licensing Status (Matrix) report that will enable each district to ascertain that its certified staff have appropriate work assignments"; the "Matrix report lists all staff who *potentially* may be working out of their certificate area and who *potentially* may have other issues related to their certificate status"; and the "outcome will be to identify problematic staff assignments and certificates and create a corrective action plan for any such issues." Dr. Higgins indicated in the memorandum that the Department was requesting all districts to prepare an initial report for their

county offices of education by September 7, 2006, and have a final report and corrective action plan in place by September 28, 2006. Dr. Kliszus described that he regularly receives updates regarding this type of report, which sets forth job titles and appropriate certifications for the positions; he must submit a report to the State each Fall of all certified staff titles and certificates they hold; and he uses this type of report to ensure that the Board has correct titles and certificates. The enclosed report includes the title of Director of Student Personnel Services/Guidance (506), along with the certifications required for that title; specifically, a Director of Student Personnel Services or a Director of School Counseling Services endorsement. It also includes the title of Supervisor of Pupil Personnel Services/Guidance (306) and the certifications required for that title, which include, among others, either a Principal/Supervisor, School Administrator, Director of Student Personnel Services or Director of School Counseling Services endorsement. The title of Director of Student Services is not listed in the report.

On September 6, 2006, the Essex County Superintendent of Schools, Anthony Marino, contacted Dr. Kliszus. The County Superintendent informed Dr. Kliszus that the title of Director of Student Services was an unrecognized and unapproved title, and directed Dr. Kliszus to correct the situation.

By letter dated September 7, 2006, Dr. Kliszus informed petitioner that because of a "recent dialogue" with the NJDOE/Essex County Office regarding certification issues she was to be the subject of discussion during an executive session meeting of the Board on September 11, 2006. Stip at ¶9; J-8. By memorandum dated September 11, 2006, Dr. Kliszus informed the Board that the Essex County Superintendent's office had contacted him on September 6, 2006, to discuss the certification of the current Director of Student Services, and informed him that the title of Director of Student Services is an unrecognized title. Stip at ¶13; J-12. Dr. Kliszus further advised the Board in the memorandum that petitioner's current certifications (principal/supervisor/school administrator) permit her to serve only as a Supervisor of Pupil Personnel Services/Guidance, and that the Director of Student Services/Guidance requires certification titled "Director of Student Personnel Services" or "Director of School Counseling Services" neither of which petitioner holds. The

Board discussed the matter at its September 11, 2006, meeting and requested Dr. Kliszus to obtain the directive from the County office in writing. J-16. Petitioner attended the meeting and was afforded the opportunity to address the Board. Ibid.

The Essex County Superintendent of Schools, Anthony Marino, later memorialized his conversation with Dr. Kliszus in a letter to Dr. Kliszus dated September 12, 2006. J-11. The County Superintendent indicated in the letter that it had come to his attention that the "Belleville School District currently is using the unrecognized title of Director of Student Services." Stip at ¶12; J-11. The County Superintendent noted that this individual was responsible for the supervision of the Guidance Department district-wide. He further informed Dr. Kliszus that "[p]ursuant to N.J.A.C. 6A:9-5.5 all unrecognized titles must be submitted for yearly approval by the County Superintendent of Schools"; "[o]ur records indicate that approval for the use of Director of Student Services has not been requested to date"; and, "[s]hould approval be requested, it would not be granted since the indicated certificates for that position . . . [would] be Director of Student Personnel Services, or Director of School Counseling Services, both of which would allow the use of a recognized title." The Superintendent advised Dr. Kliszus that, if a current employee was not available with the appropriate certificate for either of the above recognized titles, and the district did not wish to add additional staff, a possible alternative could be the recognized title of Supervisor of Pupil Personnel Services/Guidance, for which an individual with that title would be required to hold either a School Administrator, Principal or Supervisor certificate. The County Superintendent directed Dr. Kliszus that, "[s]ince law and code require that all individuals be appropriately certified for their respective positions, this situation must be corrected immediately."

By letter dated September 20, 2006, Dr. Kliszus again advised petitioner that because of the "recent dialogue" with the NJDOE/Essex County Office regarding certification issues she was to be the subject of discussion by the Board at its meeting on September 25, 2006. Stip at ¶10; J-9. By memorandum dated September 25, 2006, Dr. Kliszus informed the Board that he was recommending the creation of a twelve-month Supervisor of Pupil Personnel Services/Guidance position, along with the approval of a job description for this position. Stip at ¶14; J-13.

On September 25, 2006, the Board approved a job description for the title of twelve-month Supervisor of Pupil Personnel Services/Guidance. Stip at ¶8; J-7. The certifications listed for the position include School Administrator, Principal, Supervisor, Director of Student Personnel Services or Director of School Counseling Services.

On or about September 26, 2006, a job posting was issued for the title of "Supervisor of Pupil Personnel Services/Guidance 12-month." Stip at ¶7; J-6. On or about October 6, 2006, petitioner submitted a letter to Dr. Kliszus enclosing her resume in response to the advertisement for the new position of Supervisor of Pupil Personnel Services/Guidance. J-15; J-15a. By memorandum dated October 16, 2006, Dr. Kliszus recommended to the Board the appointment of petitioner as a twelve-month Supervisor of Student Personnel Services/Guidance at a salary of $118,542 plus longevity of $8,400 for a total of $126,942. Stip at ¶15; J-14. Thereafter, by letter dated October 17, 2006, Dr. Kliszus informed petitioner that the Board adopted a resolution appointing her to the position of twelve-month Supervisor of Student Personnel Services at a salary of $118,542, Step 4, 2006-2007 12-month Supervisors Guide, effective October 17, 2006. J-17.

As Director of Student Services, petitioner had been earning for the 2006-2007 school term the annual sum of $124,392. Stip at ¶16. Had petitioner remained in the position of Director, petitioner would have earned a total of $133,192 (base salary of $124,392 plus longevity of $4,200 until January 1, 2007, and an additional longevity of $4,600 from January 1, 2007, through June 30, 2007). Ibid. Petitioner's salary was reduced as a result of petitioner's reassignment from the title of Director of Student Services to the title of Supervisor of Pupil Personnel Services/Guidance. Her base salary went from $124,392 to $118,542 or a net loss of $5,850. Stip at ¶18. The salary for the new position of Supervisor of Pupil Personnel Service/Guidance was the product of negotiation between the Board and the Supervisors' Association. The Board eliminated the position of Director of Student Services as directed by the County Superintendent.

LEGAL DISCUSSION AND CONCLUSIONS

The tenure laws, N.J.S.A. 18A: 28-1 to -18, define the conditions under which teaching staff members are entitled to the security of tenure. Tenure has been described as a "statutory right imposed upon a teacher's contractual employment status." Zimmerman v. Newark Bd. of Educ., 38 N.J. 65, 72 (1962), cert. denied, 371 U.S. 956, 83 S. Ct. 508, 9 L. Ed. 2d. 502 (1963). The statutory provisions supersede contractual terms. Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 72 (1982). The objective of the tenure statutes is to protect competent and qualified teaching staff members, after a probationary period, from removal for "unfounded, flimsy, or political reasons." Zimmerman, supra, 38 N.J. at 71. They are "designed to aid in the establishment of a competent and efficient school system by affording to principals and teachers a measure of security in the ranks they hold after years of service." Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215, 218 (App. Div. 1949).

"The right to tenure is created and governed entirely by statute." Breitwieser v. State-Operated Sch. Dist. of Jersey City, 286 N.J. Super. 633, 637 (App. Div. 1996). To acquire the security of tenure, the precise requirements set forth in the statute must be met. Picogna v. Cherry Hill Bd. of Educ., 143 N.J. 391, 400 (1996); Kletzkin v. Spotswood Bd. of Educ., 136 N.J. 275, 278 (1994); Spiewak, supra, 90 N.J. at 72; Zimmerman, supra, 38 N.J. at 72; Ahrensfield v. State Bd. of Educ., 126 N.J.L. 543, 544 (E. & A. 1941). The employee shoulders the burden of proving an entitlement to tenure protection, which ordinarily must be clearly proven. Canfield v. Pine Hill Bd. of Educ., 51 N.J. 400 (1968), rev'd on dissent, 97 N.J. Super. 483, 493 (App. Div. 1967).

N.J.S.A. 18A:28-5 governs the requirements for tenure. The statute directs in pertinent part:

> The services of all teaching staff members employed in the positions of teacher, principal, . . . assistant principal, vice-principal, assistant superintendent, and all school nurses . . . school athletic trainer and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those

> who are not the holders of proper certificates in full force and effect . . ., shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause . . . after employment in such district or by such board for:
>
> (a) Three consecutive calendar years . . . ; or
> (b) Three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
> (c) The equivalent of more than three academic years within a period of any four consecutive academic years.
>
> [Emphasis added.]

In order to gain tenure, a teaching staff member must: (1) work in a position for which a teaching certificate is required; (2) hold the appropriate certificate; and (3) serve the requisite period of time. Spiewak, supra, 90 N.J. at 74. Tenure "arises only by passage of the time fixed by the statute . . . ." Canfield, supra, 97 N.J. Super. at 490. In the within matter, the parties do not contest petitioner's length of service in her former title. However, the parties' paths diverge concerning whether petitioner served the requisite period of time in a recognized title and under an appropriate certificate.

Pursuant to the statutory scheme, "tenure is achieved in a specific 'position' and the scope of the tenured position is initially limited by the 'certificate' the teaching staff member must hold to satisfy the prerequisite of qualifications for his or her employment." Ellicott v. Frankford Twp. Bd. of Educ., 251 N.J. Super. 342, 348 (App. Div. 1991); see Howley v. Ewing Bd. of Educ., 1982 S.L.D. 1328, 1337, adopted, Comm'r, 1982 S.L.D. 1356, aff'd, State Bd. of Educ., 1983 S.L.D. 1554. Tenure is achieved in either one of the positions specifically designated in N.J.S.A. 18A:28-5, which are separately tenurable, or in "positions which require them to hold appropriate certificates." N.J.S.A. 18A:28-5; see Ellicott, supra, 251 N.J. Super. at 347; Duva v. State-Operated Sch. Dist. of the City of Jersey City, EDU 9801-98, State Bd. of Educ. (March 6, 2002), <http://lawlibrary.rutgers.edu/oal/search.html>.

All teaching staff members employed in the public schools must be "the holder of a valid certificate to teach, administer, direct or supervise the teaching, instruction, or educational guidance of . . . pupils in such public schools . . . ." N.J.S.A. 18A:26-2; see N.J.A.C. 6A:9-5.1(a) ("any person employed as a teaching staff member by a district board of education shall hold a valid and appropriate certificate"). Similarly, a teaching staff member must possess an appropriate certificate in order to achieve tenured status. N.J.S.A. 18A:28-5 expressly excludes from tenure protection teaching staff members "who are not the holders of proper certificates in full force and effect." Likewise, N.J.S.A. 18A:28-4 unambiguously directs that "[n]o teaching staff member shall acquire tenure in any position in the public schools . . . who is not the holder of an appropriate certificate for such position, issued by the State Board of Examiners, in full force and effect . . . ."

The chief school administrator of a district board of education must "annually report the names and teaching assignments of all teaching staff members to the county superintendent" who, in turn, "shall provide to the employing district board of education . . . written notice of any instance in which a teaching staff position is occupied by a person who does not hold appropriate certification." N.J.A.C. 6A:9-5.2(c). "Any contract or engagement of any teaching staff member shall cease and terminate whenever the employing district board of education receives written notice from the county superintendent, or otherwise ascertains, that such a person is not, or has ceased to be, the holder of an appropriate certificate required for such employment." N.J.A.C. 6A:9-5.2(d). An employing district is required to "remove from the position any teaching staff member who fails to maintain the mandated license, certificate or authorization" that is "mandated by State or Federal law or by a licensing board in order for the individual to serve in a position." N.J.A.C. 6A:9-5.1(b) and (c).

Certificates are issued by the State Board of Examiners pursuant to rules and regulations prescribed by the State Board of Education. N.J.S.A. 18A:6-38. The regulations address various certificates that may be issued, describe the requirements for obtaining a particular certificate and designate which certificates are required for which positions. N.J.A.C. 6A:9-1.1, et seq. The State Board has implemented the certification requirement by authorizing the issuance of three categories of educational

certificates: Instructional, Administrative and Educational Services. N.J.A.C. 6A:9-5.2(a). The State Board has further designated endorsements under each type of certificate, which identify the specific area in which a certificate holder is authorized to serve. Employment in a specific assignment requires that the educator hold the appropriate endorsement. Nelson v. Old Bridge Bd. of Educ., 148 N.J. 358, 363 (1997).

The regulations set forth various endorsements that may be issued under an educational services certificate. See N.J.A.C. 6A:9-13.1, et seq. Pertinent to the within matter, the endorsements include a "director of school counseling services" endorsement. N.J.A.C. 6A:9-13.7. This endorsement "authorizes the holder to serve as a director, administrator or supervisor of school counseling services, including the supervision of educational activities in areas related to and within the counseling program in grades preschool through 12." N.J.A.C. 6A:9-13.7(a). In order to be eligible for the standard educational services certificate with a director of school counseling services endorsement, a candidate must, among other requirements, "hold a standard New Jersey school counselor or student personnel services certificate or an equivalent out-of-State certificate." N.J.A.C. 6A:9-13.7(b). Prior to the adoption of N.J.A.C. 6A:9, the former regulations (at N.J.A.C. 6:11-11.10) included a "director of student personnel services" endorsement, which was "required for any person who is assigned as a director, administrator or supervisor of guidance and student personnel services of a school system, including the supervision of educational activities in areas related to and within the guidance program." The new regulation "incorporates provisions formerly appearing at N.J.A.C. 6:11-11.10," the "name of the certificate has been changed from Director of Student Personnel Services to Director of School Counseling Services," and the regulation "establishes the certification process for the director of school counseling services." 35 N.J.R. 4352(a) (October 6, 2003); see also 36 N.J.R. 469(a) (January 20, 2004).

N.J.A.C. 6A:9-5.5(a) provides that "[e]ach district board of education shall assign position titles to teaching staff members that are recognized in these rules." Should a district board of education determine that the use of an unrecognized position title is desirable, prior to appointing a candidate the district board must submit to the county superintendent a written request for permission to use the proposed title, which shall

include a detailed job description. N.J.A.C. 6A:9-5.5(b)(1). The county superintendent will then exercise his/her discretion regarding approval of the request and determine the appropriate certification and title for the position. N.J.A.C. 6A:9-5.5(b)(2).

It is against this backdrop that the parties' positions are considered.

Petitioner maintains that her former title was a recognized title, she held the appropriate certification to hold that title and the Board's reassignment of petitioner to the title of Supervisor of Student Personnel Services/Guidance, with no change in duties but a reduction in salary, violated her tenure rights. In this regard, petitioner contends that "the title of director is clearly set out as a recognized title in both the seniority and certification rules." See N.J.A.C. 6A:9-12.3(a) (providing that the "school administrator endorsement is required for any position that involves services as a district-level administrative officer," and such positions shall include, among others, "director"); N.J.A.C. 6A:9-12.3(b) (providing that the "principal endorsement is required for any position that involves service as an administrative officer of a school or other comparable unit within a school or district," and such positions shall include, among others, "director"); N.J.A.C. 6A:32-5.1(l)(3) (listing "director" as a category for seniority purposes). Petitioner argues that a staff member assigned to the title of director accrues tenure as a director and seniority in the specific assignment served. Accordingly, petitioner avers that she achieved tenure as a director and accrued seniority in the area of her assignment as Director of Student Services. Petitioner further asserts that her certification qualifies her to hold the title of Director of Student Services and/or Director of Student Personnel Services. Petitioner observes that the former regulation (N.J.A.C. 6:11-11.10) stated that the director of student personnel services endorsement was "required" for "any person . . . assigned as a director, administrator or supervisor of guidance and student personnel services," whereas the current regulation (N.J.A.C. 6A:9-13.7) provides that the endorsement "authorizes" the "holder to serve as a director, administrator or supervisor of school counseling services, including the supervision of educational activities in areas related to and within the counseling program in grades preschool to 12." Petitioner opines that the director of school counseling services endorsement does not supplant the school administrator or principal endorsements, which are mutually exclusive, and a teaching staff member is

qualified to serve as a director, including a director of student services or a director of school counseling services, if the member holds either a school administrator endorsement, a principal endorsement or a director of school counseling services endorsement.

The Board contends that, as clearly outlined by Superintendent Marino, since petitioner was responsible for the supervision of the Guidance Department district-wide, her position as Director of Student Services was an unauthorized title, which would not be recognized by the Department of Education. More particularly, the Board maintains that the title would not be recognized because the required certificates to supervise the Guidance Department are a director of student personnel services endorsement or a director of school counseling services endorsement, both of which would allow the use of the recognized title of Director of Student Personnel Services/Guidance. The Board urges that, in order for an individual to acquire tenure as a director with district-wide supervisory responsibility over the Guidance Department, the individual must possess a director of school counseling services or a director of student personnel services endorsement. Accordingly, the Board asserts that petitioner did not acquire tenure while working in the position of Director of Student Services because she never possessed the requisite certificate/endorsement to hold a director-level position with district-wide supervisory responsibility over the Guidance Department, and petitioner has "enjoyed the windfall of receiving a salary on the director's guide for eight years." The Board argues that it was required by the County Superintendent to eliminate the unrecognized title of Director of Student Services, the Board acted accordingly, in good faith, to eliminate the position and to create the nearest position for which petitioner's certifications qualified her (i.e. Supervisor of Pupil Personnel Services/Guidance), and the Board is now properly paying petitioner in accordance with the supervisor's salary guide and petitioner's length of service.

Succinctly stated, the undersigned embraces the Board's position that the actions it took in response to the directive of the County Superintendent were in accordance with the regulatory scheme and applicable decisional law. The undersigned is unpersuaded by petitioner's contention that the title of Director of Student Services is a recognized title simply because it includes the word "director" or that the assignment

of director is a separately tenurable position. See Duva, supra (observing that Director of Research, Planning and Evaluation, and Director Planning/Evaluation/Grants, were unrecognized position titles and, since "director" is not among the positions enumerated in N.J.S.A. 18A:28-5, there is no basis to hold that the assignment constitutes a separately tenurable position). Apart from this, the regulations make clear that a director of school counseling services endorsement and a director of student personnel services endorsement are separate and distinct endorsements from a school administrator or principal endorsement. The former endorsements are endorsements on an educational services certificate, whereas the latter are endorsements on an administrative certificate. Simply put, the regulations do not evidence a design to authorize one holding a school administrator, principal or supervisor endorsement to serve in a director capacity responsible for district-wide supervision of counseling or guidance services. Rather, these functions fall within the purview of the director of school counseling services endorsement, which is explicitly addressed in N.J.A.C. 6A:9-13.7 and formerly addressed in N.J.A.C. 6:11-11.10.

I **CONCLUDE** that petitioner's former position of Director of Student Services was an unrecognized and unapproved title. I **CONCLUDE** that a director of school counseling services endorsement, and formerly a director of student personnel services endorsement, were required in order to hold a director-level position with district-wide supervisory responsibility over counseling services or guidance during petitioner's employment as the Director of Student Services pursuant to the regulations then in effect, N.J.A.C. 6:11-11.10 and N.J.A.C. 6A:9-13.7. It is undisputed that petitioner does not possess either endorsement and has taken no recent steps toward securing the required endorsement. I **CONCLUDE** that, inasmuch as petitioner did not hold the requisite endorsement needed to serve as a director with district-wide supervision over a guidance department, petitioner did not accrue tenure status in her former position or as a director. In short, tenure protection in a position is limited to teaching staff members who hold an appropriate certificate for that position issued by the State Board of Examiners. N.J.S.A. 18A:28-4 and N.J.S.A. 18A:28-5. This certificate requirement is mandated by the tenure statutes and is a necessary prerequisite to achieve tenure. I further **CONCLUDE** that the

Board acted consistent with the tenure/seniority requirements when it eliminated petitioner's former unrecognized title, hired petitioner for a new position in which petitioner was qualified to serve by virtue of her endorsements, and determined petitioner's compensation for the new position in accordance with the supervisor's salary guide and petitioner's length of service.

ORDER

I **ORDER** that petitioner's Petition of Appeal be and hereby is **DISMISSED WITH PREJUDICE**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 12, 2008
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

Date Received at Agency: June 12, 2008

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUN 16 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

db/jb/lr/tbj

APPENDIX

LIST OF WITNESSES

For Petitioner:

Deborah Perri

For Respondent:

Edward Kliszus

LIST OF EXHIBITS

Joint Exhibits

J-1 Letter from Michael A. Lally, Superintendent of Schools, to Dr. Mary Lou Malyska, Essex County Superintendent of Schools, dated November 18, 1997

J-2 Application for Licensure (two pp.)

J-3 Memorandum from B.B. Lach to Essex County Office of Education dated December 17, 1997

J-4 Job Description, Director of Student Services (three pp.)

J-5 Letter from Joseph Ciccone, Acting Superintendent of Schools, to Deborah Perri dated September 1, 1998

J-6 Job Posting, Supervisor of Pupil Personnel Services/Guidance 12 month, dated September 26, 2006

J -7 Job Description, 12-month Supervisor of Pupil Personnel Services/Guidance (two pp.)

J- 8 Letter from Edward A. Kliszus, Superintendent, to Deborah Perri dated September 7, 2006

J-9 Letter from Edward A. Kliszus, Superintendent, to Deborah Perri dated September 20, 2006

J-10 Memorandum from Dr. Robert R. Higgins, Acting Director, Office of Licensure and Credentials, to Chief School Administrators dated July 27, 2006, with attachment. (forty pp.).

J-11 Letter from Anthony P. Marino, Essex County Superintendent of Schools, to Dr. Edward Kliszus, Superintendent, dated September 12, 2006

J-12 Memorandum from Edward A. Kliszus, Superintendent, to Board of Education Members, dated September 11, 2006, with attachment (four pp.)

J-13 Memorandum from Edward A. Kliszus, Superintendent, to Board of Education Members dated September 25, 2006, with attachment (eight pp.)

J-14 Memorandum from Edward A. Kliszus, Superintendent, to Board of Education Members dated October 16, 2006

J-15 Resume and certificates (eight pp.)

J-15a Letter from Deborah Perri to Dr. Edward Kliszus (two pp.)

J-16 Minutes dated September 11, 2006 (two pp.)

J-17 Letter from Edward A. Kliszus, Superintendent, to Deborah Perri dated October 17, 2006

J-18 Stipulation of Facts (five pp.)

For Petitioner

P-1 Certifications (three pp.)

For Respondent

R-1 None

370-08

#370-08

WILLIESHA WHITE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged respondent Board's determination that she was not a resident of Linden during most of her last year in high school in 2006-2007. The petition was initially filed by Williesha White's mother on behalf of her minor daughter, but petitioner prosecuted the appeal on her own behalf as she attained the age of eighteen in February 2007. The Board contended that their investigation showed that petitioner and her mother resided in Piscataway during the time in question, and counterclaimed for tuition reimbursement for the period of petitioner's ineligible attendance.

The ALJ found that: petitioner's case was predicated upon a driver's license on which the address had been changed two days before the Board hearing in this matter and the testimony of petitioner's mother as to when she moved into the address at which she claimed to be domiciled at the time of the hearing; petitioner failed to produce any documentation of residency; and the respondent Board presented credible testimony of several investigators regarding their surveillance of the Linden address at which petitioner purported to live. The ALJ concluded that petitioner did not sustain her burden of proving that she was domiciled in Linden during the time in question; that the Board demonstrated that it is more likely than not that petitioner and her mother were not domiciled in the district during that time. Accordingly, the ALJ dismissed the petition and granted the Board's counterclaim for tuition.

Upon a full and independent review of this matter, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter. Petitioner is directed to pay tuition to the Board in the amount of $6,586.92 (114 days @ $57.78 per diem) for the period of her ineligible attendance.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

September 10, 2008

#370-08

OAL DKT. NO. EDU 5370-07
AGENCY DKT. NO. 108-4/07

WILLIESHA WHITE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon such review, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge that petitioner has failed to sustain her burden of establishing that she was a domiciliary of Linden during the period from December 20, 2006 through June 21, 2007 and, therefore, she was not entitled to a free public education in the District's schools during this time.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and petitioner is hereby directed to pay tuition to the Board in the amount of $6,586.92 (114 days @ $57.78 per diem) for this period of ineligible attendance in its schools.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/10/08
Date of Mailing: 9/11/08

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5370-07
AGENCY DKT. NO. 108-4/07

W.W.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,
Respondent.

W.W., pro se

Rachel M. Caruso, Esq., for Respondent (Weiner & Lesniak, attorneys)

Record Closed: June 11, 2008 Decided: July 28, 2008

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this case, Petitioner, W.W., is challenging the Board of Education's determination regarding her residency during her last year in high school. The Department of Education transmitted this matter to the Office of Administrative Law (OAL) where it was filed on May 11, 2007, as a contested case pursuant to N.J.S.A. 52:14B-1 to –15 and N.J.S.A. 52:14F-1 to –13.

FINDINGS OF FACT

Based on the evidence presented at the hearing as well as on the opportunity to observe the witnesses and assess their credibility, I make the following findings of fact, which are essentially undisputed, in this matter.

1. W.W. began attending Linden High School in November 2004, while she and her mother resided at 100 Walters Street in Linden.

2. During the period from November 2004 to approximately July or August 2007, when W.W. went to college, she resided with her mother.

3. W.W. reached her eighteenth birthday in February 2007. She continued to reside with her mother thereafter.

4. On March 19, 2007, L.S.S., W.W.'s mother, changed her address from one in Piscataway to one in Linden, according to motor vehicle records.

5. Sometime during October 2006, the attendance office for the Linden Board of Education who regularly conducts residency checks, recalls an investigation prompted by a teacher's comment. The attendance officer made a visit to the Walters Street address in Linden and found no one was home; however, she left her card.

6. The following day the landlord of the Walters Street address called to advise the high school that the occupants of that apartment had moved and were using another address in Linden.

7. The attendance officer made a visit to the second Linden address and found the apartment locked. She then called the rental agent who gave

the attendance officer the name of the person who lived there and the information that he had lived there since the year 2000.

8. Moreover, the agent for the property at which Petitioner and her mother claimed to reside advised that the records did not show that they were residing in that apartment.

9. On or about January 5, 2007, the Linden Public Schools received a returned letter that had been addressed to the parent/guardian of W.W. at the address on the student's record, which was returned from the post office with the notation "No forward order on file; unable to forward; return to sender."

10. Petitioner and her mother, L.S.S., were notified of the Board's initial determination of ineligibility on or about March 8, 2007. The notice advised them of their rights to appear at the Board to present evidence of their claim of residency in the Linden school district.

11. L.S.S. appeared before the Board on March 21, 2007, and presented a New Jersey driver's license bearing a Linden address as proof of residency.

12. W.W. has not appeared before the Board and had never presented evidence of her Linden domicile to the Board.

13. On March 26, 2007, the Linden Board of Education notified L.S.S. of its determination that W.W. was ineligible to attend school in the Linden school district.

14. This appeal followed. It was initially filed by L.S.S. on behalf of her daughter, W.W. However, on February 24, 2007, W.W. had attained the age of eighteen and, so, prosecuted the appeal on her own behalf.

ANALYSIS AND CONCLUSIONS

In cases such as this where a board of education has challenged the eligibility of a child to seek a free public education within the district, there are statutory requirements which must be met in order for a determination of eligibility to be made. In this case, the issue is whether the parent and the child were domiciled within the school district during the 2006-07 school year. N.J.S.A. 18A:38-1.

The statute specifically provides that the public schools of a district are free to persons over the age of five and under the age of twenty who are domiciled within the school district. The domicile of a child follows that of the parents when there are no complicating factors such as divorce or separation or assertion of separate domicile by the other person. Bd. of Educ. of the Twp. of Middle, Cape May County v. K.K. and P.K., 93 N.J.A.R.2d (EDU) 461, 463 (citations omitted). In this matter, the question involves the domicile of a young woman who had been attending the Linden High School since November 2004 and, at the time in question, was a high school senior preparing to graduate.

The statute also provides that a principal of a school district who finds that the parents of a child attending the schools of the district are not domiciled within the district and that child is not kept in the home of another person domiciled within the school district and supported gratis as if the child was that person's own child, the principal may apply to the board of education of the district for removal of the child. The statute further provides for a hearing before the Board on the matter and provides, as well, that the parent may contest the Board's decision before the Commissioner within twenty-one days of the date of the Board's decision. Ibid.

Furthermore, the statute specifically places the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this section on the parent. The statute also provides if, in the judgment of the Commissioner, the evidence does not support the claim of the resident, the

Commissioner shall assess the resident's tuition to the student prorated to the time of the student's ineligible attendance in the school district and sets forth the formula for that computation. N.J.S.A. 18A:38-1(b)(2).

Turning now to the definition of domicile, the regulations provide a student is domiciled in the district if she is living with a parent whose permanent home is located within the district. A home is permanent when the parent intends to return to it when absent and has no present intent of moving from it. Other homes or residences may exist elsewhere; however, a domicile is the place to which one intends to return when absent. N.J.A.C. 6A:22-3.1(a)(1). The regulations also suggest documentation which may be submitted to demonstrate a student's eligibility for enrollment in a district. That documentation includes leases, mortgages, deeds and other evidence of property ownership, tenancy or residency. These are paramount for the determining eligibility. Neither Petitioner nor her mother has ever produced any such documentation. The lease on the apartment in which L.S.S. and W.W. claim to reside and have claimed as their domicile does not have L.S.S.'s name as a tenant, according to the attendance officer.

Petitioner's case consisted of the testimony of L.S.S. reciting the action taken by the Board to remove W.W. from Linden High School because, apparently, although the appeal was filed, there was miscommunication. W.W. was told she would be removed from school because the district had not received the appeal. That issue was rectified and the Board stipulated, on the record, that L.S.S. appealed the final determination of ineligibility in a timely fashion.

Petitioner based her case on her mother's testimony. L.S.S. asserted that the Board engaged in retaliation for W.W. having made complaints against a teacher. L.S.S. also testified that no one ever physically called her to check the accuracy of the address and, perhaps most important and most relevant, she was not familiar with domicile rules because her daughter had never been a part of the public education system prior to attending Linden High School.

It is well established that ignorance of the law is no defense. L.S.S. further testified that she provided a copy of her driver's license with the date of issue showing that her address had been changed two days before the final hearing took place. She also testified that she provided some bank statements and credit card bills with the Linden address on them. However, she did not produce any of that documentation at the hearing.[1] As noted above, the burden of proof rests with Petitioner. In this matter, the only documentation that Petitioner has provided is her driver's license with the address in Linden at which she claims to reside. In addition to the driver's license, there is L.S.S.'s testimony that she moved to the address she claimed was her domicile in Linden sometime in, possibly, February 2005. However, she had been residing previously at an address in Piscataway.

Thus, Petitioner's case is predicated upon a driver's license on which the address was changed two days before the Board hearing in this matter and L.S.S.'s testimony as to when she moved into the address at which she claimed to be domiciled at the time of the hearing. On the other hand, the Board presented testimony of several investigators who had Petitioner and her mother under surveillance from approximately December 20, 2006, until March 15, 2007. That surveillance consisted of having an investigator located from 6:00 a.m. to 8:00 a.m. at the domicile address in Linden. On none of the twenty-nine mornings that the investigator watched those premises were either Petitioner and/or her mother seen leaving the premises between 6:00 a.m. and 8:00 a.m. Moreover, on one occasion, the investigator checked the parking lot and street area for vehicles driven by Petitioner's mother and found none.

On another occasion, the investigator remained on-site in addition to the 6:00 a.m. to 8:00 a.m. for the time period from 10:30 a.m. to 7:45 p.m. and did not see either Petitioner or her mother. Petitioner and her mother, on the other hand, were seen by other investigators, during approximately the same time frame as the surveillance in

[1] It should be noted that the Board objected to the introduction of the documents that Petitioner may have had with her at the hearing. There were three separate requests for discovery by the Board and none were responded to by Petitioner. Consequently, the Board moved to keep the documents out of the record. The motion was granted, based on the Board's representation that it made three discovery requests, including a request for witnesses and the documents on which Petitioner intended to rely. No documentation was forthcoming.

Linden, i.e., approximately December 20, 2006, to March 15, 2007, to be leaving premises located in Piscataway. On eighteen different occasions, the investigator observed Petitioner and her mother leaving the premises and entering a vehicle in the early morning during the week. L.S.S. had testified that she, at various times during the time frame, had leased a white Mercedes, a silver Mustang, and a gray Honda. L.S.S. was seen using each of these cars during the time frame and except for one occasion, March 2, she was accompanied by her daughter. Based on the surveillance as well as the fact that the driver's license with the Linden address was changed two days before the Board hearing from the Piscataway address, I **CONCLUDE** that Petitioner has not sustained her burden of proving she was domiciled within the district of Linden during the time frame in question, i.e., from December 20, 2006, to the end of the school in 2007. I further **CONCLUDE** the district has demonstrated that it is more likely than not that Petitioner and her mother were not domiciled within the district during the period in question.

Under the statute, Respondent is entitled to tuition for the amount of time the student attended district schools while not domiciled within the district. In this case, Respondent has demonstrated that W.W. was not domiciled within the district at minimum from December 21, 2006, to the end of the school year, June 21, 2007, a period of 114 days, excluding weekends and holidays.

The Board has provided the certifications of its Business Administrator/Board Secretary which state that $10,400 per year was the tuition rate for students attending the high school during the 2006-07 school year. Based on a 180-day school year, the daily rate is $57.78. The tuition for 114 days of attendance, therefore, is $6,586.92.

ORDER

Accordingly, I hereby **ORDER** Petitioner to pay tuition to the District in the amount of $6,586.92. I further **ORDER** that the petition be and hereby is **DISMISSED WITH PREJUDICE.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 28, 2008
DATE

Maria M. La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Date Received at Agency: July 30, 2008

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AUG 4 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

APPENDIX

Witnesses:

W.W.

L.S.S.

Exhibits:

R-1	Letter - Ms. Caruso to L.S.S., March 8, 2007
R-2	Linden Public Schools Registration Form, November 8, 2004
R-3	Letter - Ms. Caruso to L.S.S., March 26,2007
R-4	Motor Vehicle Commission Abstract re: L.S.S., April 24, 2007
R-5	Identification only
R-6	Copy of card of Lalah Motley, attendance officer
R-7	Fax - Wessex Management to Motley, March 15, 2007
R-8	Letter - William Tango, director of security to Mr. Martino, March 20, 2007
R-9	Copy of envelope addressed to W.W. - "Return to Sender"

ON-1	Certification of Kathleen Gaylord, June 4, 2008
ON-2	Certification of Gaylord, January 2, 2008

361-08

AGENCY DKT. NO. 213-7/08

IN THE MATTER OF SHERRI STULLER,	:	
BOARD OF EDUCATION OF	:	COMMISSIONER OF EDUCATION
WASHINGTON TOWNSHIP	:	DECISION
BURLINGTON COUNTY.	:	

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 for final determination on the Commission's recommended penalty, have been reviewed. Respondent did not file exceptions, nor was the Commission's underlying finding of violation appealed to the Commissioner pursuant to *N.J.A.C.* 6A:4.

Upon review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes respondent for failing to honor an obligation placed upon board members by law, since such failure has resulted in unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, the above-named respondent is hereby removed from office, as of the filing date of this decision, as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED. *

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 9/10/08

Date of Mailing: 9/10/08

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	**DECISION FOR**
SHERI STULLER	:	**FAILURE TO ATTEND TRAINING**
Washington Twp. Board of Education	:	
Burlington County	:	**DOCKET NO. T04-08**

This matter arises from an Order to Show Cause (OTSC) issued on June 20, 2008 by the School Ethics Commission alleging that Sherri Stuller, a member of the Washington Township Board of Education (Board), violated N.J.S.A. 18A:12-33 for failure to complete, during the first year of the member's first term, a training program offered by the New Jersey School Boards Association (NJSBA) regarding the skills and knowledge necessary to serve as a local school board member or charter school trustee.

The respondent was advised by the NJSBA of the training requirement in writing upon election or appointment as well as through notices published in its newsletter *School Board Notes*. The NJSBA mailed correspondence to all new board members who failed to register for, or attend, an orientation training. The NJSBA mailed such correspondence to the respondent on July 30, 2007 and December 27, 2007. The NJSBA conducted seven training sessions between April, 2007 and March, 2008 at varying locations and continuously published the dates and times of the sessions in the *School Board Notes*.

As required pursuant to N.J.A.C. 6A:28-4.2(c), the NJSBA provided the School Ethics Commission with a report listing those board members and trustees who had not fulfilled the training mandate for the first year of their first term. A report from the NJSBA indicated that the respondent failed to attend the training program within the required time period. The respondent was so notified by letter dated May 1, 2008 from the School Ethics Commission and encouraged to fulfill the training requirement. Thereafter, the NJSBA offered two additional training opportunities in May and June 2008. The respondent did not attend either training.

The June 20, 2008 OTSC was sent to the respondent by regular and certified mail. The return receipt shows that the respondent received the OTSC on June 21, 2008. The respondent did not respond to the OTSC.

DECISION

N.J.A.C. 6A:28-4.2(d) provides that board members and trustees failing to comply with the training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Sherri Stuller failed to comply with N.J.S.A. 18A:12-33 and the Commission finds her in violation of N.J.S.A. 18A:12-33. Ms. Stuller received repeated notifications of the long-standing training requirement and has had ample opportunities to attend the training. Ms. Stuller did not provide any response to the Commission's OTSC and the Commission believes that the appropriate penalty, based on her failure to respond to the OTSC, is removal, so as to underscore to this and all similarly situated board members and charter school trustees that the Commission will not tolerate the

dedication of additional administrative and adjudicative time tracking attendance at a training program well after the timeline established in N.J.S.A. 18A:12-33. Therefore, the Commission recommends to the Commissioner of Education that the respondent be removed as a member of the Washington Township Board of Education.

Paul C. Garbarini/jb

Paul C. Garbarini, Chairperson
School Ethics Commission

I hereby certify that the Decision was duly adopted by the School Ethics Commission at its public meeting on July 22, 2008.

Joanne Boyle, Executive Director

368-08

AGENCY DKT. NO. 209-7/08

IN THE MATTER OF LUCIANO ADORNATI,	:	
BOARD OF EDUCATION OF THE BOROUGH	:	COMMISSIONER OF EDUCATION
OF HELMETTA, MIDDLESEX COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 for final determination on the Commission's recommended penalty, have been reviewed. Respondent did not file exceptions with the Commissioner, nor did he appeal the Commission's underlying finding of violation of the School Ethics Act (Act) pursuant to *N.J.A.C.* 6A:4; however, on September 2, 2008, respondent wrote to the Executive Director of the Commission, requesting reconsideration of the Commission's recommended penalty and reiterating his comments in response to the Commission's Order to Show Cause, to the effect that he had registered for the next available training and his absence from the Board would cause hardship during an extremely busy time.[1]

Upon review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes respondent for failing to timely honor an obligation placed upon board members by law, since such failure has resulted in unnecessary expenditure of administrative and adjudicative resources at both State and local levels. It is not uncommon for board of education members to have busy work schedules; however, this circumstance does not lessen their duty to obtain the training deemed necessary to fulfill the functions of their office. Similarly, the absence of a board member inevitably poses some hardship for the board on which he or she sits; however, this circumstance cannot be permitted to limit exercise of the full range of

[1] Although expressing a "wish to appeal," respondent did not dispute the Commission's finding that he had failed to attend training as required; rather, his comments took exception solely to the Commission's recommended penalty. Consequently, his submission – in addition to being improperly directed – was untimely filed pursuant to *N.J.A.C.* 6A:4-2.2(b)1.

penalties the Legislature has authorized the Commission to recommend, and the Commissioner to impose, upon a finding of violation of the Act.

Accordingly, respondent is hereby suspended as a school official found to have violated the School Ethics Act, such suspension to remain in effect until the required training is completed; provided, however, that if such training is not completed by the November 15, 2008 training session, respondent shall be summarily removed from office.

IT IS SO ORDERED.[2]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 9/10/08

Date of Mailing: 9/10/08

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	**DECISION FOR**
LUCIANO ADORNATI	:	**FAILURE TO ATTEND TRAINING**
Helmetta Board of Education	:	
Middlesex County	:	**DOCKET NO. T22-08**

This matter arises from an Order to Show Cause (OTSC) issued on June 20, 2008 by the School Ethics Commission alleging that Luciano Adornat, a member of the Helmetta Board of Education (Board), violated N.J.S.A. 18A:12-33 for failure to complete, during the first year of the member's first term, a training program offered by the New Jersey School Boards Association (NJSBA) regarding the skills and knowledge necessary to serve as a local school board member or charter school trustee.

The respondent was advised by the NJSBA of the training requirement in writing upon election or appointment as well as through notices published in its newsletter *School Board Notes*. The NJSBA mailed correspondence to all new board members who failed to register for, or attend, an orientation training. The NJSBA mailed such correspondence to the respondent on July 30, 2007 and December 27, 2007. The NJSBA conducted seven training sessions between April, 2007 and March, 2008 at varying locations and continuously published the dates and times of the sessions in the *School Board Notes*.

As required pursuant to N.J.A.C. 6A:28-4.2(c), the NJSBA provided the School Ethics Commission with a report listing those board members and trustees who had not fulfilled the training mandate for the first year of their first term. A report from the NJSBA indicated that the respondent failed to attend the training program within the required time period. The respondent was so notified by letter dated May 1, 2008 from the School Ethics Commission and encouraged to fulfill the training requirement. Thereafter, the NJSBA offered two additional training opportunities in May and June 2008. The respondent did not attend either training.

The June 20, 2008 OTSC was sent to the respondent by regular and certified mail. The respondent filed a timely response to the OTSC wherein he requested that the Commission allow him to attend the training session scheduled for October 28, 2008.

DECISION

N.J.A.C. 6A:28-4.2(d) provides that board members and trustees failing to comply with the training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Luciano Adornati failed to comply with N.J.S.A. 18A:12-33 and the Commission finds HIM in violation of N.J.S.A. 18A:12-33. Therefore, the Commission recommends to the Commissioner of Education that the respondent be suspended until he takes the orientation training and removed if he fails to take such training by the November 15, 2008 training session.

Paul C. Garbarini, Chairperson
School Ethics Commission

I hereby certify that the Decision was duly adopted by the School Ethics Commission at its public meeting on July 22, 2008.

Joanne Boyle, Executive Director

369-08SEC

369-08

AGENCY DKT. NO. 214-7/08

IN THE MATTER OF KEISHA JEFFERSON,	:	
BOARD OF TRUSTEES OF THE	:	COMMISSIONER OF EDUCATION
EAST ORANGE COMMUNITY	:	DECISION
CHARTER SCHOOL, ESSEX COUNTY.	:	

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 for final determination on the Commission's recommended penalty, have been reviewed. Respondent did not file exceptions, nor was the Commission's underlying finding of violation appealed to the Commissioner pursuant to *N.J.A.C.* 6A:4.

Upon review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes respondent for failing to honor an obligation placed upon board members and charter school trustees by law, since such failure has resulted in unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, the above-named respondent is hereby removed from office, as of the filing date of this decision, as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/10/08

Date of Mailing: 9/11/08

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	**DECISION FOR FAILURE TO ATTEND TRAINING**
KEISHA M. JEFFERSON East Orange Community Charter School Essex County	:	**DOCKET NO. T16-08**

This matter arises from an Order to Show Cause (OTSC) issued on June 20, 2008 by the School Ethics Commission alleging that Keisha M. Jefferson, a member of the East Orange Community Charter School Board of Trustees (Board), violated N.J.S.A. 18A:12-33 for failure to complete, during the first year of the member's first term, a training program offered by the New Jersey School Boards Association (NJSBA) regarding the skills and knowledge necessary to serve as a local school board member or charter school trustee.

The respondent was advised by the NJSBA of the training requirement in writing upon election or appointment as well as through notices published in its newsletter *School Board Notes*. The NJSBA mailed correspondence to all new board members who failed to register for, or attend, an orientation training. The NJSBA mailed such correspondence to the respondent on July 30, 2007 and December 27, 2007. The NJSBA conducted seven training sessions between April, 2007 and March, 2008 at varying locations and continuously published the dates and times of the sessions in the *School Board Notes*.

As required pursuant to N.J.A.C. 6A:28-4.2(c), the NJSBA provided the School Ethics Commission with a report listing those board members and trustees who had not fulfilled the training mandate for the first year of their first term. A report from the NJSBA indicated that the respondent failed to attend the training program within the required time period. The respondent was so notified by letter dated May 1, 2008 from the School Ethics Commission and encouraged to fulfill the training requirement. Thereafter, the NJSBA offered two additional training opportunities in May and June 2008. The respondent did not attend either training.

The June 20, 2008 OTSC was sent to the respondent by regular and certified mail. The Commission did not receive the certified return receipt. However, the OTSC sent by regular mail was not returned to the Commission as undeliverable. The respondent did not respond to the OTSC.

DECISION

N.J.A.C. 6A:28-4.2(d) provides that board members and trustees failing to comply with the training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Keisha M. Jefferson failed to comply with N.J.S.A. 18A:12- and the Commission finds her in violation of N.J.S.A. 18A:12-33. Ms. Jefferson received repeated notifications of the long-standing training requirement and has had ample opportunities to attend the training. Ms. Jefferson did not provide any response to the Commission's OTSC and the Commission believes that the appropriate penalty, based on her failure to respond to the OTSC, is removal, so as to underscore to this and all similarly situated board members and charter school trustees that the Commission will not tolerate the dedication of additional administrative and adjudicative time tracking

attendance at a training program well after the timeline established in N.J.S.A. 18A:12-33. Therefore, the Commission recommends to the Commissioner of Education that the respondent be removed as a member of the East Orange Community Charter School Board of Trustees.

Paul C. Garbarini, Chairperson
School Ethics Commission

I hereby certify that the Decision was duly adopted by the School Ethics Commission at its public meeting on July 22, 2008.

Joanne Boyle, Executive Director

#371-08

371-08

OAL DKT. NO. EDU 4464-08
AGENCY DKT. NO. 103-4/08

IN THE MATTER OF THE TENURE HEARING	:	
OF KEVIN CISER, NEW JERSEY STATE	:	COMMISSIONER OF EDUCATION
JUVENILE JUSTICE COMMISSION.	:	DECISION
	:	

The record of this matter, the parties' proposed Stipulation of Settlement, and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon such review, the Commissioner concurs with the ALJ that the proposed settlement is consistent with established standards governing settlement of tenure matters. *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846.

Accordingly, the settlement is hereby approved and the tenure matter dismissed, subject to compliance with the terms of the settlement. A copy of this decision shall be forwarded to the State Board of Examiners for action against respondent's certificate as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 9/10/08
Date of Mailing: 9/11/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4464-08

AGENCY DKT. NO. 103-4/08

IN THE MATTER OF THE TENURE HEARING OF KEVIN CISER, NEW JERSEY STATE JUVENILE JUSTICE COMMISSION.

Christopher C. Josephson, Deputy Attorney General, for petitioner State of New Jersey Department of Education (Anne Milgram, Attorney General of New Jersey, attorney)

Rosemarie Cipparulo, Esq., for respondent Kevin Ciser (Weissman & Mintz, attorneys)

Record Closed: July 24, 2008 Decided: July 28, 2008

BEFORE **JOHN SCHUSTER III**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on June 2, 2008, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement (J-1) indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this settlement agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who, by law, is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

July 28, 2008
DATE

JOHN SCHUSTER III, ALJ

Date Received at Agency:

7/31/08

Mailed to Parties:

JUL 31 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

/cs/jh

EXHIBIT LIST

Joint exhibit:

J-1 Stipulation of Settlement

J-1

ANNE MILGRAM
Attorney General of New Jersey
Attorney for Petitioner,
Juvenile Justice Commission
R.J. Hughes Justice Complex
PO BOX 112
Trenton, New Jersey 08625

By: Christopher C. Josephson
Deputy Attorney General
(609)984-2906

RECEIVED
2008 JUL 24 A 10:44
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

In the Matter of the Tenure Hearing of KEVIN CISER, Juvenile Justice Commission	OAL Dkt. No.: EDUTH 4464-08 Agency Docket No.: 103-04/08 STIPULATION OF SETTLEMENT

The Juvenile Justice Commission, Office of Education (JJC), with offices located at 1001 Spruce Street, Suite 202, Trenton, New Jersey 08625, represented by ANNE MILGRAM, Attorney General of New Jersey, Christopher C. Josephson, Deputy Attorney General, appearing; and Kevin Ciser, a tenured employee of the JJC represented by Rosemarie Cipparulo, Esq. appearing; by way of this Stipulation of Settlement say:

WHEREAS, the JJC initiated the filing of tenure charges against Mr. Ciser, having filed the charges with the Commissioner of Education on or about April 4, 2008; and

WHEREAS, Mr. Ciser was charged in the tenure charges with Conduct Unbecoming a Public Employee and Other Just Cause; and

WHEREAS, the tenure charges alleged that Kevin Ciser physically and verbally intimidated a co-worker, "R.W.," on two

occasions between March and April of 2007, falsely accused R.W. of making obscene comments in the workplace in retaliation for engaging in protected activity which involved R.W. reporting prior misconduct by Ciser to a supervisor, and knowingly provided false information to investigators during the course of an Office of Equal Employment Opportunity investigation;

WHEREAS, the JJC sought the dismissal of Mr. Ciser on the above charges, which were transferred to the Office of Administrative Law for a hearing; and

WHEREAS, Mr. Ciser disputed the charges; and

WHEREAS, the matter was initially referred to the Office of Administrative Law for a hearing in June 2008; and

WHEREAS, the parties wish to enter into an amicable resolution of the tenure charges filed against Mr. Ciser; and

WHEREAS, it is in the best interest of the parties and the public to enter into this Stipulation of Settlement;

NOW, THEREFORE, in consideration of the mutual promises contained herein, the parties agree as follows:

1. Mr. Ciser hereby resigns from employment with the Juvenile Justice Commission, to be effective on the date that the Commissioner of Education approves settlement of this matter.

2. Upon the effective date of his resignation, the Juvenile Justice Commission shall record Mr. Ciser as having resigned in good standing.

3. The Commissioner's approval of this Settlement Agreement shall constitute a withdrawal of the tenure charges brought by the JJC against Mr. Ciser.

4. Settlement of this matter is justified and in the public interest because it obtains Mr. Ciser's resignation without the need for the parties to devote further substantial resources to a contested tenure hearing with an uncertain result. This settlement provides the relief that the JJC sought by bringing the charges.

5. This Agreement constitutes a final and complete resolution of the disciplinary action in this matter and fully disposes of all issues in controversy between the parties hereto. Mr. Ciser agrees not to appeal the terms of this Agreement in any administrative, arbitral or judicial forum.

6. This Agreement shall not constitute a precedent in any other matter involving Mr. Ciser or any other employee.

7. Should the Commissioner fail to approve this Agreement, the parties shall make every reasonable effort to reform their Agreement to meet her objections.

8. Mr. Ciser has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate (N.J.A.C. 6A:3-5.6(a)(6)).

9. Mr. Ciser has been further advised of the JJC's legal duty, pursuant to N.J.S.A. 43:1-3.3, to disclose the within

Settlement Agreement to the board of trustees of Ciser's pension fund or retirement system so that it can determine whether to order the forfeiture of all or part of Ciser's earned service credit, pension or retirement benefit.

10. This Agreement shall only become effective when the Commissioner of Education approves it. Any disapproval by the Commissioner shall not interfere with the rights of either party to pursue this matter further.

This Agreement is made in good faith. The parties have read the Agreement and freely and voluntarily agree to its provisions.

For the Employee:

Kevin Ciser — Dated: 7-2-08

Rosemarie Cipparulo, Esq.
Attorney for Kevin Ciser — Dated: 7/7/08

For the Juvenile Justice Commission:

Margie Brown
Director of Education, JJC — Dated: 7/21/08

ANNE MILGRAM
ATTORNEY GENERAL OF NEW JERSEY

By: Christopher C. Josephson
Deputy Attorney General — Dated: 7/21/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4464-08

AGENCY DKT. NO. 103-4/08

IN THE MATTER OF THE TENURE HEARING OF KEVIN CISER, NEW JERSEY STATE JUVENILE JUSTICE COMMISSION.

Christopher C. Josephson, Deputy Attorney General, for petitioner State of New Jersey Department of Education (Anne Milgram, Attorney General of New Jersey, attorney)

Rosemarie Cipparulo, Esq., for respondent Kevin Ciser (Weissman & Mintz, attorneys)

Record Closed: July 24, 2008 Decided: July 28, 2008

BEFORE **JOHN SCHUSTER III**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on June 2, 2008, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement (J-1) indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

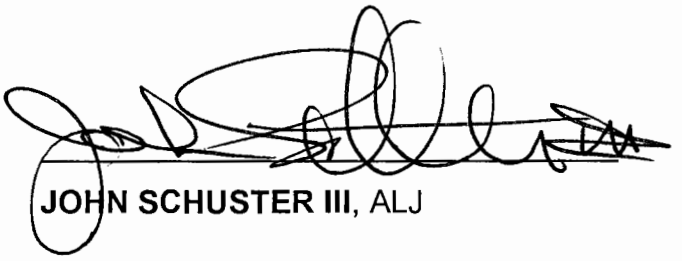
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this settlement agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who, by law, is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

July 28, 2008
DATE

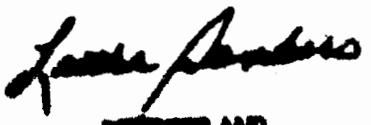


JOHN SCHUSTER III, ALJ

Date Received at Agency: 7/31/08

Mailed to Parties:

JUL 31 2008
DATE



OFFICE OF ADMINISTRATIVE LAW

/cs/jh

EXHIBIT LIST

Joint exhibit:

J-1 Stipulation of Settlement

J-1

ANNE MILGRAM
Attorney General of New Jersey
Attorney for Petitioner,
Juvenile Justice Commission
R.J. Hughes Justice Complex
PO BOX 112
Trenton, New Jersey 08625

By: Christopher C. Josephson
Deputy Attorney General
(609)984-2906

RECEIVED
2008 JUL 24 A 10:44
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

In the Matter of the Tenure Hearing of KEVIN CISER, Juvenile Justice Commission	OAL Dkt. No.: EDUTH 4464-08 Agency Docket No.: 103-04/08 STIPULATION OF SETTLEMENT

The Juvenile Justice Commission, Office of Education (JJC), with offices located at 1001 Spruce Street, Suite 202, Trenton, New Jersey 08625, represented by ANNE MILGRAM, Attorney General of New Jersey, Christopher C. Josephson, Deputy Attorney General, appearing; and Kevin Ciser, a tenured employee of the JJC represented by Rosemarie Cipparulo, Esq. appearing; by way of this Stipulation of Settlement say:

WHEREAS, the JJC initiated the filing of tenure charges against Mr. Ciser, having filed the charges with the Commissioner of Education on or about April 4, 2008; and

WHEREAS, Mr. Ciser was charged in the tenure charges with Conduct Unbecoming a Public Employee and Other Just Cause; and

WHEREAS, the tenure charges alleged that Kevin Ciser physically and verbally intimidated a co-worker, "R.W.," on two

occasions between March and April of 2007, falsely accused R.W. of making obscene comments in the workplace in retaliation for engaging in protected activity which involved R.W. reporting prior misconduct by Ciser to a supervisor, and knowingly provided false information to investigators during the course of an Office of Equal Employment Opportunity investigation;

WHEREAS, the JJC sought the dismissal of Mr. Ciser on the above charges, which were transferred to the Office of Administrative Law for a hearing; and

WHEREAS, Mr. Ciser disputed the charges; and

WHEREAS, the matter was initially referred to the Office of Administrative Law for a hearing in June 2008; and

WHEREAS, the parties wish to enter into an amicable resolution of the tenure charges filed against Mr. Ciser; and

WHEREAS, it is in the best interest of the parties and the public to enter into this Stipulation of Settlement;

NOW, THEREFORE, in consideration of the mutual promises contained herein, the parties agree as follows:

1. Mr. Ciser hereby resigns from employment with the Juvenile Justice Commission, to be effective on the date that the Commissioner of Education approves settlement of this matter.

2. Upon the effective date of his resignation, the Juvenile Justice Commission shall record Mr. Ciser as having resigned in good standing.

3. The Commissioner's approval of this Settlement Agreement shall constitute a withdrawal of the tenure charges brought by the JJC against Mr. Ciser.

4. Settlement of this matter is justified and in the public interest because it obtains Mr. Ciser's resignation without the need for the parties to devote further substantial resources to a contested tenure hearing with an uncertain result. This settlement provides the relief that the JJC sought by bringing the charges.

5. This Agreement constitutes a final and complete resolution of the disciplinary action in this matter and fully disposes of all issues in controversy between the parties hereto. Mr. Ciser agrees not to appeal the terms of this Agreement in any administrative, arbitral or judicial forum.

6. This Agreement shall not constitute a precedent in any other matter involving Mr. Ciser or any other employee.

7. Should the Commissioner fail to approve this Agreement, the parties shall make every reasonable effort to reform their Agreement to meet her objections.

8. Mr. Ciser has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate (N.J.A.C. 6A:3-5.6(a)(6)).

9. Mr. Ciser has been further advised of the JJC's legal duty, pursuant to N.J.S.A. 43:1-3.3, to disclose the within

Settlement Agreement to the board of trustees of Ciser's pension fund or retirement system so that it can determine whether to order the forfeiture of all or part of Ciser's earned service credit, pension or retirement benefit.

10. This Agreement shall only become effective when the Commissioner of Education approves it. Any disapproval by the Commissioner shall not interfere with the rights of either party to pursue this matter further.

This Agreement is made in good faith. The parties have read the Agreement and freely and voluntarily agree to its provisions.

For the Employee:

Kevin Ciser — Dated: 7-2-08

Rosemarie Cipparulo, Esq.
Attorney for Kevin Ciser — Dated: 7/7/08

For the Juvenile Justice Commission:

Margie Brown
Director of Education, JJC — Dated: 7/21/08

ANNE MILGRAM
ATTORNEY GENERAL OF NEW JERSEY

By: Christopher C. Josephson
Deputy Attorney General — Dated: 7/21/08

372-08

372-08SEC

AGENCY DKT. NO. 217-7/08

IN THE MATTER OF LYNN SMITH,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF GREENWICH,	:	DECISION
WARREN COUNTY.	:	
	:	

The record of this matter, the decision of the School Ethics Commission (the Commission), and respondent's exceptions thereto have been reviewed. Upon review, the Commissioner concludes that imposition of a penalty upon respondent is warranted.

As explained by the Commission in its decision dated July 22, 2008, the New Jersey School Boards Association (NJSBA) advised respondent in writing, when she became a school board member, of the requirement that she attend a training program to provide her with the skills and knowledge necessary for service as a board member. Notices were published in *School Board Notes,* the NJSBA's newsletter, and – on July 30, 2007 and December 27, 2007 – the NJSBA mailed correspondence to respondent when she failed to register for or attend orientation training. Between April 2007 and March 2008 the NJSBA conducted seven training sessions at varying locations, all of which were publicized in *School Board Notes.*

On May 1, 2008, upon learning from the NJSBA that respondent had not attended the mandated training for her first year as a board member, the Commission wrote to her, encouraging her to fulfill the training requirement. She neither contacted the Commission nor attended either of the two trainings that were offered in May and June 2008.

Accordingly, on June 20, 2008, the Commission sent respondent an Order to Show Cause (OTSC) – by regular and certified mail – demanding that she state why she should not be sanctioned for not attending training. No response was forthcoming. Only after the Commission issued its decision, finding – pursuant to *N.J.A.C.*6A:28-4.2(d) – that respondent was

in violation of *N.J.S.A.* 18A:12-33, and recommending that she be removed from her position, did respondent communicate with the Commission. In a letter dated July 30, 2008, respondent took the position that her decision not to seek a second term on the Greenwich Board of Education could somehow excuse her failure to take training for her first term on the board.

The Commissioner cannot agree. Respondent's failure to honor an obligation placed upon board members by law defeated the purpose of that law – *i.e.* the provision of appropriate skills and information to individuals who will set district policy. Further, her failure to respond to notices and communications resulted in unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Respondent's decision not to seek another term on the school board renders moot the Commission's recommendation to remove her from the board. However, her conduct has warranted sanction.

Accordingly, the above-named respondent is hereby censured as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/10/08
Date of Mailing: 9/11/08

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	**DECISION FOR**
LYNN SMITH	:	**FAILURE TO ATTEND TRAINING**
Greenwich Twp. Board of Education	:	
Warren County	:	**DOCKET NO. T33-08**

This matter arises from an Order to Show Cause (OTSC) issued on June 20, 2008 by the School Ethics Commission alleging that Lynn Smith, a member of the Greenwich Township Board of Education (Board), violated N.J.S.A. 18A:12-33 for failure to complete, during the first year of the member's first term, a training program offered by the New Jersey School Boards Association (NJSBA) regarding the skills and knowledge necessary to serve as a local school board member or charter school trustee.

The respondent was advised by the NJSBA of the training requirement in writing upon election or appointment as well as through notices published in its newsletter *School Board Notes*. The NJSBA mailed correspondence to all new board members who failed to register for, or attend, an orientation training. The NJSBA mailed such correspondence to the respondent on July 30, 2007 and December 27, 2007. The NJSBA conducted seven training sessions between April, 2007 and March, 2008 at varying locations and continuously published the dates and times of the sessions in the *School Board Notes*.

As required pursuant to N.J.A.C. 6A:28-4.2(c), the NJSBA provided the School Ethics Commission with a report listing those board members and trustees who had not fulfilled the training mandate for the first year of their first term. A report from the NJSBA indicated that the respondent failed to attend the training program within the required time period. The respondent was so notified by letter dated May 1, 2008 from the School Ethics Commission and encouraged to fulfill the training requirement. Thereafter, the NJSBA offered two additional training opportunities in May and June 2008. The respondent did not attend either training.

The June 20, 2008 OTSC was sent to the respondent by regular and certified mail. The certified mail was returned to the Commission as unclaimed. However, the OTSC sent by regular mail was not returned to the Commission as undeliverable. The respondent did not respond to the OTSC.

DECISION

N.J.A.C. 6A:28-4.2(d) provides that board members and trustees failing to comply with the training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Lynn Smith failed to comply with N.J.S.A. 18A:12-33 and the Commission finds her in violation of N.J.S.A. 18A:12-33. Ms. Smith received repeated notifications of the long-standing training requirement and has had ample opportunities to attend the training. Ms. Smith did not provide any response to the Commission's OTSC and the Commission believes that the appropriate penalty, based on her failure to respond to the OTSC, is removal, so as to underscore to this and all similarly situated board members and charter school trustees that the Commission will not tolerate the

dedication of additional administrative and adjudicative time tracking attendance at a training program well after the timeline established in N.J.S.A. 18A:12-33. Therefore, the Commission recommends to the Commissioner of Education that the respondent be removed from the Greenwich Township Board of Education.

Paul C. Garbarini, Chairperson
School Ethics Commission

I hereby certify that the Decision was duly adopted by the School Ethics Commission at its public meeting on July 22, 2008.

Joanne Boyle, Executive Director

#373-08L

373-08

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

JON S. CORZINE
Governor

LUCILLE E. DAVY
Commissioner

September 9, 2008

Mohamed F. El-Hewie
[redacted] M[redacted] Avenue
West Paterson, NJ 07424

William C. Soukas, Esq.
Nowell, Amoroso, Klein & Bierman
155 Polifly Road
Hackensack, NJ 07601

Melissa T. Dutton, DAG
Department of Law & Public Safety
Division of Law
Richard J. Hughes Justice Complex
P.O. Box 112
Trenton, NJ 08625

Dear Parties:

I have reviewed the papers filed in conjunction with petitioner's motion for stay, pending appeal to the Appellate Division of the Superior Court, of my April 10, 2008 decision (#169-08) in the matter entitled *Mohamed El-Hewie v. Board of Education of the Bergen County Vocational School District, Bergen County.*

The standard by which I must review this matter is well-established. Pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), an applicant for extraordinary relief must demonstrate irreparable harm, a settled legal right to relief, a likelihood of prevailing on the merits of the underlying matter, and a balancing of equities and interest in the applicant's favor. As was pointed out in the Board's and the DAG's responsive papers, petitioner has not even addressed – never mind satisfied – any of the components of this requisite standard. Most importantly, however, my April 10, 2008 decision upheld the Board's non-renewal of petitioner's employment contract and dismissed his petition. As aptly urged by the Board, there is nothing in this decision which is susceptible to being stayed.

Accordingly, petitioner's request for a stay of my April 10, 2008 decision is hereby DENIED.

Sincerely,

Lucille E. Davy
Commissioner

LED/DA/MKD/MH

Date of Faxing: 9/10/08

374-08

AGENCY DKT. NO. 212-7/08

IN THE MATTER OF DANTE FERRARIE,	:	
BOARD OF EDUCATION OF	:	COMMISSIONER OF EDUCATION
UPPER SADDLE RIVER,	:	DECISION
BERGEN COUNTY.	:	

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 for final determination on the Commission's recommended penalty, have been reviewed. Respondent's exceptions, while not denying that he has failed to take the mandated training in violation of *N.J.S.A.*18A:12-33, "appeal" as unwarranted the Commission's decision to suspend him from the Board until he takes orientation training and remove him from his duties if he fails to take such training by November 15, 2008. Respondent provides explanatory reasons, *i.e.*, "complete oversight" and a busy work/personal schedule which he argues justify his non-attendance.

Upon review, the Commissioner observes that it is not uncommon for board of education members to have busy work and/or personal schedules; however, this circumstance does not lessen their duty to obtain the training deemed necessary to fulfill the functions of their office. It is noted that the New Jersey School Boards Association conducted seven training sessions between April 2007 and March 2008, and offered two additional training opportunities in May and June 2008, which respondent did not attend. Under these circumstances, the Commissioner cannot find that the penalty recommended by the Commission is unwarranted. She, additionally, is compelled to admonish respondent for failing to honor an obligation placed upon board members by law, since such failure has resulted in unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, respondent is hereby suspended as a school official found to have violated the School Ethics Act, such suspension to remain in effect until the required training is

completed; provided, however, that if such training is not completed by the November 15, 2008 training session, respondent shall be summarily removed from office.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/10/08

Date of Mailing: 9/11/08

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	**DECISION FOR**
DANTE FERRARIE	:	**FAILURE TO ATTEND TRAINING**
Upper Saddle River Board of Education	:	
Bergen County	:	**DOCKET NO. T01-08**

This matter arises from an Order to Show Cause (OTSC) issued on June 20, 2008 by the School Ethics Commission alleging that Dante Ferrarie, a member of the Upper Saddle River Board of Education (Board), violated N.J.S.A. 18A:12-33 for failure to complete, during the first year of the member's first term, a training program offered by the New Jersey School Boards Association (NJSBA) regarding the skills and knowledge necessary to serve as a local school board member or charter school trustee.

The respondent was advised by the NJSBA of the training requirement in writing upon election or appointment as well as through notices published in its newsletter *School Board Notes*. The NJSBA mailed correspondence to all new board members who failed to register for, or attend, an orientation training. The NJSBA mailed such correspondence to the respondent on July 30, 2007 and December 27, 2007. The NJSBA conducted seven training sessions between April, 2007 and March, 2008 at varying locations and continuously published the dates and times of the sessions in the *School Board Notes*.

As required pursuant to N.J.A.C. 6A:28-4.2(c), the NJSBA provided the School Ethics Commission with a report listing those board members and trustees who had not fulfilled the training mandate for the first year of their first term. A report from the NJSBA indicated that the respondent failed to attend the training program within the required time period. The respondent was so notified by letter dated May 1, 2008 from the School Ethics Commission and encouraged to fulfill the training requirement. The Upper Saddle River business administrator responded to the May 1, 2008 letter and requested that the Commission allow the respondent to attend the November 15, 2008 training. At its May 27, 2008 meeting, the Commission considered the request and denied the request notifying the respondent that it would move forward with the issuance of an OTSC. The NJSBA offered two additional training opportunities in May and June 2008, which the respondent did not attend.

The June 20, 2008 OTSC was sent to the respondent by regular and certified mail. The respondent filed a timely response to the OTSC wherein he explained why he had not attended the training.

DECISION

N.J.A.C. 6A:28-4.2(d) provides that board members and trustees failing to comply with the training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Dante Ferrarie failed to comply with N.J.S.A. 18A:12-33 and the Commission finds him in violation of N.J.S.A. 18A:12-33. Therefore, the Commission recommends to the Commissioner of Education that the

respondent be suspended until he takes the orientation training and removed if he fails to take such training by the November 15, 2008 training session.

Paul C. Garbarini/yb

Paul C. Garbarini, Chairperson
School Ethics Commission

I hereby certify that the Decision was duly adopted by the School Ethics Commission at its public meeting on July 22, 2008.

Joanne Boyle, Executive Director

375-08

AGENCY DKT. NO. 210-7/08

IN THE MATTER OF RUSSELL WHITE,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
MERCER COUNTY SPECIAL SERVICES	:	DECISION
SCHOOL DISTRICT, MERCER COUNTY.	:	

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 for final determination on the Commission's recommended penalty, have been reviewed. Respondent did not file exceptions, nor did he appeal the Commission's underlying finding of violation pursuant to *N.J.A.C.* 6A:4.

Upon review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes respondent for failing to honor an obligation placed upon board members by law, since such failure has resulted in unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, respondent is hereby suspended as a school official found to have violated the School Ethics Act, such suspension to remain in effect until the required training is completed; provided, however, that if such training is not completed by the November 15, 2008 training session, respondent shall be summarily removed from office.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/10/08

Date of Mailing: 9/11/08

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	**DECISION FOR**
RUSSELL WHITE	:	**FAILURE TO ATTEND TRAINING**
Mercer County Special Services Board of Education	:	
Mercer County	:	**DOCKET NO. T20-08**

This matter arises from an Order to Show Cause (OTSC) issued on June 20, 2008 by the School Ethics Commission alleging that Russell White, a member of the Mercer County Special Services Board of Education (Board), violated N.J.S.A. 18A:12-33 for failure to complete, during the first year of the member's first term, a training program offered by the New Jersey School Boards Association (NJSBA) regarding the skills and knowledge necessary to serve as a local school board member or charter school trustee.

The respondent was advised by the NJSBA of the training requirement in writing upon election or appointment as well as through notices published in its newsletter *School Board Notes*. The NJSBA mailed correspondence to all new board members who failed to register for, or attend, an orientation training. The NJSBA mailed such correspondence to the respondent on July 30, 2007 and December 27, 2007. The NJSBA conducted seven training sessions between April, 2007 and March, 2008 at varying locations and continuously published the dates and times of the sessions in the *School Board Notes*.

As required pursuant to N.J.A.C. 6A:28-4.2(c), the NJSBA provided the School Ethics Commission with a report listing those board members and trustees who had not fulfilled the training mandate for the first year of their first term. A report from the NJSBA indicated that the respondent failed to attend the training program within the required time period. The respondent was so notified by letter dated May 1, 2008 from the School Ethics Commission and encouraged to fulfill the training requirement. The respondent responded to the May 1, 2008 letter and requested that the Commission allow him to attend the November 15, 2008 training. At its May 27, 2008 meeting, the Commission considered the respondent's request and denied his request notifying the respondent that it would move forward with the issuance of an OTSC. The NJSBA offered two additional training opportunities in May and June 2008, which the respondent did not attend.

The June 20, 2008 OTSC was sent to the respondent by regular and certified mail. The respondent filed a timely response to the OTSC wherein he requested that the Commission allow him to attend the training session scheduled for November 15, 2008.

DECISION

N.J.A.C. 6A:28-4.2(d) provides that board members and trustees failing to comply with the training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Russell White failed to comply with N.J.S.A. 18A:12-33 and the Commission finds him in violation of N.J.S.A. 18A:12-33. Therefore, the Commission recommends to the Commissioner of Education that the

respondent be suspended until he takes the orientation training and removed if he fails to take such training by the November 15, 2008 training session.

Paul C. Garbarini/jb

Paul C. Garbarini, Chairperson
School Ethics Commission

I hereby certify that the Decision was duly adopted by the School Ethics Commission at its public meeting on July 22, 2008.

Joanne Boyle, Executive Director

376-08

AGENCY DKT. NO. 211-7/08

IN THE MATTER OF KATHY ROETHEL,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF DELAWARE,	:	DECISION
HUNTERDON COUNTY.	:	

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 for final determination on the Commission's recommended penalty, have been reviewed. Respondent did not file exceptions, nor did she appeal the Commission's underlying finding of violation pursuant to *N.J.A.C.* 6A:4.

Upon review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes respondent for failing to honor an obligation placed upon board members by law, since such failure has resulted in unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, respondent is hereby suspended as a school official found to have violated the School Ethics Act, such suspension to remain in effect until the required training is completed; provided, however, that if such training is not completed by the November 15, 2008 training session, respondent shall be summarily removed from office.

IT IS SO ORDERED.*

Lucille T Davy

COMMISSIONER OF EDUCATION

Date of Decision: 9/10/08

Date of Mailing: 9/11/08

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	**DECISION FOR**
KATHY ROETHEL	:	**FAILURE TO ATTEND TRAINING**
Delaware Twp. Board of Education	:	
Hunterdon County	:	**DOCKET NO. T18-08**

This matter arises from an Order to Show Cause (OTSC) issued on June 20, 2008 by the School Ethics Commission alleging that Kathy Roethel, a member of the Delaware Township Board of Education (Board), violated N.J.S.A. 18A:12-33 for failure to complete, during the first year of the member's first term, a training program offered by the New Jersey School Boards Association (NJSBA) regarding the skills and knowledge necessary to serve as a local school board member or charter school trustee.

The respondent was advised by the NJSBA of the training requirement in writing upon election or appointment as well as through notices published in its newsletter *School Board Notes*. The NJSBA mailed correspondence to all new board members who failed to register for, or attend, an orientation training. The NJSBA mailed such correspondence to the respondent on July 30, 2007 and December 27, 2007. The NJSBA conducted seven training sessions between April, 2007 and March, 2008 at varying locations and continuously published the dates and times of the sessions in the *School Board Notes*.

As required pursuant to N.J.A.C. 6A:28-4.2(c), the NJSBA provided the School Ethics Commission with a report listing those board members and trustees who had not fulfilled the training mandate for the first year of their first term. A report from the NJSBA indicated that the respondent failed to attend the training program within the required time period. The respondent was so notified by letter dated May 1, 2008 from the School Ethics Commission and encouraged to fulfill the training requirement. Thereafter, the NJSBA offered two additional training opportunities in May and June 2008. The respondent did not attend either training.

The June 20, 2008 OTSC was sent to the respondent by regular and certified mail. The respondent filed a response to the OTSC wherein she requested that the Commission allow her to attend the training session scheduled for October 28, 2008.

DECISION

N.J.A.C. 6A:28-4.2(d) provides that board members and trustees failing to comply with the training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Kathy Roethel failed to comply with N.J.S.A. 18A:12-33 and the Commission finds her in violation of N.J.S.A. 18A:12-33. Therefore, the Commission recommends to the Commissioner of Education that the respondent be suspended until she takes the orientation training and removed if she fails to take such training by the November 15, 2008 training session.

Paul C. Garbarini, Chairperson
School Ethics Commission

I hereby certify that the Decision was duly adopted by the School Ethics Commission at its public meeting on July 22, 2008.

Joanne Boyle, Executive Director

377-08

OAL DKT. NO. EDU 8956-07
AGENCY DKT. NO. 308-10/07

MARY LAUDENBERGER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the parties' proposed Settlement Agreement, and the Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 9/10/08

Date of Mailing: 9/11/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8956-07
AGENCY DKT. NO. 308-10/07

MARY LAUDENBERGER,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,
Respondent.

Michael T. Barrett, Esq., for petitioner (Bergman & Barrett, attorneys)

Sharon Larmore, Esq., for respondent

Record Closed: July 21, 2008 Decided: July 28, 2008

BEFORE **ANA C. VISCOMI**, ALJ:

In this matter, petitioner asserts that the Board of Education's decision to withhold her increment for the 2007-2008 school year was arbitrary and capricious. This matter was transmitted to the Office of Administrative Law (OAL) on November 15, 2007, for determination as a contested case, pursuant to N.J.S.A.

52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. Prior to a hearing, the parties agreed to a settlement and prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein. (J-1).

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

3. The respondent Board of Education has passed a resolution accepting the settlement. (R-1).

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

July 28, 2008
DATE

ANA C. VISCOMI, ALJ

Date Received at Agency:

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUL 29 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

/cs

RECEIVED
2008 JUL 24 P 3:32
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

SETTLEMENT AGREEMENT
Mary Laudenberger v Trenton Board of Education
OAL DKT No. EDUOR 08956-2007

This **SETTLEMENT AGREEMENT ("AGREEMENT")** is made between the Petitioner, Mary Laudenberger (Petitioner), and the Respondent, City of Trenton Board of Education (Board).

WHEREAS, the Board withheld the Petitioner's increment for the 2007-2008 school year; and

WHEREAS, Petitioner challenged that withholding through the within Petition to the Commissioner; and

WHEREAS, the basis for the Board's withholding was the attendance of Petitioner during 2006-2007 school year; and

WHEREAS, the poor attendance was aberrational in view of Petitioner's attendance record over many years; and

WHEREAS, the Board has been provided with medical documentation substantiating these abscences; and

WHEREAS, the Board is satisfied that Petitioner has addressed these issues and her attendance this school year was excellent and consistent with her attendance in years prior to 2006-2007; and

WHEREAS, the Parties feel it is in the best interest of all involved and all issues related that this proceeding be settled allowing for the expeditious resolution of this matter, and saving both Parties the cost of legal fees and uncertainty of lititgation;

J-1

NOW, THEREFORE, in consideration of the covenants and mutual promises contained herein, it is hereby agreed as follows:

1. The Board agrees to restore Petitioner to the proper step on the salary guide commencing September 1, 2008;

2. In so doing, the Board will withhold only that increment designated for the 2007-2008 school year so that Petitioner's salary will remain at $76,061.00 plus dual certification and longevity.

3. As such, the salary for Petitioner commencing September 1, 2008 will be as though she suffered no increment withholding and will be $79,661.00 plus dual certification and longevity.

4. The Parties agree and covenant that neither party, nor any person, organization, or other entity on their behalf will file any charge, claim, lawsuit against any Party based upon the fact that the Board withheld Petitioner's increment for the 2007-2008 school year.

5. The Parties recognize that each of them has had input into the drafting of this Agreement and agree that if there should arise a dispute as to its terms, this Agreement shall not be construed against either party based upon the identity of its drafters;

6. The Parties understand that this Agreement and its validity is contingent upon the approval of Administrative Law Judge Ana Viscomi and the Commissioner of Education, and that if any terms of this Agreement are rejected, this Agreement shall be deemed null and void, and in such event, neither Party's position in relation to the tenure charge shall be prejudiced and the matter shall be returned to the Office of Administrative

Law for a hearing in relation to the tenure proceeding, and that in such event, the Parties may again attempt to settle the matter in a manner which is satisfactory to Administrative Law Judge Viscomi and the Commissioner of Education.

7. The Parties acknowledge that this Agreement is based upon their analysis and understanding of the evidence which would be presented should the hearing continue, and that in the event that this Agreement is not approved and the hearing is reconvened, neither this Agreement or anything in this Agreement shall be admissible in evidence;

8. In settling this matter, the Parties acknowledge that they are waiving their rights to a hearing before the Office of Administrative Law and the right to file exceptions to the Commissioner of Education as well as appeals in accordance with state law;

9. The Parties further acknowledge and agree to the terms of this Agreement and are satisfied with the legal representation that they have received in this matter;

10. The Parties warrant that this Agreement is entered into voluntarily, without any duress, or without any other promises or agreements not expressed herein, and with the understanding that neither Party is compelled to do so, and that by entering into this Agreement, each Party waives their right to a hearing and disposition on the merits of the charges;

11. Ms. Laudenberger has approved the terms of this Settlement Agreement as acknowledged by her signature below;

12. The Board has approved the terms of this Agreement by a roll call majority vote and acknowledged by the execution of this Agreement by the Board President.

APPROVED:

Mary Laudenberger

Mary Laudenberger, Petitioner

Sworn and subscribed to before me
this 18th day of Jan, 2008

Michael T. Barrett, Esq.
Attorney at Law, State of New Jersey

L. Diane Campbell

, President
Trenton Board of Education

Sworn and subscribed to before me
this 3rd day of July, 2008

Attorney at Law, State of New Jersey

TRENTON BOARD OF EDUCATION
108 North Clinton Avenue
Trenton, New Jersey 08609
BOARD CONFERENCE MEETING
Monday, May 19, 2008 – 6:30 P.M.
MINUTES

RECEIVED
2008 JUL 24 P 3:32
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

T. Missy Balmir	x
Alexander Brown	absent
L. Diane Campbell	x
Lucy Guzman	x
Elizabeth N. Johnson	x
Harry Luna	x
Donald O. Shelton	x
Marcellus Smith	x
Nicola Tatum	x

Valarie Simpson Butler, Administrative Reassignment
Motion by Mr. Shelton, seconded by Ms. Balmir to accept the Reassignment of Ms. Butler.
Approved by the entire Board. 8 Yeses 0 abstention 1 absent.

ROLL CALL	Yes	NO	Absent
T. Missy Balmir	x		
Alexander Brown	absent		
L. Diane Campbell	x		
Lucy Guzman	x		
Elizabeth N. Johnson	x		
Harry Luna	x		
Donald O. Shelton	x		
Marcellus Smith	x		
Nicola Tatum	x		

Dr. Simpson, Interim Assist., Administrative Reassignment
Motion by Mr. Shelton, seconded by Ms. Balmir to accept the Reassignment of Ms. Butler.
Approved by the entire Board. 8 Yeses 0 abstention 1 absent.

ROLL CALL	Yes	NO	Absent
T. Missy Balmir	x		
Alexander Brown	absent		
L. Diane Campbell	x		
Lucy Guzman	x		
Elizabeth N. Johnson	x		
Harry Luna	x		
Donald O. Shelton	x		
Marcellus Smith	x		
Nicola Tatum	x		

Mary Laudenberger v. Trenton Board of Education
Motion by Ms. Johnson, seconded by Mr. Luna to accept the settlement proposal.
Approved by Board members present 7 Yeses, 1 No, 0 absentions

R-1

TRENTON BOARD OF EDUCATION
108 North Clinton Avenue
Trenton, New Jersey 08609
BOARD CONFERENCE MEETING
Monday, May 19, 2008 – 6:30 P.M.
MINUTES

ROLL CALL	Yes	NO	Absent
T. Missy Balmir	x		
Alexander Brown	absent		
L. Diane Campbell	x		
Lucy Guzman	x		
Elizabeth N. Johnson	x		
Harry Luna	x		
Donald O. Shelton		x	
Marcellus Smith	x		
Nicola Tatum	x		
Nicola Tatum	x		

Adjourned to Closed Executive Session at 10:10 p.m.

Respectfully submitted,
Patricia McNeal-Rhoden
Assistant Board Secretary

#378-08

378-08

M.J-M., on behalf of minor children E.A.M., Jr. AND E.M. PETITIONER, V. BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY, RESPONDENT.	:	
AND	:	COMMISSIONER OF EDUCATION
N.J., on behalf of minor child, S.T., PETITIONER, V. BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY, RESPONDENT.	:	DECISION

SYNOPSIS

Petitioners, who are sisters with children attending school in respondent Board's district, contested the determination that their children were not domiciled in Ridgefield, and therefore were not eligible to attend the district's schools. Petitioners asserted that they and their children all live at a common address on Prospect Street, Ridgefield, which is owned and also occupied by another sister and her husband. The Board contends that M.J.-M and her sons are actually domiciled in Palisades Park, and that N.J. and her daughter are domiciled in Lodi; the Board counterclaimed for tuition.

The ALJ found the results of the respondent Board's surveillance of petitioners and their children to be credible. She further found that the petitioners are not credible in that they did not offer convincing documentary evidence of their residency, nor did they produce the obvious witnesses who should have been called if their truthful testimony would have been favorable to the petitioners. The ALJ concluded that the petitioners did not meet their burden of proof, and because they carried the burden of proof of residency from the start of the school year and not just from the commencement of the investigation, the Board is entitled to reimbursement of tuition for the entire school year for each of the three children in question.

Upon a full and independent review, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter; ordered petitioner M.J.-M to reimburse the Board for tuition in the of $15,392; ordered petitioner N.J. to reimburse the Board for tuition in the amount of $7,128; and dismissed the consolidated petition of appeal.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

September 15, 2008

OAL DKT. NOS. EDU 5660-08 AND EDU 5661-08
AGENCY DKT. NOS. 90-3/08 AND 91-3/08
(CONSOLIDATED)

M.J-M., on behalf of minor children E.A.M., Jr. AND E.M.

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD , BERGEN COUNTY,

RESPONDENT.

AND

N.J., on behalf of minor child, S.T.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon her full and independent consideration of this matter – and according due deference to the Administrative Law Judge's (ALJ) credibility determinations[1] – the Commissioner concurs with the ALJ that both M.J.-M. and N.J. have failed to sustain their burden of establishing, by a preponderance of

[1] The Commissioner "may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent and credible evidence in the record." *N.J.S.A.* 52:14B-10(c). It is noted that the instant record provides no cause whatsoever to question the ALJ's determinations in this regard.

the credible evidence, that they were domiciled in Ridgefield during the 2007-08 school year so as to entitle M.J.-M.'s minor children, E.A.M., Jr. and E.M. and N.J.'s child, S.T. to a free public education in that District.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter for the reasons presented therein and this consolidated petition of appeal is hereby dismissed. Petitioner M.J.-M is hereby directed to reimburse the Board for tuition in the amount of $15,392 and petitioner N.J. is hereby directed to reimburse the Board for tuition in the amount of $7,128 for the period of their children's ineligible attendance in the District's schools.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 9/15/08

Date of Mailing: 9/15/08

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

CONSOLIDATED INITIAL DECISIONS

OAL DKT. NO. EDU 05660-08
AGENCY DKT. NO. 90-3/08

M.J-M., ON BEHALF OF MINOR CHILDREN E.A.M., Jr. and E.M.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY,
Respondent.

OAL DKT. NO. EDU 05661-08
AGENCY DKT. NO. 91-3/08

N.J., ON BEHALF OF MINOR CHILD S.T.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY,
Respondent.

Santo J. Bonanno, Esq., for petitioners

Marla Wolfe Taus, Esq. for respondent Ridgefield Board of Education (Ferrar, Turitz, Harraka & Goldberg, attorneys)

Record Closed: July 10, 2008 Decided: August 4, 2008

BEFORE **GAIL M. COOKSON,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

These matters both involve non-residency determinations made by the Board of Education of the Borough of Ridgefield (Board) with respect to three children who are cousins and reported a common address of 663 Prospect Street, Ridgefield, New Jersey. M.J-M. is the mother of twin seven-year old boys, E.A.M., Jr. and E.M., and N.J. is the mother of a twelve-year old girl, S.T. M.J-M. and N.J. are sisters. Petitioners challenge the findings of the Board in each case that they were not domiciled in the district and were not entitled, therefore, to a free education for their children.

By notice dated March 6, 2008, petitioners were individually notified that the Superintendent of Schools of the Board intended to recommend that E.A.M., Jr., E.M. and S.T. be de-enrolled from the Ridgefield Public Schools on the basis that they had not been lawfully domiciled in the District since September 5, 2007. A hearing was conducted on March 13, 2008, at which time the Board determined that the children were ineligible for free attendance in the Ridgefield schools. Both petitioners filed a Pro Se Residency Appeal pursuant to N.J.S.A. 18A:38-1 and N.J.A.C. 6A:3-8.1 and 6A:22 with the Commissioner of Education (Commissioner) in a timely manner on March 27, 2008. On April 17, 2008, the respondent Board filed an Answer to each appeal with the Commissioner with a Counterclaim for reimbursement from petitioners for the costs of tuition incurred by the attendance of each minor child in the Board's school district for the entire 2007-2008 academic year. The appeals were transmitted by the Commissioner to the Office of Administrative Law on May 9, 2008, as contested matters in accordance with N.J.S.A. 52:14B-1 to -15. Because the facts relating to each residency challenge were intertwined, both matters were assigned to the above for a consolidated evidentiary hearing. The hearing was held on July 10, 2008, on which date the record closed.

FACTUAL DISCUSSION

The three children whose residency has been challenged by the Ridgefield Board all assert that they reside at 663 Prospect Avenue, Ridgefield, NJ. During the 2007-2008 school year, S.T. was in seventh grade but has been a registered student in

Ridgefield since 2002. The twins E.A.M. and E.M. have attended both kindergarten and first grade in Ridgefield, the latter during the recently concluded school year. The twins attend the Bergen Boulevard School, approximately one mile southeast of the 663 Prospect home. S.T. attends the Skewes Middle School which is across the street from the home.

The 663 Prospect property is owned by the sister and brother-in-law to both N.J. and M.J-M. That couple purchased the home on August 31, 2007. It has four bedrooms as well as a basement. According to the testimony of the petitioners, the three sisters and their respective families all live in the house. Of the three bedrooms on the second floor, the master bedroom is occupied by the sister and brother-in-law; another is occupied by their daughters[1]; and the third is shared by N.J. and her daughter S.T. On the first floor, M.J-M. occupies a bedroom in which her twin sons also have bunk beds.

Between 2002 and 2007, N.J. resided at 949 Rey Avenue, Ridgefield with her husband and registered their daughter S.T. in the district from that address. Her sister and brother-in-law owned the Rey Avenue property and sold it July 12, 2007. N.J. had purchased a house at 69 Avenue C, Lodi on or about December 18, 2006, but she claims it was always intended as a rental property. She stated that she is now separated from her husband, who lives in the basement apartment in the Lodi house[2], but has been trying to reconcile with him. After their separation and the sale of the Rey property, N.J. stated that she and her daughter moved into her sister's new house at 663 Prospect in time for the start of the 2007-2008 school year. N.J. filed her tax return for 2007 using the address of 663 Prospect and a filing status of "head of household" with one dependent rather than a filing status of "married filing separately." N.J. works in Teaneck for 7-Eleven and must be at work by 7 a.m.

N.J. testified that she often takes her daughter in the early morning hours to S.T.'s father's apartment in Lodi on her way to her job at 7-Eleven in Teaneck. The father has night-shift employment and is able to get S.T. back to 663 Prospect after their

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[1] One of the daughters is in eighth grade in Ridgefield and the other is in her early twenties.
[2] However, the Lodi property is presently in foreclosure. See Summons and Complaint attached as exhibit to N.J. Answers to Interrogatories. P-1.

visit in time for her to cross the street to the school. I do not **FIND** N.J.'s testimony in this regard to be credible. In fact, I **FIND** it incredible that she wakes up her twelve-year old daughter at 5 a.m. to drive her to Lodi just to be returned to 663 Prospect in time to have breakfast by herself and get herself to school across the street.

N.J. presented a few documents in support of her proof of residency at 663 Prospect. P-1. Those included a savings account statement in the name of her daughter using the 663 Prospect address, but on which there was no activity except maintenance fee debits that exceeded the less-than-$10 value in the account. Further, there was no statement indicating when the account was originally opened or what documents were presented to the bank as proof of identity. N.J.'s vehicle registration using the 663 Prospect address was a duplicate which appears to have been issued only in March 2008 with her prior vehicle registration indicating the old Rey Avenue address. Her driver's license now has the 663 Prospect address but was issued only in June 2008. Also, she did not present any lease for any period of time for the house in Lodi that would substantiate her claim that it was rental property and not the home of her husband, daughter and herself.

M.J-M. works two jobs, one in Teaneck and the other in Manhattan. She is on the deed of 663 Prospect as joint owner with her sister and brother-in-law. M.J-M. also is on the deed with her sister and brother-in-law of a house located at 127 East Brinkerhoff, Palisade Park, purchased the same date of August 31, 2007. P-2. She stated that the Palisade Park house is occupied by her mother. She explained that she usually wakes the boys early at 663 Prospect and takes them to her mother's for breakfast and then she or her sister N.J. take the boys to school from there.

With respect to M.J-M., documents were presented including voter registration, car insurance, paystubs, vehicle registration and driver's license that were all addressed at 663 Prospect. The water utility bill for 663 Prospect is issued in both sister-owners' names. P-2. Both M.J-M. and N.J. asserted that their mother – the grandmother to the three school children – is the person who lives at 127 E. Brinkerhoff Avenue, Palisade Park. As stated, the Palisade Park house is jointly owned by petitioner M.J-M., her other sister and her brother-in-law. The closing was the same date of August 31, 2007,

as the property at 663 Prospect. I **FIND** it significant that no documents were presented to substantiate that the grandmother resides in the Palisade Park house. No documents were presented relating to the payment of utilities, the mortgage or other expenses at the Palisade Park house. Nor were any photographs presented of the allegedly occupied bedrooms of petitioners and the three children at the 663 Prospect house, which would have been easily-accessible evidence to present if it would have helped their appeals.

I also do not **FIND** the testimony of M.J-M. credible that she wakes her seven-year old twin boys up at 663 Prospect, takes them in the opposite direction to the grandmother's house in Palisade Park just for breakfast and then drives them to elementary school back in Ridgefield. If she has time to personally take them to school before she leaves for work, it strains common sense to believe that she does not feed them breakfast at their own home at 663 Prospect. Children need their sleep and are often reluctant to awake in the morning in time for school, let alone the hour earlier that petitioners' asserted routines would have necessitated. I **FIND** it highly unlikely that all three of these children are being wakened earlier than necessary by the petitioners to have breakfast away from their normal home and/or to visit with relatives before the school day begins.

The Board disputes that N.J. and M.J-M. are domiciled in their sister's home at 663 Prospect and presented the testimony and investigative reports of Ronald J. Deramo in support of its de-enrollment decisions. Deramo is employed by the Board as an enrollment verification officer. He has over twenty years experience in the fields of public and private investigation, including the Bergen County Prosecutor's Office. He conducted a review of the documents on file with the school but then engaged in approximately twenty occasions of visual surveillance of the several properties and persons related to the residency of the three children.

Deramo summarized his findings with respect to M.J-M. by stating that he always saw the twins being taken to the Bergen Boulevard elementary school from the Palisade Park house. After school, the twins would sometimes go to 663 Prospect but later be

picked up by M.J-M. and taken to Palisade Park for the remainder of the evening. Specifically, Deramo made observations on the following dates and times:

On January 22, 2008, Deramo saw the two middle school girls leave 663 Prospect and go across the street to their school but he never saw the twins leave for elementary school. Their school later informed him that the twins were dropped off by their mother at approximately 8:30 a.m. Deramo then proceeded to conduct early morning surveillance of the property located in Palisade Park on numerous occasions between the hours of 7:00 a.m. and 8:30 a.m. On January 24, M.J-M. drove the boys from the Palisade Park house to school. He saw M.J-M.'s car that evening in the Palisade Park driveway and then again the next morning. On January 25, she again drove the twins directly to the school using a vehicle that he found to be parked in a similar location as it had been the night before. January 28, M.J-M. drove back and forth between Palisade Park and 663 Prospect but the twins remained in car and were then driven to school by their mother who then returned to Palisade Park before leaving presumably for work. On each of the mornings of January 30 and 31, February 1, 4, 5, 6, 8, 11, 12, 13, 14, 24, 26, 27 and 28, M.J-M. drove the twins to school from the Palisade Park house. Deramo also witnessed what he described as some indicia of home ownership, such as carrying out the trash, picking up the newspaper, locking the front door, etc. He also noted that he made some evening observations as well and found on the evenings of January 29, 30, and February 13, that M.J-M.'s car was parked at the Palisade Park house. R-3.

Deramo continued his investigation into the residency question relating to M.J-M. On February 29, March 4, 5, 6, 7, 10, 11, 12, 17, 26 2008, Deramo was at the Palisade Park house at or before 7:40 a.m. On each date, M.J-M. and her twins would exit the house and take the approximately eight-minute drive to the school. R-5; R-10. On March 6, 26 and May 23, Deramo observed M.J-M.'s car at the Palisade Park house around the dinner hour, and on two other occasions, he observed her car there on the weekends. R-5, R-10. I **FIND** that M.J-M. was residing at the Palisade Park house on all the occasions observed by Deramo.

With respect to N.J., Deramo made numerous surveillances of the Lodi property and the whereabouts of N.J.'s car in order to determine if she genuinely lived at 663 Prospect. On February 8-11, 2008, Friday through Monday, the vehicle belonging to N.J. was seen parked at the Lodi house at various times by Deramo and remaining there until at least Monday morning. R-11. On that particular Monday morning, he witnessed S.T.'s mother N.J. leave for work and her father drive her to 663 Prospect before school. Again, on February 12, 13 and 15, Deramo observed the same routine of N.J. leaving the Lodi house alone presumably to go to work and then S.T. being driven by her father to 663 Prospect prior to the beginning of the school day. On Sunday, February 24, N.J.'s car was at the Lodi house and on the next day, Monday February 25, she left the house and cleaned frost from the vehicle. Deramo observed N.J. leaving the Lodi house on a regular basis on February 26, 27 and 28 at approximately 6:40 a.m. R-11. In addition, with respect to S.T., Deramo observed her father taking her from the Lodi house to 663 Prospect on five occasions on February 29, March 5, 7, 10, 11, just prior to 7 a.m., arriving there approximately fourteen minutes later. On March 6 and 12, he observed N.J. driving her daughter to 663 Prospect around that same time in the morning. During the week of March 2, Deramo conducted surveillance on Tuesday through Friday that week. He observed N.J.'s car at the Lodi property on two occasions in the evening and was of the opinion that the position and condition of her car the following mornings were indicative of it remaining there overnight. R-13. I **FIND** that N.J. was residing at the Lodi house on all the above-referenced occasions.

Deramo made certain observations during his investigation relating to the activities of the petitioners' families during the afternoon hours after the school day had concluded. On January 17, Deramo conducted a surveillance of 663 Prospect at around 4:00 p.m. He observed N.J. pick up all three children and drive to the Lodi house. On January 23, N.J. picked up the twins, with her daughter S.T. and their middle-school cousin in the vehicle already, and dropped all of the children off at 663 Prospect. On January 28, N.J. picked up the twins and dropped them off at Palisade Park house. On January 29, all four children of these related households were picked up from school and then dropped off at the library by N.J. I do not **FIND** the after-school

activities of the school-age children to be relevant to the issue of the proper domicile of their parents, as discussed below.

After the de-enrollment hearing in March, Deramo observed N.J.'s car consistently at Lodi house but did not see S.T. being driven by her father in the morning. From this circumstantial evidence, he concluded that S.T. had been staying with her aunt and uncle at 663 Prospect during the spring in order to complete the school year in Ridgefield. R-14. Similarly, Deramo undertook a surveillance of M.J-M. after the Board hearing in March and concluded on the basis of "drive by checks" on unspecified dates that M.J-M. might have moved back into 663 Prospect for the period of the appeal process and the conclusion of school. I do not **FIND** the post-hearing investigation of Deramo to be conclusive on the issue of where M.J-M., E.A.M., Jr., E.M., or S.T. were living but I **FIND** that it does establish that her mother N.J. and her father were living in Lodi.

On the Counterclaims for tuition asserted by the Board, Diana Essbach, Tuition Administrator, presented undisputed testimony that the annual tuition cost for each of the elementary school children was $7,696 and for the middle school child was $7,128. R-16, R-17. I **FIND** these annual tuition costs to be accurate. Petitioners asserted in contradiction only that the Board had not investigated non-residency until January 2008 and that petitioners were entitled, therefore, to credit as residents for the September-December 2007 school days.

ANALYSIS AND CONCLUSIONS OF LAW

Persons over five and under twenty years of age who are domiciled within a school district may attend its public schools free of charge. N.J.S.A. 18A:38-1(a). For purposes of this subsection, the domicile of an unemancipated child is the domicile of the parent, custodian or guardian. P.B.K. v. Tenafly Bd., 343 N.J. Super. 419 (App. Div. 2001). If the parent or guardian of a child attending school in the district is not domiciled within the district, the superintendent or administrative principal may apply to the board of education for the child's removal. N.J.S.A. 18A:38-1b.(2). No child shall be removed from school during the twenty-one day period during which the parent or guardian may

contest the board's decision or during the pendency of the proceedings before the Commissioner. Ibid. In a residency appeal, the parent has the burden of proof by a preponderance of the evidence. N.J.S.A. 18A:38-1(b)(2). The legal standard to be applied is set forth in the regulation:

> A student is domiciled in the district when he or she is living with a parent or legal guardian whose permanent home is located within the district. A home is permanent when the parent or guardian intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere.
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> [N.J.A.C. 6A:28-2.4(a)(1)(i).]

It has long been held that a person may have many residences but only one domicile. Somerville Bd. v. Manville Bd., 332 N.J. Super. 6, 12 (App. Div. 2000), aff'd, 167 N.J. 55 (2001). As incorporated in the regulation, the domicile of a person is the place where she has her true, fixed, permanent home and principal establishment, and to which whenever she is absent, she has the intention of returning, and from which she has no present intention of moving. Matter of Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991), aff'd, 311 N.J. Super. 589 (App. Div. 1998), certif. denied, 157 N.J. 541 (1998), cert. denied, 526 U.S. 1051, 119 S.Ct. 1357, 143 L. Ed.2d 518 (1999). The acts, statements and conduct of the individual, as viewed in light of all circumstances, determine a person's true intent. Collins v. Yancey, 55 N.J. Super. 514, 521 (Law Div. 1959).

Where a person has more than one residence, the following factors are useful in determining his or her domicile: the physical characteristics of each place, the time spent and the things done in each place, the other persons found there, the person's mental attitude towards each place, and whether there is or is not an intention, when absent, to return. Mercadante v. City of Paterson, 111 N.J. Super. 35, 39-40 (Ch. Div. 1970), aff'd, 58 N.J. 112 (1971). A choice of domicile by a person, irrespective of his motive, will be honored by the court, provided there are sufficient objective indicia, by way of proofs, supporting the actual existence of that domicile." In re Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991).

Based upon the testimony and documents presented by each party, I **CONCLUDE** that there are insufficient objective indicia that the house at 663 Prospect is the domicile of M.J-M and her twin boys, or N.J. and her twelve-year old daughter. As stated, there were documents that logically would have bore upon the expenses, mortgages and living arrangements of each of the three houses in question that were not presented. There were also witnesses that a fact-finder would have a reasonable basis to presume would have been produced if their truthful testimony would have been favorable to the petitioners, including the sister who owned and resided at 663 Prospect, the grandmother, N.J.'s husband, and petitioners' adult niece. I draw the inference that the production of additional witnesses or objective indicia of domicile was avoided because they would have been unfavorable to the petitioners, notwithstanding that they would have made superior witnesses on the contested issues.

> As Dean Wigmore points out, when the inference is permitted it is based not on the bare fact that a particular person is not produced as a witness by a party, but on his non-production, when it would be natural for the party to produce the witness if the facts known by him had been favorable. To meet the requirement "when it would be natural for the party to produce the witness," it must appear that the person was within the power of the party to produce. . . . . Nor may the inference be drawn if the person's testimony is comparatively unimportant, or cumulative, or inferior to what is already utilized. As a general rule the inference cannot fairly be drawn, except from the non-production of witnesses whose testimony would be superior in respect to the fact to be proved. 2 Wigmore, Evidence (3d ed. 1940), §§ 286, 287, 288.
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> [O'Neil v. Bilotta, 18 N.J. Super. 82, 86 (App.Div. 1952).]

The production of some of these witnesses would have provided the Board and this forum a more thorough opportunity to explore the truth of the asserted living arrangements. The petitioners plainly use each other's houses as locations for common family meals and gatherings or after-school care but the investigation just as plainly and more thoroughly proves that the petitioners are not domiciled at 663 Prospect.

This is not to say that this extended family does not assist one another with childcare before and especially after school. Petitioners' adult niece and N.J. were observed picking up the twins or all the children along with their middle-school cousin,

who then sometimes stayed together after school at 663 Prospect, the library, etc. To say that children cannot be enrolled in a school district unless they are cared for before and after school within that same school district would de-enroll a substantial portion of our population. Working parents, especially single parents, often must call upon the volunteer services of grandmothers, cousins or aunts to help cover the hours before and after public school when their own job(s) do not allow them to be home with the children. But the fact that family members help out with these types of responsibilities does not form the factual predicate for concluding that permanent residence exists in Ridgefield. On that issue, petitioners' evidence falls woefully short of establishing domicile on the part of either petitioner in Ridgefield and the Board's case provides substantial proof to the contrary.

In sum, I **CONCLUDE** that the above-referenced testimonial descriptions by petitioners of their daily routines were self-serving, contrived and created after-the-fact to fit the facts as objectively observed by the Board's investigator and the law on residency that was their burden to meet.

Accordingly, I **CONCLUDE** that petitioners have not met the burden of proof on their appeals of the Board's non-residency and de-enrollment determinations. Because they carry the burden of proof on residency from the start of the school year and not just the commencement of the investigation, I also **CONCLUDE** that the Board is entitled to an award in its favor on the counterclaims for the full amount of the school year tuition cost for each of E.A.M., Jr., E.M. and S.T.

ORDER

Based on the foregoing findings of fact and conclusions of law, I **DENY** the relief requested by the M.J-M. on behalf of E.A.M., Jr. and E.M. and **DISMISS** her residency appeal. The decision of the Board with respect to E.A.M., Jr. and E.M. is **AFFIRMED** for the school year 2007-2008. Accordingly, I **GRANT** respondent's tuition reimbursement counterclaim on Docket No. EDU 05660-08 in the amount of $15,392.

Based on the foregoing findings of fact and conclusions of law, I **DENY** the relief requested by N.J. on behalf of S.T. and **DISMISS** her residency appeal. The decision of the Board with respect to S.T. is **AFFIRMED** for the school year 2007-2008. Accordingly, I **GRANT** respondent's tuition reimbursement counterclaim on Docket No. EDU 05661-08 in the amount of $7,128.

I hereby **FILE** these initial decisions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

These recommended decisions may be each separately adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject each of these decisions within forty-five days and unless such time limit is otherwise extended, each of these recommended decisions shall become a final decision in accordance with N.J.S.A. 52:14B-10.

August 4, 2008
DATE

Gail M. Cookson
GAIL M. COOKSON, ALJ

Date Received at Agency:

8/4/08

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AUG 6 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

pb

APPENDIX

LIST OF WITNESSES

For Petitioners:

N.J.

M.J-M.

For Respondent:

Ronald J. Deramo

Diana Essbach

LIST OF EXHIBITS IN EVIDENCE

For Petitioners:

P-1 Answers to Interrogatories by N.J. o/b/o minor child S.T.

P-2 Answers to Interrogatories by M.J-M. o/b/o minor children E.A.M. and E.M.

P-3 Interrogatories from BOE Ridgefield to M.J-M.

P-4 Interrogatories from BOE Ridgefield to N.J.

For Respondent:

R-1 Ridgefield Schools Medical Information and Emergency Card for N.J. obo minor child S.T.

R-2 Photograph dated February 27, 2008, 06:55 a.m.

R-3 Memorandum re M.J-M. Investigation from Ronald J. Deramo to Dr. Richard Brockel dated February 28, 2008

R-4 Memorandum re M.J-M. Investigation from Ronald J. Deramo to Dr. Richard Brockel dated March 3, 2008

R-5 Memorandum re Investigation from Ronald J. Deramo to Dr. Richard Brockel dated March 12, 2008

R-6 Photographs (16) dated January 25, 2008 [subparts a-p]

R-7 Photographs (4) dated January 28, 2008 [subparts a-d]

R-8 Photographs (21) dated January 29, 2008 [subparts a-u]

R-9 Photographs (9) dated February 8, 2008 [subparts a-i]

R-10 Memorandum re M.J-M. Investigation from Ronald J. Deramo to Dr. Richard Brockel dated June 18, 2008

R-11 Memorandum re N.J. Investigation from Ronald J. Deramo to Dr. Richard Brockel dated February 28, 2008

R-12 Memorandum re N.J. Investigation from Ronald J. Deramo to Dr. Richard Brockel dated March 3, 2008

R-13 Memorandum re N.J. Investigation from Ronald J. Deramo to Dr. Richard Brockel dated March 12, 2008

R-14 Memorandum re N.J. Investigation from Ronald J. Deramo to Dr. Richard Brockel dated June 18, 2008

R-15 Photographs (2) dated February 27, 2008 [subparts a-b]

R-16 Memorandum re Tuition Rates dated March 13, 2008

R-17 Memorandum re Tuition Rates dated July 2, 2008

380-0

#380-08SEC

AGENCY DKT. NO. 216-7/08

IN THE MATTER OF MARGARET HINTZ,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
BOROUGH OF ROCKY HILL,	:	DECISION
SOMERSET COUNTY.	:	

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 for final determination on the Commission's recommended penalty, have been reviewed. Respondent did not file exceptions, nor was the Commission's underlying finding of violation appealed to the Commissioner pursuant to *N.J.A.C.* 6A:4.

Upon review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes respondent for failing to honor an obligation placed upon board members and charter school trustees by law, since such failure has resulted in unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, the above-named respondent is hereby removed from office, as of the filing date of this decision, as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED. *

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/11/08

Date of Mailing: 9/12/08

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	**DECISION FOR**
MARGARET HINTZ	:	**FAILURE TO ATTEND TRAINING**
Rocky Hill Board of Education	:	
Somerset County	:	**DOCKET NO. T27-08**

This matter arises from an Order to Show Cause (OTSC) issued on June 20, 2008 by the School Ethics Commission alleging that Margaret Hintz, a member of the Rocky Hill Board of Education (Board), violated N.J.S.A. 18A:12-33 for failure to complete, during the first year of the member's first term, a training program offered by the New Jersey School Boards Association (NJSBA) regarding the skills and knowledge necessary to serve as a local school board member or charter school trustee.

The respondent was advised by the NJSBA of the training requirement in writing upon election or appointment as well as through notices published in its newsletter *School Board Notes*. The NJSBA mailed correspondence to all new board members who failed to register for, or attend, an orientation training. The NJSBA mailed such correspondence to the respondent on July 30, 2007 and December 27, 2007. The NJSBA conducted seven training sessions between April, 2007 and March, 2008 at varying locations and continuously published the dates and times of the sessions in the *School Board Notes*.

As required pursuant to N.J.A.C. 6A:28-4.2(c), the NJSBA provided the School Ethics Commission with a report listing those board members and trustees who had not fulfilled the training mandate for the first year of their first term. A report from the NJSBA indicated that the respondent failed to attend the training program within the required time period. The respondent was so notified by letter dated May 1, 2008 from the School Ethics Commission and encouraged to fulfill the training requirement. Thereafter, the NJSBA offered two additional training opportunities in May and June 2008. The respondent did not attend either training.

The June 20, 2008 OTSC was sent to the respondent by regular and certified mail. The return receipt shows that the respondent received the OTSC on June 24, 2008. The respondent did not respond to the OTSC.

DECISION

N.J.A.C. 6A:28-4.2(d) provides that board members and trustees failing to comply with the training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Margaret Hintz failed to comply with N.J.S.A. 18A:12-33 and the Commission finds her in violation of N.J.S.A. 18A:12-33. Ms. Hintz received repeated notifications of the long-standing training requirement and has had ample opportunities to attend the training. Ms. Hintz did not provide any response to the Commission's OTSC and the Commission believes that the appropriate penalty, based on her failure to respond to the OTSC, is removal, so as to underscore to this and all similarly situated board members and charter school trustees that the Commission will not tolerate the

dedication of additional administrative and adjudicative time tracking attendance at a training program well after the timeline established in N.J.S.A. 18A:12-33. Therefore, the Commission recommends to the Commissioner of Education that the respondent be removed from the Rocky Hill Board of Education.

Paul C. Garbarini, Chairperson
School Ethics Commission

I hereby certify that the Decision was duly adopted by the School Ethics Commission at its public meeting on July 22, 2008.

Joanne Boyle, Executive Director

379-0

#379-08SEC

AGENCY DKT. NO. 215-7/08

IN THE MATTER OF NEIL LANG, BOARD OF EDUCATION OF THE TOWNSHIP OF BOONTON, MORRIS COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 for final determination on the Commission's recommended penalty, have been reviewed. Respondent did not file exceptions, nor was the Commission's underlying finding of violation appealed to the Commissioner pursuant to *N.J.A.C.* 6A:4.

Upon review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes respondent for failing to honor an obligation placed upon board members and charter school trustees by law, since such failure has resulted in unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, the above-named respondent is hereby removed from office, as of the filing date of this decision, as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/11/08

Date of Mailing: 9/12/08

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	**DECISION FOR**
NEIL LANG	:	**FAILURE TO ATTEND TRAINING**
Boonton Twp. Board of Education	:	
Morris County	:	**DOCKET NO. T24-08**

This matter arises from an Order to Show Cause (OTSC) issued on June 20, 2008 by the School Ethics Commission alleging that Neil Lang, a member of the Boonton Township Board of Education (Board), violated N.J.S.A. 18A:12-33 for failure to complete, during the first year of the member's first term, a training program offered by the New Jersey School Boards Association (NJSBA) regarding the skills and knowledge necessary to serve as a local school board member or charter school trustee.

The respondent was advised by the NJSBA of the training requirement in writing upon election or appointment as well as through notices published in its newsletter *School Board Notes*. The NJSBA mailed correspondence to all new board members who failed to register for, or attend, an orientation training. The NJSBA mailed such correspondence to the respondent on July 30, 2007 and December 27, 2007. The NJSBA conducted seven training sessions between April, 2007 and March, 2008 at varying locations and continuously published the dates and times of the sessions in the *School Board Notes*.

As required pursuant to N.J.A.C. 6A:28-4.2(c), the NJSBA provided the School Ethics Commission with a report listing those board members and trustees who had not fulfilled the training mandate for the first year of their first term. A report from the NJSBA indicated that the respondent failed to attend the training program within the required time period. The respondent was so notified by letter dated May 1, 2008 from the School Ethics Commission and encouraged to fulfill the training requirement. Thereafter, the NJSBA offered two additional training opportunities in May and June 2008. The respondent did not attend either training.

The June 20, 2008 OTSC was sent to the respondent by regular and certified mail. The return receipt shows that the respondent received the OTSC prior to July 2, 2008, which is when the undated return receipt was returned to the Commission. The respondent did not respond to the OTSC.

DECISION

N.J.A.C. 6A:28-4.2(d) provides that board members and trustees failing to comply with the training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Neil Lang failed to comply with N.J.S.A. 18A:12-33 and the Commission finds him in violation of N.J.S.A. 18A:12-33. Mr. Lang received repeated notifications of the long-standing training requirement and has had ample opportunities to attend the training. Mr. Lang did not provide any response to the Commission's OTSC and the Commission believes that the appropriate penalty, based on his failure to respond to the OTSC, is removal, so as to underscore to this and all similarly situated board members and charter school trustees that the Commission will not tolerate the dedication

of additional administrative and adjudicative time tracking attendance at a training program well after the timeline established in N.J.S.A. 18A:12-33. Therefore, the Commission recommends to the Commissioner of Education that the respondent be removed from the Boonton Township Board of Education

Paul C. Garbarini/jb

Paul C. Garbarini, Chairperson
School Ethics Commission

I hereby certify that the Decision was duly adopted by the School Ethics Commission at its public meeting on July 22, 2008.

Joanne Boyle, Executive Director

382-05

OAL DKT. NO. EDU 12711-07
AGENCY DKT. NO. 331-11/07

WALLACE GOULD AND GLENN HOUTHUYSEN,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the parties' proposed Settlement Agreement and Release, and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon such review, the Commissioner approves the parties' settlement as it relates to the matter before the Commissioner* and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 9/17/08

Date of Mailing: 9/17/08

* The settlement also resolves related grievances filed by petitioners' majority representatives.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 12711-07

AGENCY REF.NO.331-11/07

WALLACE GOULD AND GLENN HOUTHUYSEN,

Petitioners,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,

Respondent.

Richard Friedman, Esq., for petitioner (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys),

Mark S. Tabenkin, Esq., for respondent

Record Closed: July 29, 2008 Decided: August 4, 2008

BEFORE **CAROL I. COHEN**, ALJ:

The matter was transmitted to the Office of Administrative Law (OAL) on December 27, 2007 for determination as a contested case. The parties reached a tentative settlement before the hearing. Several telephone conferences were held in order to settle the matter.

The parties were ultimately able to settle the matter, and the parties submitted the attached Settlement Agreement on July 29, 2008, indicating the terms of the agreement.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signature of the parties and/or signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

8/4/08
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Date Received at Agency: 8-8-08

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AUG 8 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

id

RECEIVED
2008 JUL 29 P 4:07
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

MARK S. TABENKIN, ESQ.
Paterson Public Schools
33-35 Church Street
Paterson, New Jersey 07505
(973) 321-2436
Attorney for Respondent

In the Matter of **WALLACE GOULD** and **GLENN HOUTHUYSEN,** Petitioners, -vs- **STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,** Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY Agency Dkt. No. 331-10/07 OAL Dkt. No. EDUOR 12711-2007N **SETTLEMENT AGREEMENT AND RELEASE**

This agreement is made this 25th day of July, 2008, by and between petitioners, Wallace Gould ("petitioner Gould") and Glenn Houthuysen ("petitioner Houthuysen"), and respondent, State-Operated School District of the City of Paterson, Passaic County (the "District"), with its principal place of business located at 33-35 Church Street, Paterson, New Jersey, and the Paterson Education Association (the "Association"), with its principal place of business located at 445 Straight Street, Paterson, New Jersey.

WHEREAS in or about November 2007, petitioner Gould and petitioner Houthuysen filed a Petition of Appeal bearing OAL Dkt. No. EDUOR 12711-2007N and Agency Ref. No. 331-10/07, alleging that the District failed to give them appropriate salary guide credit for military service as required by N.J.S.A. 18A:29-11; and

WHEREAS the District has filed an Answer to the Petition of Appeal denying any violation of N.J.S.A. 18A:29-11; and

WHEREAS on or about June 19, 2007, the Paterson Education Association filed a grievance on behalf of petitioners Gould and Houthuysen, alleging that they had been improperly placed on the salary guide upon hire by the District (Grievance No. 06-56); and

WHEREAS the District has denied the grievance, and the Association has sought to process the grievance to arbitration; and

WHEREAS petitioners Gould and Houthuysen, respondent District and the Association now desire to resolve all issues relative to the Petition of Appeal and to Grievance No. 06-56 amicably and without the need for further litigation.

NOW, THEREFORE, in consideration of the foregoing, petitioners Gould and Houthuysen, respondent District and the Association hereby agree as follows:

1. The District shall pay to petitioner Gould the sum of Fifty-Two Thousand Four Hundred Eighty-Eight ($52,488.00) Dollars, less applicable deductions, in full satisfaction of all claims which petitioner Gould has against the District asserted in the Petition of Appeal and in Grievance No. 06-56. Such payment shall be made within 60 days after approval of this settlement by the Commissioner of Education.

2. The District shall pay to petitioner Houthuysen the sum of Six Thousand Fifty ($6,050.00) Dollars, less applicable deductions, in full satisfaction of all claims which petitioner Houthuysen has against the District asserted in the petition of Appeal and in Grievance No. 06-56. Such payment shall be made within 60 days after approval of this settlement by the Commissioner of Education.

3. Effective June 30, 2008, the District shall place petitioner Houthuysen on Step 9 of the M.A. salary guide. The District and the Association are currently engaged in negotiations for a successor agreement to the agreement which expires June 30, 2008; it is the intention of the parties that petitioner Houthuysen shall move to Step 10 of the M.A. salary guide upon removal of the restrictions upon salary guide advancement imposed by Neptune Township Board of Education v. Neptune Township Education Association, 144 N.J. 16 (1996).

4. Within ten (10) days of payment to petitioners Gould and Houthuysen of the sums set forth in paragraphs 1 and 2 of this Agreement, above, the Association shall withdraw Grievance No. 06-56, with prejudice.

5. In consideration of the foregoing, petitioners Gould and Houthuysen hereby release and forever discharge the District and its present and former affiliates, subsidiaries, officers, directors, agents, employees, and their successors and assigns, from any and all actions, causes of action, suits, claims, charges or complaints which petitioners Gould and Houthuysen may have or may have had, or may claim to have or have had, in the past, currently, or in the future for anything which has occurred prior to the execution of this Agreement, against any of them, except as may be necessary to enforce this Agreement. Petitioners Gould and Houthuysen acknowledge that this general release also includes but is not limited to claims arising under federal, State, and local laws prohibiting employment discrimination, claims arising under the State education laws, including the tenure laws, claims arising under State, federal or common law for breach of contract, or claims growing out of any legal restrictions on the District's rights with regard to employment of individuals. Petitioners Gould and Houthuysen hereby expressly waive and release any and all claims or rights arising under the Education Law, N.J.S.A. 18A:1-1 et seq., as well as any and all claims or rights arising under, but not limited to, the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq., Title VII of the Civil Rights Act of 1964, as

amended, 42 U.S.C. § 2000e et seq., and the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 et seq.

6. This Agreement does not constitute an admission by either party of any wrongful action or violation of any federal or state statute, or common law rights, including those relating to the provisions of any law, statute or contractual requirement concerning employment actions and placement on the salary guide, or of any other possible or claimed violation of law or rights.

7. The terms of this Agreement shall be kept confidential to the extent permitted by law; provided, however, that the Association may inform its members that the petitioners were hired and allegedly placed on the wrong step of the applicable salary guide, that a grievance and Petition of Appeal were filed, and that both matters have been satisfactorily resolved with an adjustment to salary guide placement and payment of retroactive salary.

8. This Agreement shall be binding upon and inure to the benefit of petitioners Gould and Houthuysen, the District, and any of their respective heirs, legal or personal representatives, employees, officers, directors, successors or assigns.

9. This Agreement sets forth the entire Agreement between the parties and supersedes any and all prior agreements or understandings between the parties. Petitioners Gould and Houthuysen represent and acknowledge that they do not rely, and have not relied upon, any representation or statement not set forth in this Agreement made by the District or its counsel with regard to the subject matter, basis, or effect of this Agreement or otherwise.

10. This Agreement shall be construed in accordance with, and all disputes hereunder shall be governed by, the laws of the State of New Jersey.

11. Petitioners Gould and Houthuysen acknowledge that they have carefully read and fully understand all of the terms of this Agreement, including the general release contained herein, that they have had a reasonable period of time of not less than seven (7) days to consider the terms hereof, and that they enter into this Agreement voluntarily and with the advice of counsel.

12. The parties agree that this Agreement will be incorporated into an Initial Decision by the Honorable Carol I. Cohen, the administrative law judge assigned to preside over the pending Petition of Appeal bearing OAL Dkt. No. EDUOR 12711-2007N and Agency Ref. No. 331-10/07.

13. The terms of this Agreement are contingent upon approval of this Settlement Agreement by the State District Superintendent of Schools and the Paterson School District Advisory Board, and by the Commissioner of Education.

WALLACE GOULD
Petitioner

Wallace Gould

GLENN HOUTHUYSEN
Petitioner

Glenn Houthuysen

STATE OPERATED SCHOOL DISTRICT
OF THE CITY OF PATERSON

Dr. Dennis J. Clancy
Interim State District Superintendent

PATERSON EDUCATION ASSOCIATION

Peter Tirri
President

A.P. on behalf of minor child J.T.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT OLIVE, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a *pro se* residency appeal on behalf of his nephew in February 2008. The respondent filed an answer and, subsequently, a counterclaim for tuition. Petitioner received appropriate notice of a hearing scheduled on July 3, 2008, but failed to appear and provided no explanation for his nonappearance.

Based upon petitioner's failure to prosecute his appeal and failure to submit any opposition to the Board's certification in support of its tuition claim, the ALJ concluded that the petition filed by A.P. should be dismissed. She further concluded that the Board sustained its burden of proving entitlement to tuition reimbursement in the amount of $5,700.44.

The Commissioner adopted the Initial Decision as the final decision in this case, and granted the Board's counterclaim for tuition.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

September 17, 2008

OAL DKT. NO. EDU 3353-08
AGENCY DKT. NO. 44-2/08

A.P. on behalf of minor child J.T.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT OLIVE, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

Upon review of the record in this matter and the Initial Decision of the Office of Administrative Law (OAL),[1] the Commissioner adopts the Initial Decision as the final decision in this case. Accordingly, petitioner's appeal is dismissed and respondent's counterclaim for tuition in the amount of $5,700.44 is granted.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 9/17/08

Date of Mailing: 9/17/08

[1] No exceptions were filed.
[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 03353-08
AGENCY DKT. NO. 44-2/08

A.P. ON BEHALF OF MINOR CHILD J.T.C.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT OLIVE, MORRIS COUNTY,
Respondent.

A.P. on behalf of **J.T.C.**, petitioner, pro se (no appearance)

Marc H. Zitomer, Esq., for respondent (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: July 28, 2008 Decided: August 6, 2008

BEFORE **MARGARET M. MONACO,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter involves an appeal by petitioner, A.P. on behalf of J.T.C., from a residency determination by respondent Board of Education of the Township of Mount Olive (the Board). By letter dated January 23, 2008, the Board informed petitioner of its determination that J.T.C. was ineligible to attend the schools in the Mount Olive School

District (the District) since, based on the information provided, "there is no family or economic hardship present that renders [J.T.C.'s] parent incapable of caring for him" and petitioner "will not be supporting [J.T.C.] gratis and will receive money from his parent . . . ." On March 3, 2008, the Board filed an answer to petitioner's residency appeal, which included a request for tuition reimbursement for the period of J.T.C.'s ineligible attendance in the District's schools.

The Department of Education transmitted the contested case to the Office of Administrative Law (OAL), where it was filed on March 7, 2008. The hearing was scheduled for July 3, 2008. A Notice of Plenary Hearing, dated March 24, 2008, was sent to petitioner and counsel for the Board advising of the July 3, 2008, hearing and instructing that, "[i]f you do not attend the hearing, the judge may dismiss your case or order that the action requested by the other party be granted." The Notice of Plenary Hearing depicts that it was sent to petitioner at the address listed in his pro se residency appeal. Counsel for the Board appeared at the OAL on July 3, 2008. Neither petitioner nor a representative on petitioner's behalf appeared for the hearing. I granted the Board's request for leave to submit a certification in support of its tuition claim. Under letter dated July 15, 2008, the Board's attorney submitted a certification of Dr. Rosalie Lamonte, the chief school administrator for the District. Subsequently, I informed petitioner and the Board's attorney in a letter dated July 18, 2008, that petitioner would be afforded the opportunity to submit a certification by July 25, 2008, should he dispute the amount of the tuition claimed. No written or oral communication was received from petitioner in response to my letter, and the record was closed on July 28, 2008.

FINDINGS OF FACT

Based upon a review of the record, including the certification submitted on behalf of the Board, I **FIND** the following **FACTS**:

1. A.P. failed to attend the hearing scheduled for July 3, 2008.

2. A.P. was afforded proper notice of the hearing, and did not contact this office to request an adjournment or to explain the reason for his failure to appear at the hearing.

3. A.P. was afforded the opportunity to submit a certification in opposition to the amount of tuition set forth in the certification of Dr. Rosalie Lamonte.

4. A.P. did not submit any documentation in opposition to the certification, and has not contacted this office in writing or by telephone as of the date of this Initial Decision.

5. J.T.C. enrolled in Mount Olive High School on February 19, 2008.

6. J.T.C.'s last day of school was June 20, 2008.

7. There were eighty-two school days in between the time of J.T.C.'s enrollment in the District and J.T.C.'s final day in the school, excluding holidays, snow days and spring recess.

8. The daily tuition rate in the District is $68.68 per day.

9. The amount of tuition due to the District for the period of J.T.C.'s ineligible attendance equals $5,700.44.

LEGAL DISCUSSION

Public education must be provided free of charge to persons over five and under twenty years of age who are domiciled within the school district, or who are kept in the home of another person domiciled within the school district and supported by such other person gratis or without remuneration as if the student were his/her own child. N.J.S.A. 18A:38-1; N.J.A.C. 6A:22-3.1; N.J.A.C. 6A:22-3.2. A district board of education may deny admission to a child if the evidence does not support the validity of the resident's

claim. N.J.S.A. 18A:38-1(b)(1). The resident is afforded an opportunity to contest the board's decision and is entitled to a hearing on the validity of the claim. Ibid.; N.J.A.C. 6A:22-5.1. In connection therewith, the resident bears the burden of proving, by a preponderance of the evidence, that the child is eligible for a free education under the statutory criteria. N.J.S.A. 18A:38-1(b)(1). Should the child be currently enrolled in the district, the student may not be removed from the school during the time frame in which the resident may contest the board's decision or during the pendency of the proceedings before the Commissioner. Ibid.; N.J.A.C. 6A:22-4.3. If the evidence does not support the resident's claim, the Commissioner "shall assess the resident tuition for the student prorated to the time of the student's ineligible attendance in the school district." N.J.S.A. 18A:38-1(b)(1). The Commissioner may order the assessment of tuition where the resident "does not sustain the burden of demonstrating entitlement to attend the schools of the district, or abandons the appeal through withdrawal, failure to prosecute or any means other than settlement . . . ." N.J.A.C. 6A:22-6.2. The tuition is computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance. N.J.S.A. 18A:38-1(b)(1); see N.J.A.C. 6A:22-6.3.

CONCLUSION

In view of petitioner's failure to prosecute his appeal and to submit any opposition to the certification filed on behalf of the Board, I am persuaded that the Board is entitled to reimbursement for the cost of the education provided to J.T.C. pursuant to the aforesaid statutory and regulatory provisions. Based upon the unopposed certification submitted on behalf of the Board, coupled with the Findings of Fact set forth above, I **CONCLUDE** that the petition filed by A.P. should be dismissed because of a failure to prosecute by petitioner. See N.J.A.C. 1:1-14.4. I further **CONCLUDE** that the Board has sustained the burden of proving its entitlement to tuition reimbursement from A.P. in a total amount of $5,700.44.

ORDER

I **ORDER** that petitioner's residency appeal be and hereby is **DISMISSED** with prejudice.

I further **ORDER** that respondent's application for tuition reimbursement in the amount of $5,700.44 be and hereby is **GRANTED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 6, 2008
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

Date Received at Agency: August 6, 2008

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AUG 8 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

tbj/sej

APPENDIX

List of Witnesses

For Petitioner:

None

For Respondent:

None

List of Exhibits In Evidence

For Petitioner:

None

For Respondent:

Certification of Dr. Rosalie Lamonte (three pages)

OAL DKT. NO. EDU 4287-08
AGENCY DKT. NO. 125-5/08

L.C. on behalf of R.M.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF GLOUCESTER, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed Settlement Agreement and Release (Agreement) and the Initial Decision of the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case, with the following observation. Sections 1 and 3 of the Agreement make reference to an August 8, 2008 date for petitioner to pay respondent $1000 and provide respondent with a copy of a listing agreement for petitioner's house. That date has preceded consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves same.

Accordingly, the Commissioner adopts the Initial Decision as the final decision in this case, providing that the parties have already implemented the settlement terms, or have

agreed upon a mutually satisfactory alternate date for the effectuation of same. Assuming the foregoing, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 9/17/08

Date of Mailing: 9/17/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4287-08

AGENCY DKT NO. 125-5/08

L.C. O/B/O R.M.L.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF GLOUCESTER, CAMDEN COUNTY,

Respondent.

David S, Thalheimer, Esq., for petitioner (Thalheimer & Palumbo, attorneys)

John D. Wade, Esq., for respondent (Wade, Long, Wood & Kennedy, attorneys)

Record Closed: July 31, 2008 Decided: August 1, 2008

BEFORE **DOUGLAS H. HURD**, ALJ:

This matter involves petitioner's challenge of the Board of Education's residency determination. The case was transmitted to the Office of Administrative Law (OAL) on May 23, 2008, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13 and was assigned to the undersigned Administrative Law Judge (ALJ) for hearing.

A Settlement Agreement and Release indicating the terms thereof is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

August 1, 2008

DATE

DOUGLAS H. HURD, ALJ

Date Received at Agency:

Mailed to Parties:

AUG - 8 2008

DATE

OFFICE OF ADMINISTRATIVE LAW

/lam

Settlement Agreement and Release

L.C. on behalf of minor child R.M.L.
Petitioner

v.

Board of Education of the Twp of Gloucester, Camden, County
Respondent

Dept. of Education
Agency Docket No.
125-5108

The parties to the above captioned matter hereby agree to settle and resolve all potential claims relating to this dispute, including the Board of Education's counterclaim for tuition reimbursement totaling $3,111.68 (64 school days x

$48.62 tuition/day) pursuant to the following terms:

1. Petitioner will pay Respondent Board of Education One Thousand Dollars ($1,000.00) no later than August 8, 2008.

2. Petitioner and her mother Brenda DeJohn will upon the request of the Bd. of Education execute an affidavit certifying that Petitioner and minor child R.M.L. reside with

Brenda De John at 15 Springhill Drive, Laurel Springs, N.J. 08021.

3. Petitioner will, no later than August 8, 2008 furnish the Bd. of Education with a copy of a current Listing Agreement establishing that petitioner's property at 57 Dover Drive, Lindenwold, N.J 08021 is currently for sale.

31 August, 2008:

Lori Casolaro
Petitioner

Thomas D Seddon
GT Bd of Ed
Thomas D. Seddon

witness D. L. Falk
Atty for Petitioner

witness John Rwalt Esq
Atty for GT Bd of Ed

351-09

GLORIA DEZUZIO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BOUND BROOK, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, a tenured secretarial employee whose position was abolished in a reduction in force (RIF) in 2005, alleged that the respondent Board violated her tenure and seniority rights when it employed non-tenured secretaries in positions that she was qualified for. The Board denies the allegation, contending that no non-tenured secretaries were retained when petitioner's position was eliminated.

The ALJ found that: to acquire the security of tenure, the precise conditions enunciated in the applicable statute must be met; *N.J.S.A.* 18A:17-2 specifically governs the tenure of secretarial or clerical positions in school districts; the statutes applicable to secretaries and clerical employees do not require that terminations resulting from a reduction in force or reemployment of such individuals be made on the basis of seniority; and the Board's elimination of petitioner's position was pursuant to a reduction in force in accordance with *N.J.S.A.* 18A:17-2 and *N.J.S.A.* 18A:6-10. The ALJ concluded that the petitioner should be dismissed.

Upon a thorough and independent review of the record in this matter the Commissioner concurred with the findings and conclusions in the Initial Decision, adding that the respondent Board was not obliged to maintain a seniority list nor to call petitioner back when secretarial openings occurred in the district. Accordingly, the Initial Decision was adopted as the final decision, and the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

September 18, 2008

OAL DKT. NO. EDU 771-06
AGENCY DKT. NO. 67-2/06

GLORIA DEZUZIO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BOUND BROOK, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner of Education (Commissioner) has independently reviewed the Initial Decision of the Office of Administrative Law and the record underlying it – including the transcript of the September 19, 2007 hearing and the exhibits that were entered into evidence.[1]

Upon such review, the Commissioner adopts the Initial Decision as the final decision in this case, with the following additional comment. While petitioner did not meet her burden to show that there was any improper reason for the elimination of her position, or that a non-tenured secretary was retained when she was let go, she nonetheless suggested that she should have been contacted by respondent when – approximately six months after her position was eliminated – respondent advertised for two new secretarial positions necessitated by the opening of a new school and the retirement of a secretary in the Pupil Services office.

However, as the Administrative Law Judge explained, in the context of reductions in force (RIFS), school district secretaries – unlike teachers and custodians – are not terminated or reinstated on the basis of seniority. *Ferronto v. Bd. of Educ. of the Township of Wymouth, et*

[1] No exceptions were filed.

al., State Board of Education Decision #36-05, decided February 1, 2006. Respondent was, consequently, not obliged to maintain a seniority list and call petitioner back when secretarial openings occurred in the district.

The petition is accordingly dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 9/18/08

Date of Mailing: 9/18/08

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 771-06
AGENCY DKT. NO. 67-2/06

GLORIA DEZUZIO,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF BOUND BROOK, SOMERSET COUNTY,
Respondent.

Hana S. Wolf, Esq., appearing for Petitioner (Law Office of Ellen O'Connell, LLC, attorneys)

James F. Schwerin, Esq., appearing for Respondent (Parker McCay, attorneys)

Record Closed: December 24, 2007 Decided: August 7, 2008[1]

BEFORE **ISRAEL D. DUBIN**, ALJ:

Gloria Dezuzio, a tenured secretarial employee whose position was abolished on November 2, 2005, alleges that the Bound Brook Board of Education employed non-tenured secretaries in positions that she was qualified for, or could have learned to perform, in violation of her tenure and seniority rights. The Board denies the allegation,

asserting that by resolution dated September 12, 2005, it had granted tenure to all of the secretaries in its employ who had at least eight consecutive months of service and that no non-tenured secretaries were retained when Ms. Dezuzio's position was eliminated.

Ms. Dezuzio filed her petition with the Commissioner of Education on February 9, 2006, the Board filed its answer on February 27, 2006, and the matter was transmitted to the Office of Administrative Law as a contested case on March 1, 2006. N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. After the parties agreed to withdraw their cross-motions for summary decision,[2] a hearing was held on September 19, 2007. The parties requested the opportunity to submit post-hearing briefs and the record was subsequently closed on December 24, 2007.

It is undisputed that Ms. Dezuzio was initially employed by the Board as a confidential secretary to the superintendent on December 3, 2001, and that her job title was changed to confidential secretary for human resources on July 30, 2002.[3] Among other things, her personnel-related responsibilities included posting and advertising open positions; processing applicants' criminal background checks; preparing contracts; assisting staff with the professional development process; and contacting and providing information to prospective substitute teachers. Her general administrative duties, which she shared with Marianne Everett, the confidential secretary to the superintendent, included preparing agendas, reports and resolutions; overseeing the teacher mentoring program; and performing all confidential work assigned by the superintendent.

It is also undisputed that Ms. Dezuzio's performance evaluations for the 2001-02, 2002-03, and 2003-04 school years, completed by then-superintendent of schools Deborah Alexander, gave her a rating of "Excellent"[4] for her overall job performance.

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[1] By Orders of Extension, the time limit within which to file this Initial Decision with the Commissioner of the Department of Education was extended until August 7, 2008.

[2] By letter dated December 19, 2006, I notified counsel that their respective briefs and certifications clearly established there were a number of disputed material facts that rendered the matter inappropriate for summary decision. Consequently, in lieu of a formal order denying their respective motions, I suggested that they withdraw their cross-motions.

[3] The change in title was made retroactive to July 1, 2002.

[4] Possible ratings were 1-Excellent, 2-Good, 3-Fair, 4-Needs Improvement and 5-Poor.

Similarly, the performance evaluation for the 2004-05 school year, completed by interim superintendent John Deibert, gave her a rating of "Outstanding"[5] for her overall level of performance. By letter dated May 24, 2005, she was notified that her contract for the 2005-06 school year had been renewed.

Testifying in her own behalf, Ms. Dezuzio stated that she enjoyed working in the superintendent's office until Carol Deddy was hired as the new business administrator. Although Ms. Deddy was not her immediate supervisor, on a few occasions she asked or told her to do something "illegal" or "improper." Ms. Deddy also "verbally attacked and humiliated" her in front of other people to such an extent that on August 30, 2005, she went out on medical leave with what her doctor diagnosed as a "stress reaction."

As Ms. Dezuzio recalled, Ms. Deddy first asked her to do something illegal in April 2005 when Deddy requested that she "look the other way" and forego ordering the mandatory criminal background check for a prospective school bus driver because she was in a hurry to get him started. Ms. Dezuzio stated that she didn't immediately respond and just looked at her until Ms. Deddy said, "I guess that means no," and walked away. As soon as Ms. Deddy was gone, she went to Dr. Deibert and told him about the request. He told her that he'd speak to Ms. Deddy and advised her not to worry about it.

Ms. Dezuzio also recalled an e-mail she'd received from Ms. Deddy telling her not to require any outside applicants for summer jobs to get fingerprinted or get a TB test. In her reply, she quoted and attached a copy of the law requiring fingerprinting and TB testing. She did not, however, have a copy of this or any other e-mail because she periodically deleted all of the e-mail in her computer.

As an example of how Ms. Deddy berated and humiliated her, Ms. Dezuzio recalled the time she'd arranged to have a certain ad published in a specific location in The Star-Ledger newspaper as per Ms. Deddy's instructions. Although the ad was exactly where it was supposed to be, Ms. Deddy came up to her desk, sarcastically

[5] Possible ratings were Unacceptable, Satisfactory, More than Satisfactory and Outstanding.

asked her "Do you ever read these things?" and threw a newspaper other than The Star-Ledger down on her desk. When she tried to show Ms. Deddy the ad in The Star-Ledger and tell her that she'd been looking at the wrong paper, Deddy just walked away.

On October 3, 2005, approximately one month after going out on medical leave, Ms. Dezuzio sent a letter to the new superintendent, Edward Hoffman, advising him that she had an appointment with her doctor to be re-evaluated on October 17, 2005. By letter dated October 18, 2005, she advised him that the doctor had not yet cleared her for a return to work but that she'd be re-evaluated at the end of the month. Dr. Hoffman replied later that same day, advising her that her sick days and vacation time would be exhausted as of October 27 and November 16, 2005, respectively, but that she could apply for an unpaid leave of absence if she needed more time. Following her re-evaluation on October 31, she faxed Dr. Hoffman a letter notifying him that she would be returning to work on November 2, 2005.

Ms. Dezuzio testified that upon returning to work on November 2, Dr. Hoffman called her into his office and handed her a memorandum notifying her that her position was "being eliminated, effective immediately, due to reorganization and improvements in technology." Memo Concerning Elimination of Position, Exhibit R-15. She would, however, receive two weeks of severance pay and an additional ten days' pay for accumulated vacation time. Dr. Hoffman then told her that there was someone outside waiting to help her clean out her desk.

According to Ms. Dezuzio, she didn't say anything at the time because she was in shock. She had no idea that her job was in jeopardy, and had received a memo from Dr. Hoffman two weeks earlier notifying her that her sick time and vacation time would soon be exhausted, but that she could apply for an unpaid leave of absence. However, she did allow that when he was first introduced as the new superintendent, Dr. Hoffman mentioned that he'd never had two secretaries before. She, in turn, replied that she hadn't been hired to be his "second secretary;" rather, she'd been "hired to be the secretary for human resources."

Ms. Dezuzio went on to explain that although she'd always had to report to the superintendent of schools, she was not the superintendent's secretary. As she put it, "I was Human Resources." For example, when Dr. Deibert took over as interim superintendent and the Board hired 31 new employees, it was her job to get the advertisements published, help teachers get their certifications, and assist in the administration of the provisional teacher program. Human resources was "a separate position," or so she'd been told.

At the time she was terminated, there were three other secretaries in the Board's employ: Marianne Everett, the superintendent's confidential secretary; Nancy Rose, a retired secretary who occasionally came in and helped out; and Mary Beth Roche, the business administrator's secretary. To the best of her knowledge, they did not lose their jobs.

The Board's first witness, Dr. John Deibert, served as Bound Brook's interim superintendent of schools between July 2004 and August 2005. He had previously served as the superintendent of schools in Lebanon Township for eighteen years, and as an interim superintendent in Bedminster for six months, Long Valley for seven months, and Bethlehem Township for eighteen months. It was not until he was the interim superintendent in Bethlehem Township that he had to implement a reduction in force (RIF).

Dr. Deibert testified that the most common rationales for an RIF are the failure of a budget referendum, which can render a district unable to afford all of its positions and programs, or a realignment of priorities in the confines of an existing budget. Although the superintendent may suggest certain actions, it is the Board that ultimately decides which actions to take.

However, Dr. Deibert also testified that he faced a completely different kind of problem when he was hired. The previous superintendent had been fired, he didn't have enough administrators, there was no high school principal and a significant number of teaching positions were vacant. So there was a big push to recruit and hire approximately 30 new administrators and teachers before school started in September.

The big push meant that Ms. Dezuzio had to spend about 60 percent of her time taking care of the paperwork for the new hires and keeping things moving. Among other things, she directed the applicants to get fingerprinted, processed their criminal background checks, obtained their certifications and kept in touch with the county superintendent's office. And she had to do everything by hand because the district wasn't fully computerized.

Once everyone had been hired and their personnel files had been "put to bed," Ms. Dezuzio no longer had to devote the majority of her time to personnel-related matters. And by that time, he'd already begun doing most of his work on a computer and no longer needed a secretary to take dictation or type for him. So he began to think that there really wasn't enough work to keep both secretaries – Ms. Everett and Ms. Dezuzio – busy, and shared his thoughts with them sometime in February 2005.

As Dr. Deibert recalled, Ms. Dezuzio asked him if he would consider breaking down a wall and reconfiguring the office to make more room. He demurred, telling the secretaries that he wasn't going to make that kind of decision since he was just the interim superintendent. But he also told them that he wasn't even sure that the staffing was going to remain the same because there might be a reallocation of work. He didn't get into specifics because he didn't know how the new superintendent wanted to staff the office. All he wanted to do was to let them know that there might be a change in the status quo.

Later that spring, the budget was defeated and that meant cuts had to be made. Among other things, he and the Board had no choice but to abolish a number of teaching positions because there were too many other more pressing needs. The RIF went into effect as of July 1, 2005, the same day his contract ended and Dr. Hoffman took over.

During the transition period, Dr. Deibert brought Dr. Hoffman "up to speed" on the school district's finances and the reduction in force that had been made in order for the district to operate under its budgetary constraints. At the time, Ms. Dezuzio's position was still in the budget, and while he didn't recommend that it be eliminated, he did

suggest that Dr. Hoffman take a look at the work load in the office. As Dr. Deibert explained, the district had just begun to place much of the human relations work – advertising, information, applications, etc. – on its website. Consequently, there was a lot less paperwork and there didn't appear to be enough work left to keep both secretaries busy. But the ultimate decision was Dr. Hoffman's to make.

Testifying on behalf of the Board, Dr. Edward Hoffman stated that he'd been hired as the superintendent on July 1, 2005, but that his predecessor, Dr. Deibert, had remained as a consultant for approximately three weeks to help him with the transition. During this period he had several conversations with Dr. Deibert concerning staffing. Among other things, Dr. Deibert advised him that there had been a series of budget defeats and, therefore, concomitant reductions in staffing. Some of the positions had been eliminated through attrition, while others had been the result of RIFs. Following the defeat of the 2005-06 budget in April or May 2005, there was another RIF, primarily in the teaching ranks. Layoffs of other employees were left for him, as the new superintendent, to deal with once he decided how he wanted to operate.

One of the areas he focused on was the superintendent's office, and the first thing he noticed was that there were two to two and a half people working in the office on any given day. Yet, in almost twelve years as a superintendent in school districts ranging in size from 900 to 6000 students, he'd never needed more than a part-time or one full-time secretary.

Dr. Hoffman also took notice of the district's increased use of computer technology, particularly in personnel-related work. For example, the district placed job advertisements on its website and "NJ Hire," a job placement site, and set up individual mailboxes for each position so that applications, credentials and resumes could be uploaded directly to the appropriate box. That way, principals and other administrators could just log on, look over the individual applications and decide who they wanted to see. As a result, the office no longer received a "barrage" of paper each time a new job was advertised and it streamlined the process.

As Dr. Hoffman recalled, when Ms. Dezuzio went out on sick leave for approximately six weeks or so, Marianne Everett was the only secretary in the office. During that time, all of the work got done and the office functioned "just fine." Nothing was "falling through the cracks," and it confirmed his belief that, "with some minor modifications," one secretary would be able to do all the work. However, it wasn't until some time after October 18, 2005 – when he sent Ms. Dezuzio the letter regarding her sick days and vacation time – that he decided to eliminate her position.

Although he couldn't bring this reduction in force to the Board's attention until the regular business meeting of November 14, 2005, he notified Ms. Dezuzio of his decision as soon as she returned to work on November 2, because "there wasn't any point in letting this thing go on." As it turned out, it was part of another round of "economies" that were taken to produce a healthier budget. In all, a total of fourteen positions, including those of Ms. Dezuzio, Nancy Rose, a guidance department secretary, a high school secretary, two individuals in the business office and eight teachers, were eliminated through non-renewals and RIFs.

While acknowledging that he'd consulted Carol Deddy about the elimination of Ms. Dezuzio's position, Dr. Hoffman stated that the conversation was "specific to the position, not Gloria." For example, they considered the work performed by, and looked for areas of overlap in, the superintendent's office, Board office and business office. They also considered the fact that he was typing 99% of his own correspondence. When he mentioned his belief that one person could handle all of the secretarial work, Ms. Deddy "did not disagree."

According to Dr. Hoffman, Ms. Deddy never suggested that he consider eliminating a position. In fact, it was something he'd been thinking about since his full-day interview in May 2005, when he was interviewed by the Board and met with the office staff. One of the first questions he could recall asking Dr. Deibert was why he had two secretaries. From that point on, the idea of abolishing Ms. Dezuzio's position became more and more evident until it "crystallized" in mid-to-late October, when it was clear that having just one secretary would not cause a major disruption of services.

The Board's final witness was Carol Deddy, who has served as the Board's secretary and business administrator since July 2004. Ms. Deddy testified that she and Dr. Deibert arrived at a time when, in addition to the superintendent, every principal, vice principal and all but one of the other administrators had been fired, and the one remaining administrator had only been in the district for six months. There had been another budget defeat and the district's finances were "tight." As a result, maintenance of facilities already in poor condition was deferred, classroom materials were in limited supply, and there were virtually no reserves to draw upon. In fact, the State Department of Education had conducted an audit of the district due to complaints about the disarray in the business office.

Almost immediately, a hiring freeze was imposed and a significant number of positions were lost to attrition. Only those positions deemed absolutely necessary in order to open the schools in September were allowed to be refilled. Although vacant teaching positions were filled, the assistant principals, athletic directors, director of pupil services and a bus driver were not replaced. For her part, the computerization of her office enabled her to reduce the full-time payroll/benefits and accounts payable positions to ".6" (three-days-per-week) positions. The part-time bookkeeper/accountant continued as a ".6" employee.

The initial RIF effectuated during her tenure as business administrator took place in April 2005, when eight teaching positions were eliminated. And instead of hiring new teachers to fill an additional twelve teaching positions that were vacant at the start of the 2005-06 school year, the Board hired long-term substitutes to teach their classes.

Also in September 2005, the Board voted to grant tenure to directors – including the Director of Pupil Personnel, Director of Special Services, Director of Technology and Athletic Director – with two or more years of service, and secretaries with at least eight months of service. The Board made these changes at the superintendent's and her recommendations because after all of the firings the previous year and the RIF in April 2005, there was a need for some stability and tenure was awarded to encourage the directors and secretaries to stay. Still, a bus driver was riffed in October 2005 and Ms. Dezuzio followed in November 2005. The next significant RIF took place in April 2006,

when twelve positions were eliminated, and another followed in April 2007, resulting in the elimination of an additional ten to eleven positions.

Ms. Deddy stated that her involvement in the decision to eliminate Ms. Dezuzio's position was limited to the discussions she had with Superintendent Hoffman regarding the entire central office operation. Among other things, they discussed the technological advances – computers, software, color printers and copiers – that had automated and streamlined many of the tasks that had previously been done manually. As a result, positions such as Ms. Dezuzio's became superfluous.

When asked about the incidents Ms. Dezuzio had mentioned as being examples of her alleged "illegal" or "improper" conduct, Ms. Deddy stated that they had been mischaracterized. She explained that she had just left the private sector, having spent the previous twelve years as the director of finance and administration for Verizon Wireless, and was unfamiliar with the regulations. As a result, she would frequently ask Ms. Everett or Ms. Dezuzio about the process that had to be followed to get something done. However, she had never asked Ms. Dezuzio or any other employee to overlook a particular step in the process, much less except a bus driver applicant from the fingerprinting requirement.

When asked about the incident involving ad placement in The Star-Ledger, Ms. Deddy stated that her recollection wasn't all that different from Ms. Dezuzio's version. As she recalled, she'd picked up one of The Star-Ledger's subsidiary newspapers in which ads were published for the same price. When she looked for the ad she noticed that it had been given a very poor placement on the bottom of the "turn page." Consequently, she showed Ms. Dezuzio where the ad had been placed and asked her to be diligent when placing an ad to ensure that it received a good placement. She was not aware of Ms. Dezuzio's allegations regarding either this incident or the one concerning fingerprinting of the bus driver until she read the petition of appeal.

Ms. Deddy acknowledged that the district had advertised for two secretaries following the elimination of Ms. Dezuzio's position. As she recalled, the secretary for the director of pupil services had retired and, with the opening of a new school, there was a

need for a new school secretary to work with the new principal. The ads didn't specify whether the secretaries were being hired for 10-month or 12-month positions because the administration still wasn't convinced that either one needed to be a full-time position. In fact, given the district's budgetary constraints, including the caps on school-related tax increases, administrative costs and overall spending, the guidance secretary's position was eliminated and she was given the new school secretary position. Unfortunately, she retired and the district was left with a vacant secretarial position.

Ms. Deddy also acknowledged that upon becoming the business administrator in July 2004, she had filled the vacant secretarial position in her office with another secretary, Debra Pardo, who'd been laid off by her previous employer. However, Ms. Pardo, was offered and chose to return to her old job after six weeks. By then Ms. Deddy had a better idea of the staffing she required and, later that year, advertised for an "assistant to the business administrator," a position not at all similar to that of a secretary.

According to Ms. Deddy, the assistant was charged with supervising the staff and operation of the food service group, supervising and evaluating the transportation personnel, and reviewing independently completed reports in satisfaction of State reporting requirements. Consequently, a "certificate of eligibility was highly preferred," and the individual she hired, Mary Beth Roche, had a college degree and was in the process of earning her certification as a business administrator. In the end, she was one of the two people hired that year.

Tenure statutes are "designed to aid in the establishment of a competent and efficient school system by affording to . . . [covered employees] a measure of security in the ranks they hold after years of service." Viemeister v. Bd. of Educ. of the Borough of Prospect Park, 5 N.J. Super. 215, 218 (App. Div. 1949). In general, they are meant to protect competent and qualified employees who have completed a probationary period from removal for "unfounded, flimsy, or political reasons." Zimmerman v. Bd. of Educ. of the City of Newark, 38 N.J. 65, 71 (1962), cert. den., 371 U.S. 956 (1963).

To acquire the security of tenure, the precise conditions enunciated in the applicable statute must be met. See Picogna v. Bd. of Educ. of the Twp. Of Cherry Hill, 143 N.J. 391, 400 (1996); Kletzkin v. Bd. of Educ. of the Borough of Spotswood, 136 N.J. 275, 278 (1993); Spiewak v. Bd. of Educ. of Rutherford, 90 N.J. 63, 72 (1982); and Zimmerman v. Bd. of Educ. of the City of Newark, supra, 38 N.J. at 72. Tenure "arises only by the passage of time fixed by the statute . . . ." Canfield v. Bd. of Educ. of the Borough of Pine Hill, 51 N.J. 400 (1968), rev'g on dissent, 97 N.J. Super. 483, 490 (App. Div. 1967).

N.J.S.A. 18A:17-2 specifically governs the tenure of individuals who, like Ms. Dezuzio, are employed by school districts in secretarial or clerical positions. In addition to specifying the statutory requirements for acquiring tenure in these positions, N.J.S.A. 18A:17-2 also provides that individuals who acquire tenure under the statute " . . . shall not be dismissed . . . except for neglect, misbehavior or other offense and only in the manner prescribed by [N.J.S.A. 18A:6-10]."

N.J.S.A. 18A:6-10, in turn, provides that no person under tenure "shall be dismissed or reduced in compensation, . . . except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing . . . ." However, it also includes the following exception: "Nothing in this section shall prevent the reduction of the number of any such persons holding such offices, positions or employments under the conditions and with the effect provided by law." In other words, a local board of education may conduct a reduction in force abolishing certain positions, even where tenured positions are affected. Cf. Klinger v. Cranbury Bd. of Educ., 190 N.J. Super. 354, 357 (App. Div. 1982), certif. denied, 93 N.J. 277 (1983) (school board may abolish the positions of tenured teachers as part of a RIF, if done for reasons of economy).[6]

"Tenure in a position, even if it is a secretarial position, requires the conclusion that when other assignments exist within the same position title, a riffed tenured

[6] Under N.J.S.A. 18A:28-9, the statute governing the tenure of teaching staff members, boards have the authority to eliminate a position, even when held by a tenured staff member, "for reasons of economy or

employee who held that position title is entitled to claim that vacancy as opposed to a non-tenured applicant." Sherrill v. Bd. of Educ. of the Township of Cinnaminson, 96 N.J.A.R. 2d (EDU) 727, adopted, Commissioner of Education, 96 N.J.A.R. 2d (EDU) 730, aff'd State Board of Education, 96 N.J.A.R. 2d (EDU) 731. However, unlike teaching staff members who are riffed in accordance with N.J.S.A. 18A:28-9, and janitorial employees, who are riffed in accordance with N.J.S.A. 18A:17-4, the statutes applicable to secretaries and clerical employees do not require that terminations resulting from a reduction in force or reemployment of such individuals be made on the basis of seniority, Ferronto v. Bd. of Educ. of the Township of Wymouth, et als., EDU 8774-02, State Board of Education <http://lawlibrary.rutgers.edu/oal/search.html.>

In the present matter, Ms. Dezuzio did not contest the validity of the RIF per se. Rather, the sole gravamen of her petition of appeal[7] is that after abolishing her position, the Board "employed non-tenured secretaries in positions that she was qualified to perform or could have easily learned in a reasonable period of time." Still, she appeared to imply that the RIF was improperly motivated by Ms. Deddy, who must have been angered by her refusal to carry out Ms. Deddy's alleged "illegal" and "improper" instructions.

However, as Dr. Deibert very credibly testified, once he settled into his new position and had an opportunity to assess the organization of the office, he began to think that there really wasn't enough work to keep both secretaries busy, and he shared his thoughts with them sometime in February 2005. Similarly, Dr. Hoffman testified that he'd first considered the elimination of Ms. Dezuzio's position as early as the day he appeared for his full-day interview with the Board in May 2005, because in his twelve years as a superintendent in school districts of varying sizes, he'd never needed more than a part-time or one full-time secretary. It was during the period of time Ms. Dezuzio was out on medical leave that he became convinced one secretary could handle all the work.

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because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause . . . ."

[7] The petition of appeal was part of the Commissioner's transmittal to the Office of Administrative Law.

By the same token, Ms. Deddy testified that her involvement in the decision to eliminate Ms. Dezuzio's position was limited to the discussions she'd had with Superintendent Hoffman regarding the entire central office operation and the technological advances that had automated and streamlined many of the tasks that had previously been done manually, and rendered positions such as Ms. Dezuzio's superfluous. This was confirmed by Dr. Hoffman, who testified that his discussions with Ms. Deddy were "specific to the position, not Gloria." In fact, he stated that Ms. Deddy had not actually suggested that he consider eliminating a position, and had certainly not recommended that Ms. Dezuzio's position be abolished.

Again, Ms. Dezuzio has not formally contested the validity of the RIF. Rather, she has only implied that Ms. Deddy was behind or responsible for the elimination of her position. Other than this inference, there is no evidence in the record to support a conclusion that improper considerations were determinative factors in the Board's decision to RIF her position. If anything, the evidence strongly supports the Board's argument that there was no wrongful motive and that the exercise of its legal authority to implement the RIF was reasonable.

Ms. Dezuzio's claim that the Board kept non-tenured secretaries in its employ at the time of her RIF is similarly unsupported by the record. Marianne Everett and Nancy Rose were the only secretaries she so much as even named during the proceedings and she did not allege that either of them was non-tenured. In fact, Ms. Rose was retired and only came in on a part-time basis, and even that position was ultimately riffed.

The only other employee mentioned by name was Mary Beth Roche, who responded to an advertisement for an "assistant to the business administrator," a position described by Ms. Deddy as not at all similar to that of a secretary. There was no attempt by Ms. Dezuzio to rebut Ms. Deddy's testimony or otherwise establish that the vacant position Ms. Roche filled was actually that of a secretary.

Based upon the foregoing, I find that the Board's elimination of Ms. Dezuzio's position was implemented pursuant to a reduction in force in accordance with N.J.S.A.

18A:17-2 and N.J.S.A. 18A:6-10. and I therefore **CONCLUDE** that her petition of appeal should be **DISMISSED**. It is so **ORDERED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 7, 2008 — Israel D. Dubin

DATE — **ISRAEL D. DUBIN**, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

August 7, 2008

DATE

Mailed to Parties:

AUG - 8 2008

DATE — OFFICE OF ADMINISTRATIVE LAW

IDD/cmo

APPENDIX

WITNESSES

For Petitioner:

Gloria Dezuzio

For Respondent:

John P. Deibert
Edward Hoffman
Carol Deddy

EXHIBITS

For Petitioner:

P-1 Appointment Letter dated December 4, 2001
P-2 Memo Re: Revised Job Title dated July 30, 2002
P-3 Job Description: Confidential Secretary for Human Resources
P-4 Evaluation Form for 2001-02 School Year
P-5 Evaluation Form for 2002-03 School Year
P-6 Evaluation Form for 2003-04 School Year
P-7 Performance Evaluation dated May 16, 2005
P-8 Personnel File Employment History
P-9 Contract Approval for 2005-06 School Year dated May 24, 2005
P-10 Sick Leave Continuation Letter dated October 3, 2005
P-11 Sick Leave Continuation Letter dated October 18, 2005
P-12 Response to Sick Leave Continuation Letter also dated October 18, 2005
P-13 Anticipated Return to Work Letter dated October 21, 2005
P-14 Return to Work Letter dated October 31, 2005
P-15 Memo Concerning Elimination of Position dated November 2, 2005
P-16 Quotation of Retirement Benefits dated March 30, 2007

P-17 Minutes of Board's Regular Business Meeting of September 12, 2005

P-18 Minutes of Board's Regular Business Meeting of November 14, 2005

For Respondent:

None

#388-08

BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE, UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MUNICIPAL COUNCIL OF THE TOWNSHIP OF HILLSIDE, MAYOR KAREN OLIVER, AND TOWNSHIP OF HILLSIDE, UNION COUNTY,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioning Board of Education alleges that respondents misappropriated State Abbott Bordered District Aid ("Rim" Aid) when the Municipal Council (Council) reduced the proposed base tax levy after it was defeated by the voters, and converted the aid to municipal use, which reduced the school budget – thereby neutralizing the benefit to the District of the "Rim" Aid in violation of *N.J.S.A.* 18A:7F-10.1, which has since been appealed. Petitioner demands restoration of the base tax levy which it proposed in the budget that was rejected by the voters; respondents contend that the Board's demand is without merit, and filed a motion for summary decision.

The ALJ found, *inter alia,* that: there are no relevant or material facts in dispute, and the matter is ripe for summary decision; the petitioner cites no law, regulation, or authority that suggests that the actions of the Council violated any school law; and neither *N.J.S.A.* 18A:7F-10.1, nor the budget review provisions of *N.J.S.A.* 18A:7F-5(e), prohibit a governing body from considering the receipt of "Rim" Aid in determining whether to reduce a district's proposed base tax levy. Accordingly, the ALJ determined that the respondents' motion for summary decision should be granted, and the petition dismissed.

Upon full and independent review and consideration, the Commissioner concurred with the ALJ's findings, adopted the Initial Decision with supplementation, and dismissed the petition.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

September 19, 2008

OAL DKT. NO. EDU 10979-06
AGENCY DKT. NO. 289-8/06

BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE, UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MUNICIPAL COUNCIL OF THE TOWNSHIP OF HILLSIDE, MAYOR KAREN OLIVER, AND TOWNSHIP OF HILLSIDE, UNION COUNTY,	:	DECISION
RESPONDENTS.	:	

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL) and petitioner's exceptions and respondents' reply thereto have been reviewed. Upon full and independent consideration, the Commissioner asserts jurisdiction and adopts the Initial Decision as the final decision in this case, as supplemented below.

In planning the total school district funding for the 2006-2007 school year, petitioner put together a budget that sought $25,242,459 (referred to as the base tax levy) from the local taxpayers. This was over half of the projected general fund amount of $42,764,452 for the district. One of the many sources of monies available to petitioner – over and above the base tax levy – was "rim aid" in the amount of $1,749,273, which petitioner was eligible to receive because it borders on several Abbott districts and met the rim aid criteria set forth in the now repealed *N.J.S.A.* 18A:7F-10.1.

The requested $25,242,459 base tax levy was rejected by the voters. Thus, the universe of funds available to the school district from the various State, local and/or federal sources could not reach the total budget figure originally proposed by petitioner unless the local governing body, *i.e.,* the respondent town council (Council), exercised its discretion under *N.J.S.A.* 18A:7F-5(e) to provide the school district with the base tax levy that had been rejected by the voting residents of Hillside. The Council declined to do so. After a meeting with petitioner's representatives, the Council voted to reduce petitioner's proposed budget by $1,500,000.

Petitioner contends that the Council's action was in violation of *N.J.S.A.* 18A:7F-10.1, which had been in effect at the time but is now repealed. It argues as follows. Petitioner planned to use its rim aid for improvements in school facilities. The Council directed that $1,275,000 of the $1,500,000 cut from the proposed school budget be subtracted from the $2,948,011 that petitioner had allocated for school facility improvements. Therefore, petitioner asserts, the Council was redirecting the rim aid that petitioner intended to use for school facilities, using it to supplement the municipal budget in violation of *N.J.S.A.* 18A:7F-10.1.[1]

The factual support offered by petitioner for its position that the rim aid served as the Council's justification for reducing the school budget was a comment by the Council's accountant – given at a meeting between petitioner's representatives and the Council to discuss options for the defeated budget. When the accountant was asked what differences existed between Hillside and neighboring towns that could explain Hillside's larger school budget cut, the accountant observed that the other towns had not qualified for rim aid.

[1] As a factual matter, the record before the Commissioner does not include evidence that the Council knew about petitioner's plan to use rim aid for facility improvements.

The legal basis for petitioner's stance is the word "additional" in *N.J.S.A.* 18A:7F-10.1, which stated in pertinent part:

> **Additional State school aid for certain districts bordered by Abbott districts.**
> 1. a. In addition to any State school aid to which a school district is entitled for the school year under P.L.1996, c.138 (C.18A:7F-1 et seq.) or any other law, a school district, other than a regional or consolidated school district, which is bordered by three or more Abbott districts shall receive additional State school aid if the district meets one or more of the following criteria:[2]
>
> (Emphasis added)

Petitioner urges that the word "additional" signified that rim aid could not be considered by municipal lawmakers when they evaluated a school budget. Stated differently, the rim aid, in petitioner's view, should have been additional to any school budget approved by a municipality.

The Commissioner finds no merit in these arguments. First, the accountant's comment at a meeting between petitioner and the Council, even if made as described by petitioner, does not suffice as proof that the Council's budget decision was influenced by the rim aid. Second, even if the existence of the rim aid had influenced the Council's budget

---

[2] (1) the district's per pupil cost in the prebudget year as reported in the Department of Education's Comparative Spending Guide was less than the average per pupil cost for the Abbott districts in the prebudget year as calculated based on data from the Comparative Spending Guide;

(2) the district had an average school student mobility rate of 10% or greater as reported in the most recent New Jersey School Report Card;

(3) 35% or more of the district's students were eligible for free or reduced price meals under the federal school lunch program;

(4) 15% or more of the numbers shown in the most recent New Jersey School Report Card data for class size by grade level, other than prekindergarten, and school for a district indicated an average class size of 30 or more students; and

(5) the per capita personal income of the residents of the school district was $19,000 or less for the 2004-2005 school year based upon aggregate total income reported on the NJ-1040 for 2001 and all public assistance including Temporary Assistance to Needy Families for 2001. For each subsequent school year, the per capita personal income limit shall be increased by the CPI as defined in section 3 of P.L.1996, c.138 (C.18A:7F-3).

determination, petitioner offers no legal authority for its theory that factoring a rim aid award into budget deliberations must necessarily have been deemed a violation of *N.J.S.A.* 18A:7F-10.1. Third, the text of *N.J.S.A.* 18A:7F-10.1 stated that rim aid was to be additional to other State aid. There was no express language instructing municipalities to establish the local share of their school budgets without taking rim aid – or other non-local funding sources – into account. In point of fact, the function of *N.J.S.A.* 18A:7F-10.1, as set forth in its provisions, was to identify 1) the conditions that would entitle an Abbott rim district to receive aid and 2) the calculations that would be employed in determining how much aid the district would receive. As there was no language in the statute dictating how the aid had to be allocated, there can be no finding of violation of the statute based upon how the rim aid was used. Finally, there is nothing in the record that supports the notion that the rim aid was ultimately used for anything other than school district expenses.

In its exceptions, petitioner also invokes *Abbott v. Burke,* 119 *N.J.* 287, 385-86 (1990). The particular language which petitioner references instructs the State that state aid must be dispensed in order that children may receive a thorough and efficient education regardless of local tax bases. There is nothing in the record to suggest that the Council's budget decision threatened the provision of a thorough and efficient education to the students of Hillside. In fact, it was apparently stipulated by the parties that such a threat did not exist. (Initial Decision at 4) Thus, petitioner's *Abbott* citation is not germane to the instant controversy. Similarly, the language petitioner cited from a later *Abbott* litigation,[3] which language discusses the provision

[3] *Abbott v. Burke,* 153 *N.J.* 480, 519 (1998).

of State funding to Abbott districts for facilities, is also informed by the concern that children receive a thorough and efficient education.[4]

Petitioner's contention that summary decision was inappropriate due to the dispute about the Council's intentions concerning the rim aid warrants no discussion, since the Commisioner has determined that the Council's actions did not violate the legal authority discussed in petitioner's papers.

Accordingly, the petition is dismissed.

IT IS SO ORDERED.[5]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 9/19/08

Date of Mailing: 9/19/08

[4] The Commissioner notes that after the Council's budget cut, there was still $1,673,011 in the budget for facility projects for the 2006-2007 school year. No affidavit or documentary evidence was submitted by plaintiff to explain how this was insufficient to address the facility issues in petitioner's district.

[5] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 10979-06

AGENCY DKT. NO. 289-8/06

BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE, UNION COUNTY,

Petitioner,

v.

MUNICIPAL COUNCIL OF THE TOWNSHIP OF HILLSIDE, MAYOR KAREN OLIVER, AND TOWNSHIP OF HILLSIDE, UNION COUNTY,

Respondents.

Thomas O. Johnston, Esq., for petitioner (Porzio, Bromberg & Newman, P.C., attorneys)

Richard H. Bauch, Esq., for respondents (Bauch Zucker Hatfield LLC, attorneys)

Record Closed: June 9, 2008 Decided: June 26, 2008

BEFORE **JOSEPH A. PAONE**, ALJ:

STATEMENT OF THE CASE & PROCEDURAL HISTORY

Petitioner Board of Education of the Township of Hillside, Union County (Board) alleges that respondents Municipal Council of the Township of Hillside, Mayor Karen Oliver, and Township of Hillside, Union County misappropriated State Abbott Bordered District Aid (State Aid) when the Council reduced the proposed base tax levy after it was defeated by the voters, and converted the aid to municipal use, which reduced the school budget, thereby neutralizing the benefit to the district of the State Aid. The Board demands restoration of the funds to the District's base tax levy, while respondents contend that Board's demand is without merit.

On August 18, 2006, the Board filed a Verified Petition of Appeal with the Commissioner of Education. On October 11, 2006, respondents filed an Answer. On November 8, 2006, the New Jersey Department of Education, Bureau of Controversies and Disputes, transmitted the contested case to the Office of Administrative Law. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. Respondents' filed a motion for summary decision. Due to a change of counsel, discovery delays, settlement discussions and several adjournment requests, oral argument on respondents' motion was not heard until June 9, 2008, at which time the record closed.

STATEMENT OF FACTS

The following relevant facts are stipulated and undisputed:

1. The Board is a body politic organized under the laws of New Jersey. It operates a K-12 school district for children in Hillside.

2. Respondent Municipal Council of the Township of Hillside is the governing body for Hillside Township.

3. The New Jersey Legislature enacted N.J.S.A. 18A:7F-10.1[1] in 2005 to address the significant needs of school districts that resemble "Abbott districts." The law requires that school districts that border three or more

[1] This statute was repealed, effective January 13, 2008.

Abbott districts shall receive additional State school aid if one of five enumerated criteria is met. The Hillside School District borders three Abbot districts (Newark, Elizabeth and Irvington) and satisfies three of five criteria: 1) the district's per pupil cost is less than the average per pupil cost for Abbott districts; 2) the district has an average student mobility rate of 15.4%, while the statutory criteria is merely 10%; and 3) 54% of the student population are eligible for free or reduced lunch, while the criteria is merely 35%.

4. The Hillside School District received $1,749,273 in State Aid for the 2006-2007 school year pursuant to N.J.S.A. 18A:7F-10.1 The Board designated these funds for school facilities improvement to address needed maintenance and repairs.

5. On April 18, 2006, the Hillside School District base tax levy was submitted for voter approval. Of the $42,764,452 general fund amount, $2,948,011 was allocated for facilities maintenance and repair. The base tax levy amount (the amount derived from local taxes) was $25,242,459. The State Aid is a revenue source separate and apart from the base tax levy.

6. The base tax levy budget was defeated by a margin of 126 votes.

7. Pursuant to N.J.S.A. 18A:7F-5(e), the base tax levy was referred to the Township Council for a "determination of the amount that should be expended notwithstanding voter rejection."

8. School base tax levy budgets in the neighboring communities of Union, Linden, Springfield, Kenilworth, Berkeley Heights, and Roselle were also defeated, and the governing bodies for those respective communities reduced the school base tax levies.

9. When the Board's representatives met with the Township Council to discuss the budget on May 17, 2006, Council representatives told Board representatives that they were inclined to reduce the budget by $1,500,000, a reduction far greater than that imposed by the governing bodies on the school districts in the neighboring communities. When a Board representative asked how the Hillside School District was different from the districts in the neighboring communities, Warren Korecky, who had been retained by the Township to audit the budget and advise respondents, stated that the neighboring communities had not received State Aid as had the Hillside District.

10. By way of resolution, the Township Council reduced the Hillside School District base tax levy by $1,500,000. The Council explained that $1,275,000 was to come from the amount allocated for facilities repairs and maintenance, and the remainder of the reduction was to come from budgeted amounts related to general supplies, school parking lot repaving and health benefits.

11. In explaining its actions, the Council stated that the Board should "reduce and prioritize [the] number of construction projects."

12. The reduction of the base tax levy will not compromise the provision of a thorough and efficient education, nor will the reduction negatively impact on the stability of the school district. (See also the Board's letter to the Acting Commission of Education, dated July 28, 2006.)

CONCLUSIONS OF LAW

The issue presented by respondents' motion is whether the Board states a claim upon which relief may be granted. The relevant and material facts related to this issue are not in dispute. Accordingly, pursuant to N.J.A.C. 1:1-12.5(b) and Brill v. Guardian

Life Insurance Co. of America, 142 N.J. 520, 523 (1995), the matter is ripe for summary decision.

N.J.S.A. 18A:7F-5(e)(1) in relevant part provides:

> Any general fund tax levy rejected by the voters for a proposed budget in excess of the maximum T&E budget shall be submitted to the governing body of each of the municipalities included within the district for determination of the amount that should be expended notwithstanding voter rejection . . . If the governing body . . . reduce[s] the district's proposed net budget, the district may appeal any of the reductions to the commissioner on the grounds that the reductions will negatively impact on the stability of the district given the need for long term planning and budgeting. In considering the appeal, the commissioner shall consider enrollment increases or decreases within the district; the history of voter approval or rejection of district budgets; the impact on the local levy; and whether the reductions will impact on the ability of the district to fulfill its contractual obligations. A district may not appeal any reductions on the grounds that the amount is necessary for a thorough and efficient education.
>
> [Emphasis added.]

Respondents advance the position that the Council did exactly what it was statutorily authorized to do, and since it has been acknowledged and stipulated that the "reduction will [not] negatively impact on the stability of the district given the need for long term planning and budgeting" and further stipulated that the Board's budget has not been reduced beyond the amount determined by the Commissioner of Education to be required to provide a thorough and efficient education, the Board has no cause of action against respondents.

The Board counters that under the guise of reviewing the local tax levy the Council "unlawfully, arbitrarily, capriciously, unreasonably and contrary to the intent of N.J.S.A. 18A:7F-10.1" reduced the Board's budget. The Board suggests that the Council exceeded its authority because the Council relied on the Board's receipt of State Aid in reducing the Board's proposed base tax levy. It points to Warren Korecky's statement and the inferences that could be drawn from that statement to support its

contention. The Board argues that the Council had no authority to consider any funding source beyond the local tax levy. Therefore, in considering State Aid, the Council acted in violation of the law. The Board further argues that since N.J.S.A. 18A:6-9 provides the Commissioner of Education with the authority to adjudicate all "disputes arising under the school laws," review of respondents' action is not limited to the mechanism prescribed by N.J.S.A. 18A:7F-5(e)(1).

The Board cites no law, regulation, or authority that suggests that any purported reliance by the Council on the Board's receipt of State Aid violates any school law. N.J.S.A. 18A:7F-10.1 established the criteria for entitlement by school districts bordered by Abbott districts for receipt of additional school aid and the formula by which that aid should be calculated. Neither that statute, nor the budget review provisions of N.J.S.A. 18A:7F-5(e), prohibit a governing body from considering the receipt of State Aid in determining whether to reduce a district's proposed base tax levy. Therefore, even viewing Korecky's statements, and the inferences derived therefrom, in the light most favorable to the non-moving party, the Board has failed to establish how the Council's reliance on State Aid when it reduced the base tax levy constituted a violation of the law. See Brill v. Guardian Life Insurance Co. of America, supra.

ORDER

Accordingly, I hereby **ORDER** that respondents' motion for summary decision that the Verified Petition of Appeal be dismissed because the Board has failed to state a claim upon which relief can be granted is **GRANTED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and

unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 26, 2008

DATE

JOSEPH A. PAONE, ALJ

Date Received at Agency 6-30-08

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUN 30 2008

DATE

OFFICE OF ADMINISTRATIVE LAW

lr

389-08

OAL DKT. NO. EDU 2877-08
AGENCY DKT. NO. 98-4/08

DEBORAH PETROZZA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BROOKLAWN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the parties' proposed Settlement Agreement, and the Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 9/19/08

Date of Mailing: 9/19/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2877-08

AGENCY DKT. NO. 98-4/08

DEBORAH PETROZZA,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF BROOKLAWN, CAMDEN COUNTY,

Respondent.

Keith Waldman, Esq., for petitioner (Selikoff & Cohen, attorneys)

Leonard J. Wood, Esq., for respondent (Wade, Long, Wood & Kennedy, attorneys)

Record Closed: August 4, 2008 Decided: August 14, 2008

BEFORE **LISA JAMES-BEAVERS**, ALJ:

STATEMENT OF THE CASE

Petitioner Deborah Petrozza, a teacher affected by a prior reduction in force, claimed that the respondent Board of Education of the Borough of Brooklawn, Camden County, violated her tenure and seniority rights by assigning health instruction duties for

which she is qualified to a certified aide. As detailed below, the parties have settled the case.

PROCEDURAL HISTORY

Ms. Petrozza filed a petition with the Commissioner of Education on April 4, 2008. The respondent Board filed an answer on April 18, 2008. This matter was transmitted to the Office of Administrative Law on April 29, 2008, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The case was scheduled for a hearing on August 12, 2008.

The parties have agreed to a settlement and have prepared a letter adopting the settlement and effectuating the withdrawal of the petition and an attached letter stating the terms and conditions, which is attached and fully incorporated herein.

FINDINGS OF FACT

The parties' settlement agreement is as follows:

1) Beginning with the 2008-2009 school year, Ms. Petrozza will have four days at Brooklawn Public Schools. These days will be Tuesday, Wednesday, Thursday and Friday. She will keep the three days that she teaches Physical Education, and the fourth day is the day that she will be teaching Health to the sixth, seventh and eighth grades.

2) The Board will pay Ms. Petrozza the total sum of $3,600 in full and complete satisfaction of any and all claims regarding any issues with respect to this litigation or the 2007-2008 school year. The payment will be made as follows: $1,800 on September 15 and $1,800 on November 15, 2008, in separate checks.

I have reviewed the record and the terms thereof and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

The case involved substantial issues of fact. The settlement agreement avoids the time and expense of full hearing and further litigation. The terms of the settlement are reasonable.

CONCLUSIONS OF LAW

I **CONCLUDE** that this settlement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved.

ORDER

I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

8/14/08
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency:

AUG 15 2008
DATE

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jh

SELIKOFF
&COHEN,PA
A Labor and Employment Law Firm for more than 30 years

Kei ·ldman
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Carol H. Alling
Michael C. Damm

Joel S. Selikoff,
Of Counsel

members NJ bar
members DC bar
members PA bar

RECEIVED
2008 AUG -4 A 10: 52
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

VIA FAX ONLY

July 31, 2008

307 Fellowship Road
Suite 314
Mount Laurel, New Jersey
08054-1233

t 856-778-6055
f 856-778-6056
selikoff.cohen@verizon.net

Leonard J. Wood, Esq.
Wade, Long, Wood & Kennedy, LLC
1250 Chews Landing Road
Laurel Springs, NJ 08021

Re: *Deborah Petrozza v. Bd. of Ed. of the Borough of Brooklawn, County of Camden*
Docket No. 94-4/08
Enclosure of Settlement Agreement; Request to Cancel of 08-12-08 Hearing
Our File No. 5364

Dear Mr. Wood:

Enclosed please find a copy of your letter to me of July 21, 2008 as countersigned by Petitioner Deborah Petrozza, settling the above-entitled case. I will forward my client's original signature upon receipt.

I am forwarding a copy of this letter with enclosures directly to ALJ Lisa James-Beavers to apprize her of the settlement reached by the parties. I trust that ALJ James-Beavers will cancel the hearing presently scheduled in this matter for August 12, 2008 and will prepare an initial decision and recommendation adopting the settlement and effectuating the withdrawal of the petition in view of the settlement.

Thank you both for your time and attention to these matters. Both are appreciated.

Very truly yours,
SELIKOFF & COHEN, P.A.

BY: _____
KEITH WALDMAN
kwaldman@selikoffcohen.com

KW:dwe
Enclosures
c: Lisa James-Beavers, ALJ (w/encl.)
Deborah Petrozza (w/encl.)
Donna Maurer, NJEA UniServ Rep. (w/encl.)

WADE, LONG, WOOD & KENNEDY, LLC

Attorneys at Law

John D. Wade
Howard C. Long, Jr.
Leonard J. Wood, Jr.
John S. Kennedy
Audra A. Pondish

Of Counsel
Thomas S. Higgins
Certified Civil Trial Attorney

July 21, 2008

RECEIVED
2008 AUG -4 A 10:52
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

Keith Waldman, Esq.
Selikoff & Cohen, P.A.
307 Fellowship Road
Suite 314
Mount Laurel, NJ 08054

RE: Petrozza v. Brooklawn BOE

Dear Mr. Waldman:

As a follow-up to our conversation on Thursday, July the 17th, I did speak with my clients concerning your client's request that the payments being made to her as described in my June 24th letter be paid as "separate checks" and not added onto her regular payroll check. My clients are fine with that caveat.

This letter will therefore confirm that we have resolved this matter in its entirety in accordance with the terms and conditions outlined in my June 24th, 2008 letter. This will further confirm that you will be withdrawing the matter currently pending before the Office of Administrative Law.

I would ask that you affix your signature to the copy of this letter, which I have attached, indicating your consent of an acknowledgement of the terms and conditions of the settlement. Again, the only modification to my June 24th letter being that the $1800 checks on September 15th and November 15th will be separate checks.

Thank you for your courtesies and attention.

Very truly yours,

LEONARD J. WOOD

I hereby agree and consent to the terms and conditions recited above, which represent a full resolution of the pending matter of Petrozza v. Brooklawn Board of Education.

KEITH WALDMAN

Deborah Petrozza

LJW/tkw
Encl.
cc: Dr. Kellmayer

WADE, LONG, WOOD & KENNEDY, LLC

Attorneys at Law

John D. Wade
Howard C. Long, Jr.
Leonard J. Wood, Jr.
John S. Kennedy
Audra A. Pondish

Of Counsel
Thomas S. Higgins
Certified Civil Trial Attorney

RECEIVED
2008 AUG -4 A 10: 52
NEW JERSEY
OFFICE OF ADMIN LAW

June 24, 2008

Keith Waldman, Esq
Selikoff & Cohen, P.A.
307 Fellowship Road
Suite 314
Mount Laurel, NJ 08054

Dear Mr. Waldman,

This is to confirm our conversation of June 20, with respect to the proposal that I made to you to resolve this litigation, which proposal was made without prejudice and without admission. This is also to confirm that you have consented that we will extend the time to provide you discovery to July 18 in order to allow you to discuss with your client the parameters of our proposal.

Again without prejudice and solely and exclusively for the purpose of resolving this litigation, and not to be used for any other purpose, our proposal to resolve this dispute is as follows: Commencing with the 2008-2009 school year, your client will have four days at Brooklawn Public Schools. Those days will be Tuesday, Wednesday, Thursday, and Friday. She will keep the three days that she teaches Physical Education, and the fourth day is the day that she will be teaching Health to the sixth, seventh, and eighth grades. The Board would pay to your client the total sum of $3600.00 in full and complete satisfaction in any and all claims regarding any issues with respect to this litigation or the 2007-2008 school year. The payment will be made $1800.00 on September 15 and $1800.00 on November 15, with the regular payroll.

Again, once you have had an opportunity to review this matter with your client, please advise. These are the parameters that I was authorized to discuss and offer to you by the Board of Education on its regularly scheduled meeting on June 19.

Very truly yours,

LEONARD J. WOOD

JLW/tkw
cc: Dr. Kellmayer

#390-08

390-08

OAL DKT. NO. EDU 547-08
AGENCY DKT. NO. 395-12/07

D.O. on behalf of minor child M.O.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF GLASSBORO, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed Settlement Agreement, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 9/22/08

Date of Mailing: 9/22/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 547-08

AGENCY DKT. NO. 395-12/07

D.O., ON BEHALF OF MINOR CHILD, M.O.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF GLASSBORO, GLOUCESTER COUNTY,

Respondent.

Jack S. Senechal, Esq., for petitioner (Pappas & Richardson, LLC, attorneys)

Frank P. Cavallo, Jr., Esq., for respondent (Parker McCay, P.A., attorneys)

Record Closed: August 14, 2008 Decided: August 18, 2008

BEFORE **LISA JAMES-BEAVERS**, ALJ:

STATEMENT OF THE CASE

Petitioner D.O. on behalf of minor child, M.O. claimed that the respondent Board of Education of the Borough of Glassboro, Gloucester County was arbitrary and

capricious in its decision to deny M.O credit for summer school classes following M.O.'s removal for a classroom incident. As detailed below, the parties have settled the case.

PROCEDURAL HISTORY

D.O. filed a petition with the Commissioner of Education on December 28, 2007. The respondent Board filed an answer on February 1, 2008. This matter was transmitted to the Office of Administrative Law on February 6, 2008, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A prehearing conference was held on May 13, 2008. At that time, the attorneys stated that they were discussing settlement, so a second conference was scheduled for June 2, 2008. During that conference, the attorneys said that they had reached a settlement that would be placed before the Board at its meeting in the third week of June.

The parties have agreed to a settlement and have prepared an agreement adopting the settlement and effectuating the withdrawal of the petition. The settlement agreement is attached and fully incorporated herein.

FINDINGS OF FACT

I have reviewed the record and the terms thereof and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

The case involved substantial issues of fact. The settlement agreement avoids the time and expense of full hearing and further litigation. The terms of the settlement are reasonable.

CONCLUSIONS OF LAW

I **CONCLUDE** that this settlement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved.

ORDER

I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

8/18/08
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency:

AUG 21 2008

DATE

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

jh

RECEIVED
2008 AUG 14 P 4:15
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

Law Offices
Parker McCay P.A.
Three Greentree Centre
7001 Lincoln Drive West
P.O. Box 974
Marlton, NJ 08053
(609) 596-8900
Attorneys for Respondent, Board of Education of The Borough of Glassboro

D.O. on behalf of minor child, M.O.	)	**BEFORE THE COMMISSIONER OF EDUCATION**
	)	**STATE OF NEW JERSEY DEPARTMENT OF EDUCATION**
Petitioner(s),	)	**AGENCY Ref. No. 395-12/07**
	)	**OAL DOCKET NO. EDS**
vs.	)	
	)	**Civil Action**
Board of Education of the Borough of Glassboro	)	**SETTLEMENT AGREEMENT**
Respondent(s).	)	

THIS AGREEMENT is made this 11th day of June, 2008, by and between the Borough of Glassboro School District Board of Education (the "District"), and D.O. o/b/o M.O. (the "Parent").

WITNESSETH:

WHEREAS, M.O. was enrolled in a summer school program operated by the District during the summer of 2007; and

WHEREAS, M.O. was expelled from the summer school program as a result of an incident that occurred on July 31, 2007; and

WHEREAS, prior to July 31, 2007, M.O. had successfully completely final examination in the English II course and shall receive a grade of "B" for said course; and

WHEREAS, M.O. earned a grade of 76 in the Geometry course and shall receive the appropriate credit therefore; and

WHEREAS, the Parent filed a Petition of Appeal with the Commissioner of Education seeking to compel the District to provide credit for M.O. for the English II and Geometry courses; and

WHEREAS, the District filed an Answer to the Petition of Appeal; and

WHEREAS, the Parent and the District have reached agreement in settlement of any and all disputes relating to this matter.

NOW, THEREFORE, the parties, for the consideration specified below, set forth their full and complete agreement as follows:

(1) The Borough of Glassboro School District shall extend credit to M.O., for both the Geometry course and the English II course. An appropriate Report Card shall be issued to M.O. by the Borough of Glassboro School District.

(2) The Parent hereby agrees to waive and release any and all claims that she may have individually and/or on behalf of M.O. arising out of M.O.'s attendance at the Glassboro School District summer school during the summer of 2007, including any and all claims that were or could have been raised in the Petition of Appeal filed in this matter, as well as any claims for counsel fees and costs, compensatory education and/or monetary damages.

(3) Each party shall be responsible for their counsel fees and costs relative to the proceedings that are the subject of this Agreement.

(4) The Parent hereby states that she is signing this Agreement voluntarily, of her own free will and not under duress or coercion of any kind.

(5) This Agreement shall be construed fairly according to the plain language of its terms and not for or against any party hereto.

(6) This Agreement constitutes the full and complete agreement of the parties hereto with respect to its subject matter, it supersedes any prior or contemporaneous representations, whether oral or written, and it may not be modified or amended except by a written instrument signed by all parties hereto.

IN WITNESS WHEREOF, the parties have set their hands this 2nd day of July, 2008.

PARENT

Doris E. Onorati

Doris Onorati, Individually and on behalf of Megan Onorati

Date 8-14-08

BOROUGH OF GLASSBORO SCHOOL DISTRICT BOARD OF EDUCATION

Leonard D. Fitts

Dr. Leonard D. Fitts
Superintendent of Schools

Date 7/3/08

RESOLUTION OF THE BOROUGH OF GLASSBORO BOARD OF EDUCATION APPROVING THE SETTLEMENT AGREEMENT BETWEEN THE BOARD OF EDUCATION AND D.O. O/B/O M.O.

WHEREAS, a Petition of Appeal was filed by D.O. o/b/o M.O. against the Borough of Glassboro Board of Education ("Board") with the Commissioner of Education claiming entitlement to certain academic achievements based upon her attendance at the Glassboro Summer School Program during the summer of 2007; and

WHEREAS, the Petition of Appeal was transmitted to the Office of Administrative Law for hearing before the Honorable Lisa James-Beavers, A.L.J.; and

WHEREAS, the Board and D.O. o/b/o M.O., through their respective counsel, engaged in settlement discussions in this matter; and

WHEREAS, as a result of those settlement discussions, the parties have expressed a desire to settle this matter and have entered into the terms of a Settlement Agreement; and

WHEREAS, the Board believes it is in the best interest of the Borough of Glassboro School District to settle all claims in accordance with the terms of the Settlement Agreement.

NOW, THEREFORE, BE IT RESOLVED on the 11th day June, 2008 by the Borough of Glassboro Board of Education as follows:

1. The Settlement Agreement between the Borough of Glassboro Board of Education and D.O. o/b/o M.O. is hereby approved.

2. The Superintendent of Schools, Dr. Leonard D. Fitts, is hereby authorized to execute the Settlement Agreement.

School Business Administrator/Board Secretary

7/2/08

Date

#391-08

OAL DKT. NO. EDU 8234-07
AGENCY DKT. NO. 241-8/07

FAITH D. YOST,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the parties' proposed Settlement Agreement, and the Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 9/22/08

Date of Mailing: 9/22/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8234-07

AGENCY DKT. NO. 241-8/07

FAITH D. YOST,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,

Respondent.

Michael Damm, Esq., for petitioner (Selikoff and Cohen, attorneys)

Roland R. Formidoni, Esq., for respondent (Lenox, Socey, Wilgus, Formidoni, Brown, Giordano & Casey, attorneys)

Record Closed: August 18, 2008 Decided: August 19, 2008

BEFORE **RONALD W. REBA**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) in October, 2007 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a settlement agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the settlement terms and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1, and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

August 19, 2008
DATE

RONALD W. REBA, ALJ

Date Received at Agency:

AUG 21 2008

DATE

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

/cad

SELIKOFF & COHEN, P.A.
307 Fellowship Road, Suite 314
Mt. Laurel, New Jersey 08054-1233
(856) 778-6055; Fax: (856) 778-6056
Attorneys for Faith D. Yost, Petitioner

FAITH D. YOST,

Petitioner,

HAMILTON TOWNSHIP BOARD OF EDUCATION, COUNTY OF MERCER,

Respondent.

BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY

Docket No. EDU 08234-2007S
Agency Ref. No. 241-8/07.

SETTLEMENT AGREEMENT

This Agreement is made by and between Petitioner, Faith D. Yost ("Petitioner"), and the Hamilton Township Board of Education (referred to herein as "Respondent Board") to resolve the matter filed with the Commissioner of Education entitled *Faith D. Yost v. Hamilton Township Board of Education*, OAL Docket No. EDU 08234-2007S, Agency Ref. No. 241-8/07. The Parties hereby agree as follows:

1. The Respondent Board shall pay to the Petitioner the sum of $5,000.00. A check in that amount is to be sent to Petitioner's attorney within fourteen days (14) days of July 16, 2008. If in the event the check is not received by Petitioner's attorney at the address stated above by the close of business on July 30, 2008, or such extended date as may be mutually agreed upon by the parties in writing, then this agreement shall become null and void and of no effect. Neither party shall be obligated to extend the agreement beyond the July 30, 2008 date. It is understood

that should the agreement become null and void due to an untimely payment or non payment, Petitioner reserves the right to return any late payment and litigate the matter before the Commissioner of Education seeking the entire amount claimed due and not the compromised figure set forth above. Should the matter be litigated, the Respondent Board reserves the right to assert that nothing is due.

2. The Petitioner shall withdraw and/or dismiss the above Petition of Appeal filed in this matter with prejudice and releases any further claims for benefits she may have under *N.J.S.A.* 18A:30-2.1, on the condition that the Respondent Board makes payment to the Petitioner as set forth in paragraph 1. This release and obligation to withdraw and/or dismiss the Petition of Appeal shall only become effective upon the timely payment of the $5,000.00 as set forth in Paragraph 1. Should the Respondent Board not pay or pay untimely, Petitioner shall be entitled to proceed with the above case as if there was no agreement. Petitioner shall not be obligated to except a payment after July 30, 2008, but may instead choose to proceed to litigation, returning to the Respondent Board any late payment.

3. The parties agree that this settlement is not to be considered as precedent as to any other matter or any other party.

4. The parties agree that this Agreement may be signed in counterparts and that facsimiles of signatures will have the same force and effect as original signatures.

5. This Agreement has been entered into voluntarily and without coercion by each of the parties with a full understanding of the rights and ramifications of this Agreement.

6. By signing this Agreement, each signatory represents that he or she is a Party or has been duly authorized by a Party to sign on that Party's behalf.

Intending to be legally bound hereby, Petitioner, Faith D. Yost, and the Hamilton Township Board of Education execute the foregoing Agreement as indicated below.

WITNESS:

Michael C. Damm

FAITH D. YOST
DATED: 7-16-08

SELIKOFF & COHEN, P.A.

MICHAEL C. DAMM, ESQ.
ATTORNEYS FOR PETITIONER
DATED: 7-16-08

WITNESS:

HAMILTON TOWNSHIP
BOARD OF EDUCATION

8/13/08

JOSEPH TRAMONTANA
DIRECTOR OF HUMAN RESOURCES
DATED:

The Hamilton Township Board of Education has authorized and consented to the terms of this settlement agreement.

LENOX, SOCEY, WILGUS, FORMIDONI, BROWN, GIORDANO & CASEY

ROLAND R. FORMIDONI, ESQ.
ATTORNEYS FOR RESPONDENT, HAMILTON TOWNSHIP BOARD OF EDUCATION
DATED: 7/17/08

Sworn & subscribed to by me
this 13th August 2008

TOTAL P.04

TOTAL P.06

DAWN MARIE CHARLES
NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES MARCH 2, 2012

394-C

#394-08

OAL DKT. NO. EDU 10129-06
AGENCY DKT. NO. 278-8/06

PATERSON EDUCATION ASSOCIATION, ON BEHALF OF ITSELF AND NAMED MEMBERS, AND PEGEEN JONES, INDIVIDUALLY,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the parties' proposed Settlement Agreement and Release, and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon such review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 9/23/08

Date of Mailing: 9/23/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10129-06

AGENCY REF.NO.278-8/06

PATERSON EDUCATION ASSOCIATION, ET AL.
AND PEGEEN JONES, INDIVIDUALLY,

Petitioners,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE
CITY OF PATERSON, PASSAIC COUNTY,

Respondent.

Richard Friedman, Esq., for petitioner (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys),

Joanne L. Butler, Esq., for respondent (Schenck, Price, Smith & King, LLP, attorneys)

Record Closed: August 22, 2008 Decided: August 22, 2008

BEFORE **CAROL I. COHEN**, ALJ:

The matter was transmitted to the Office of Administrative Law (OAL) on September 27, 2006 for determination as a contested case.

The parties have agreed to an amicable resolution of the matter and submitted the attached Settlement Agreement and General Release on August 22, 2008, indicating the terms of the agreement. .

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signature of the parties and/or signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

8/22/08
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Date Received at Agency: 8-26-08

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AUG 26 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

id

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OFFICE OF ADMINISTRATIVE LAW

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN
150 West State Street
Trenton, New Jersey 08608
(609) 392-8172
Attorneys for Petitioners

PATERSON EDUCATION ASSOCIATION, On Behalf of Itself and On Behalf of the Following Members: VINCENT ARDIS, PAMELA BAGOT, GEORGE BOTTINOR, MINDY ESPINAL, BRIANNE FORD, PEGEEN JONES, CHRIS LASKOWICH, SHEENA MCDERMOTT, KELLY TIERNAN and PAULA ZANCHELLI, and PEGEEN JONES, Individually,

Petitioners,

v.

STATE OPERATED SCHOOL DISTRICT OF PATERSON,

Respondent.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDUOR 10129-2006N
AGENCY REF. NO. 278-8/06

SETTLEMENT AGREEMENT AND RELEASE

WHEREAS, Petitioners were employees of Respondent and have asserted certain claims pursuant to the New Jersey Education Statutes and Regulations challenging the Respondent's actions in relation to the content of its notices of non-renewal, in issuing Statements of Reasons for non-renewal, in scheduling *Donaldson* hearings, and in conducting *Donaldson* hearings,

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

which are asserted more particularly in the Petition of Appeal under Docket No.: EDUOF 10129-2006N; and

WHEREAS, said parties have reached an agreement to fully and finally settle and/or release all claims which were the subject of the petition of appeal, as expressed and detailed by the terms of and execution of this agreement.

THE PARTIES HEREIN AGREE AS FOLLOWS:

1. The above Recitals are made part of this Agreement.

2. Prospectively, Respondent will provide Statements of Reasons, as that term is used in the New Jersey Statutes and Regulations, regarding the non-renewal of teaching staff members' employment contracts, only after receiving a request for the Statement of Reasons from a non-tenured teaching staff employee who has received notification that his/her employment will not be renewed for the coming year.

3. For each Petitioner who received a letter setting forth the reason for the non-renewal of his or her employment, that letter will be withdrawn and deleted from the Petitioner's personnel file and from the District's files and records (except the District's file regarding this litigation), and a new letter will be issued stating only that Respondent determined not to renew the Petitioner's employment. In the event, however, that the reason for the non-renewal was budgetary, at the Petitioner's option, the new letter will state only that the non-renewal was for budgetary reasons.

4. Prospectively, Respondent will provide to a non-tenured teaching staff employee seeking a Statement of Reasons sufficient information to enable a reasonable person under the circumstances to understand why the teaching staff employee's employment contract was not renewed.

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

5. As to only those Petitioners who submitted letters of resignation before non-renewal notices were issued, those Petitioners who submitted letters of resignation between receiving non-renewal notices and their *Donaldson* hearings, and those petitioners who submitted letters shortly after their *Donaldson* hearings, meaning within thirty (30) days thereafter, if requested by the Petitioner, Respondent will amend those Petitioners' personnel records to reflect resignation rather than non-renewal, and the non-renewal notices, Statements of Reasons, and post-*Donaldson* letters will be removed from their personnel files.

6. For all Petitioners who had *Donaldson Hearings* and were issued formal decisions or letters with reasons for the non-renewal of their employment following their *Donaldson Hearing*, those decisions and letters will be withdrawn and deleted from the Petitioner's personnel file and from the district's files and records (except the district's file regarding this litigation), provided that the withdrawal and deletion of same will not entitle any Petitioner to a new *Donaldson* Hearing.

7. Any request made to Respondent about Petitioners by any prospective employer or other outside party shall be responded to by Respondent, its employees and agents, by providing only each Petitioner's job title and dates of service, unless the specific Petitioner requests the provision of additional information in writing, provided the disclosure of such additional information is acceptable to the District.

8. Each Petitioner hereby releases and forever discharges Respondent and its present and former affiliates, subsidiaries, officers, directors, agents, employees, and their successors and assigns, from any and all actions, causes of action, suits, claims, charges or complaints which Petitioners may have, or claim to have, which relate to, and only to, the subject matter of this

litigation and from all claims for compensatory and punitive damages and attorneys' fees, cost or other expenses incurred by Petitioners in relation to the subject matter of this petition.

9. This Agreement does not constitute an admission by Respondent of any wrongful action or violation of any federal or state statute, or common law rights, including those relating to the provisions of any law or statute concerning employment actions, or of any other possible or claimed violation of law or rights.

10. By executing this Agreement, each Petitioner represents and acknowledges that the Petitioners do not rely, and have not relied upon, any representation or statement not set forth in this Agreement made by Respondent or its counsel with regard to the subject matter, basis, or effect of this Agreement or otherwise.

11. This Agreement shall be binding upon and inure to the benefit of the Petitioners, the Respondent and any of their respective heirs, legal or personal representatives, employees, officers, directors, successors or assigns.

12. This Agreement sets forth the entire Agreement between the parties and supersedes any and all prior agreements or understandings between the parties.

13. In the event of a breach of this Agreement, either party may seek relief, including damages, restitution and injunctive relief, at law or in equity, in a court of competent jurisdiction.

14. Any Petitioner, at his or her option, may, rather than be covered by this Settlement Agreement, withdraw the Petition of Appeal, or his or her participation therein, provided that a withdrawal shall be deemed to constitute a waiver of the claims, and only the claims, covered by the Petition of Appeal.

15. This Agreement shall be construed in accordance with, and all disputes hereunder shall be governed by, the laws of the State of New Jersey.

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

16. This Agreement is effective upon its execution by all parties or their counsel. This Agreement may be executed in multiple counterparts, each of which shall be considered an original but all of which shall constitute one Agreement.

ACCEPTANCE OF SETTLEMENT TERMS

The terms of this agreement are hereby accepted on behalf of Pamela Bagot, Brianne Ford, Pegeen Jones, Chris Laskowich, Kelly Tiernan, Paula Zanchelli, and Sheena McDermott.

By: Richard A. Friedman, Esq. for
Petitioners Pamela Bagot, Brianne Ford,
Pegeen Jones, Chris Laskowich,
Kelly Tiernan, Paula Zanchelli, and
Sheena McDermott

Dated: 7/17/08

THE STATE OPERATED SCHOOL
DISTRICT OF PATERSON

By: _____
Date: 8/18/08

THE STATE OPERATED SCHOOL
DISTRICT OF PATERSON

By: _____
Date: 8/21/08

ZAZZALI,
FAGELLA, NOWAK,
KLEINBAUM
& FRIEDMAN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

_____

Paterson Public Schools
PERSONNEL TRANSACTION REQUEST & PERSONNEL ACTION FORM

(Please Type)

Date: 8/18/2008

1. INITIATOR: Dr. Dennis J. Clancy Position: Interim State District Superintendent Signature: _____

2. EXPLANATION: *Provide a brief written explanation of personnel transaction/request:*

Approve the settlement of the case captioned Paterson Education Association v. State Operated School District of Paterson, OAL Dkt. EDUOR 10129-2006N / Agency Ref. No. 278-8/06, pertaining to *Donaldson* hearings.

Account #: _____ $ No cost to District

3. PURPOSE(S) ____ Fill Vacancy ____ Change Date(#6) ____ Create/Delete Position (Approval Required)
____ Transfer(s) ____ Promote ____ Request/Return Leave
____ Resignation Retirement Suspension Dismissal Death(Circle)
X Other Describe: Approve settlement of litigation

4. VACANCIES: In PC#: N/A Position: _____ Location: _____
Vacated by: _____ Empl. #: _____ Reason: _____
Eff. Date: _____ Comments: _____

5. APPOINTMENT(S): In PC#: N/A Position: _____ Location: _____
Name of Appointee: _____ New Hire: YES ____ NO ____
If NO, provide: PC# _____ Position from: _____ Location: _____ Empl. #: _____
Eff. Date: _____ Comments: _____
Salary Guide: _____ Salary: _____ Level: _____ Step: _____

6. DATA: Funding, Split Time, Change in Time, Etc.:
Name: N/A Empl. #: _____ PC#: _____ Location: _____
Nature and Details of Changes: _____
Eff. Date: 8/18/2008

7. STAFF TRANSFERS (i.e., even exchanges among existing positions):

MF 8/19

	Name	Empl. #	From Location	From PC#	From Position/Funding	To Location:	To PC#	To Position/Funding	EFF. DATE
A.									
B.									
C.									
D.									

APPROVALS REQUIRED

	Signature	Date		Signature	Date
Principal/Admin.					
Local Inst. Supt.			Bus. Admin.		8/18/08
Assist. Supt.			Deputy Supt.		8/18/08
Personnel Director		8-19-08	Superintendent		

Original-To Board Office Green-Superintendent Yellow-Personnel Pink-Payroll Gold Initiator

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Mr. Pete J. Frankoski
John F. Kennedy High School

378

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN
150 West State Street
Trenton, New Jersey 08608
(609) 392-8172
Attorneys for Petitioners

2006 AUG 22 A 10:21
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

PATERSON EDUCATION ASSOCIATION, On Behalf of Itself and On Behalf of the Following Members: VINCENT ARDIS, PAMELA BAGOT, GEORGE BOTTINOR, MINDY ESPINAL, BRIANNE FORD, PEGEEN JONES, CHRIS LASKOWICH, SHEENA MCDERMOTT, KELLY TIERNAN and PAULA ZANCHELLI, and PEGEEN JONES, Individually,

Petitioners,

v.

STATE OPERATED SCHOOL DISTRICT OF PATERSON,

Respondent.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDUOR 10129-2006N
AGENCY REF. NO. 278-8/06

SETTLEMENT AGREEMENT AND RELEASE
MINDY ESPINAL

WHEREAS, Petitioners were employees of Respondent and have asserted certain claims pursuant to the New Jersey Education Statutes and Regulations challenging the Respondent's actions in relation to the content of its notices of non-renewal, in issuing Statements of Reasons for non-renewal, in scheduling *Donaldson* hearings, and in conducting *Donaldson* hearings, which are asserted more particularly in the Petition of Appeal under Docket No.: EDUOT-10129-2006N; and

WHEREAS, said parties have reached an agreement to fully and finally settle and/or release all claims which were the subject of the petition of appeal.

THE PARTIES HEREIN AGREE AS FOLLOWS:

1. The above Recitals are made part of this Agreement.

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

2. Prospectively, Respondent will provide Statements of Reasons, as that term used in the New Jersey Statutes and Regulations, regarding the non-renewal of teaching staff members' employment contracts, only after receiving a request for the Statement of Reasons from a non-tenured teaching staff employee who has received notification that his/her employment will not be renewed for the coming year.

3. For each Petitioner who received a letter setting forth the reason for the non-renewal of his or her employment, that letter will be withdrawn and deleted from the Petitioner's personnel file and from the District's files and records (except the District's file regarding this litigation), and a new letter will be issued stating only that Respondent determined not to renew the Petitioner's employment. In the event, however, that the reason for the non-renewal was budgetary, at the Petitioner's option, the new letter will state only that the non-renewal was for budgetary reasons.

4. Prospectively, Respondent will provide to a non-tenured teaching staff employee seeking a Statement of Reasons sufficient information to enable a reasonable person under the circumstances to understand why the teaching staff employee's employment contract was not renewed.

5. As to only those Petitioners who submitted letters of resignation before non-renewal notices were issued, those Petitioners who submitted letters of resignation between receiving non-renewal notices and their *Donaldson* hearings, and those petitioners who submitted letters shortly after their *Donaldson* hearings, meaning within thirty (30) days thereafter, if requested by the Petitioner, Respondent will amend those Petitioners' personnel records to reflect resignation rather than non-renewal, and the non-renewal notices, Statements of Reasons, and post-*Donaldson* letters will be removed from their personnel files.

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7. Any request made to Respondent about Petitioners by any prospective employer or other outside party shall be responded to by Respondent, its employees and agents, by providing only each Petitioner's job title and dates of service, unless the specific Petitioner requests the provision of additional information in writing, provided the disclosure of such additional information is acceptable to the District.

8. Each Petitioner hereby releases and forever discharges Respondent and its present and former affiliates, subsidiaries, officers, directors, agents, employees, and their successors and assigns, from any and all actions, causes of action, suits, claims, charges or complaints which Petitioners may have, or claim to have, which relate to, and only to, the subject matter of this litigation and from all claims for compensatory and punitive damages and attorneys' fees, costs, or other expenses incurred by Petitioners in relation to the subject matter of this petition. **This Settlement Agreement shall not apply to any workers' compensation claims or to any other claims that Petitioner may have or assert which are not related to the issues in the within action.**

9. This Agreement does not constitute an admission by Respondent of any wrongful action or violation of any federal or state statute, or common law rights, including those relating

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

10. By executing this Agreement, each Petitioner represents and acknowledges th the Petitioners do not rely, and have not relied upon, any representation or statement not set forth in this Agreement made by Respondent or its counsel with regard to the subject matter, basis, or effect of this Agreement or otherwise.

11. This Agreement shall be binding upon and inure to the benefit of the Petitioners, the Respondent and any of their respective heirs, legal or personal representatives, employees, officers, directors, successors or assigns.

12. This Agreement sets forth the entire Agreement between the parties and supersedes any and all prior agreements or understandings between the parties.

13. In the event of a breach of this Agreement, either party may seek relief, including damages, restitution and injunctive relief, at law or in equity, in a court of competent jurisdiction.

14. Any Petitioner, at his or her option, may, rather than be covered by this Settlement Agreement, withdraw the Petition of Appeal, or his or her participation therein, provided that a withdrawal shall be deemed to constitute a waiver of the claims, and only the claims, covered by the Petition of Appeal.

15. This Agreement shall be construed in accordance with, and all disputes hereunder shall be governed by, the laws of the State of New Jersey.

16. Each Petitioner acknowledges that he or she has carefully read and fully understands all of the terms of this Agreement, including the general release contained herein, that he or she has had a reasonable period of time to consider the terms hereof, and that he or she enters into this Agreement voluntarily and with the advice of counsel.

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
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17. This Agreement is effective upon its execution by all parties. This Agreement may be executed in multiple counterparts, each of which shall be considered an original but all of which shall constitute one Agreement.

ACCEPTANCE OF SETTLEMENT TERMS

IN WITNESS WHEREOF, and intending to be legally bound, the parties have executed this Agreement.

Lindy ESPINAL
PETITIONER'S NAME

PETITIONER'S SIGNATURE
Date: 7/15/08

THE STATE OPERATED SCHOOL
DISTRICT OF PATERSON

By: _____
Date: 8/15/08

WITHDRAWAL OF PETITION OR OF PARTICIPATION

I hereby withdraw my Petition of Appeal and/or my participation in this Petition of Appeal.

_____
PETITIONER'S NAME

_____
PETITIONER'S SIGNATURE
Date:

THE STATE OPERATED SCHOOL
DISTRICT OF PATERSON

By: _____
Date:

ZAZZALI, AGELLA, NOWAK, KLEINBAUM & FRIEDMAN
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ACCEPTANCE OF SETTLEMENT TERMS

IN WITNESS WHEREOF, and intending to be legally bound, the parties have executed this Agreement.

George Bottinor
PETITIONER'S NAME

George Bottinor
PETITIONER'S SIGNATURE
Date: 5/22/08

THE STATE OPERATED SCHOOL DISTRICT OF PATERSON

By: _____
Date: 8/18/08

WITHDRAWAL OF PETITION OR OF PARTICIPATION

I hereby withdraw my Petition of Appeal and/or my participation in this Petition of Appeal.

_____
PETITIONER'S NAME

_____
PETITIONER'S SIGNATURE
Date:

THE STATE OPERATED SCHOOL DISTRICT OF PATERSON

By: _____
Date:

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

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2008 AUG 22 A 10:20
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

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WHEREAS, Petitioners were employees of Respondent and have asserted certain claims pursuant to the New Jersey Education Statutes and Regulations challenging the Respondent's actions in relation to the content of its notices of non-renewal, in issuing Statements of Reasons for non-renewal, in scheduling *Donaldson* hearings, and in conducting *Donaldson* hearings, which are asserted more particularly in the Petition of Appeal under Docket No.: EDUOT-10129-2006N; and

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ACCEPTANCE OF SETTLEMENT TERMS

IN WITNESS WHEREOF, and intending to be legally bound, the parties have executed this Agreement.

Vincent Ardis
PETITIONER'S NAME

PETITIONER'S SIGNATURE
Date: 5-22-08

THE STATE OPERATED SCHOOL DISTRICT OF PATERSON

By:
Date: 8/18/08

WITHDRAWAL OF PETITION OR OF PARTICIPATION

I hereby withdraw my Petition of Appeal and/or my participation in this Petition of Appeal.

PETITIONER'S NAME

PETITIONER'S SIGNATURE
Date:

THE STATE OPERATED SCHOOL DISTRICT OF PATERSON

By:
Date:

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

#395-08

BOARD OF EDUCATION OF THE BOROUGH OF ALPINE, BERGEN COUNTY,

PETITIONER,

V.

LEONID YUZ,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning school district sought to suspend the certificate of respondent pursuant to *N.J.S.A.* 18A:26-10 and *N.J.A.C.* 6A:9-17.9(a) for not providing adequate notice of resignation from his contract to teach mathematics during the 2005-2006 school year. Respondent claimed that he was not legally bound by the contract because he never received a fully executed copy of same; further, he contended that he had relied on oral representations allegedly made by the superintendent that there would be no negative repercussions for resigning his teaching position without the standard 60-day notice.

The ALJ found that: the material facts in this matter are undisputed; unrefuted proofs establish the validity of the teaching contract respondent signed with the district; and respondent violated the statutory sixty day notice requirement when he resigned in order to obtain a higher paid position for personal gain. Accordingly, the ALJ determined that respondent is guilty of unprofessional conduct pursuant to *N.J.S.A.* 18A:26-10, and ordered that his teaching certificate be suspended for a period of one year.

Upon a thorough and independent review, the Commissioner adopted the Initial Decision as the final decision in this matter, and forwarded a copy of the decision to the State Board of Examiners.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

September 23, 2008

OAL DKT. NO. EDU 1116-06
AGENCY DKT. NO. 324-11/05

BOARD OF EDUCATION OF THE BOROUGH OF ALPINE, BERGEN COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
LEONID YUZ,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision have been reviewed. No exceptions were filed by the parties. For the reasons set forth therein, the Commissioner adopts the Initial Decision of the Office of Administrative Law as the final decision in this case. A copy of this decision shall be forwarded to the State Board of Examiners for the purpose of effectuating this order.

IT IS SO ORDERED.*

Lucille Davy

COMMISSIONER OF EDUCATION

Date of Decision: 9/23/08

Date of Mailing: 9/23/08

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1116-06
AGENCY DKT. NO. 324-11/05

BOARD OF EDUCATION
OF THE BOROUGH OF ALPINE,
Petitioner,
v.
LEONID YUZ,
Respondent.

Rodney T. Hara, Esq., for petitioner (Fogarty & Hara, attorneys)

John C. Freemyer, Esq., for respondent

Record Closed: July 16, 2008 Decided: July 17, 2008

BEFORE **KEN R. SPRINGER**, ALJ:

STATEMENT OF THE CASE

A teacher who resigns from his teaching duties on less than sixty-days notice, without consent of the board of education that employs him, may have his teaching certificate suspended for a period not to exceed one year. Petitioner Alpine Board of Education ("Board") maintains that respondent Leonid Yuz ("Yuz") abandoned his employment with the Board for a better job opportunity, without giving the sixty-day prior

notice required under his contract. Yuz had agreed to teach mathematics at the middle-school level in the district, but notified the Board three weeks before commencement of 2005-2006 academic year that he would not honor his commitment. Because Yuz's abrupt departure interfered with the continuity of instruction of students in the district, the Board has petitioned the Commissioner of Education ("Commissioner") to suspend Yuz's teaching certificate for the maximum period permitted by law.

Claiming that he never received a fully-executed copy of the contract signed by the Board, Yuz denies that he was legally bound by any contract. Alternatively, Yuz contends that he relied on oral representations allegedly made by the superintendent of schools that he could immediately resign from his teaching position without negative repercussions.

For the reasons that follow, Yuz knowingly breached his contractual teaching obligation for personal economic gain and at the sacrifice of his responsibilities to his students. Consequently, his teaching certificate should be suspended for one year.

PROCEDURAL HISTORY

On November 5, 2005, the Board filed a verified petition with the Commissioner of Education (Commissioner). Yuz filed his answer on November 21, 2005. Subsequently, on January 6, 2006, the Commissioner transmitted the matter to the Office of Administrative Law (OAL) for hearing as a contested case.

Presently, the matter comes before the OAL on the Board's motion for summary decision. The Board filed its notice of motion, together with supporting certification and legal brief, on April 3, 2006. Yuz filed his opposing papers, including supporting certification and legal brief, on April 25, 2006. Thereafter, the Board filed its reply on April 22, 2006. The OAL heard oral argument on March 21, 2007. On July 16, 2008, the OAL held a status conference call.

FINDINGS OF FACT

All of the relevant facts necessary for disposition of this motion are undisputed. From the pleadings, certifications and exhibits attached to the moving papers, **I FIND**:

Leonid Yuz moved to the United States from the Ukraine, with his wife and two young sons, in August 2003. When he arrived he spoke little English, but has since acquired a basic working knowledge of the language. He holds a certificate of eligibility with advanced standing as teacher of mathematics issued by the New Jersey State Board of Examiners in April 2005. During the spring of 2005, the Board undertook an extensive campaign to hire a teacher of mathematics in its middle school. As part of this teacher search, Dr.Kathleen Semergieff, superintendent of schools of the Alpine Public School District (District), interviewed Yuz for appointment to a teaching position.

After Yuz had completed the application process, including a check of his qualifications and successful demonstration of a teaching lesson, Dr. Semergieff recommended to the Board that he be hired as a full-time teaching staff member. On June 24, 2005, Dr. Semergieff forwarded an employment contract to Yuz. In her cover letter, entitled "Welcome to the Alpine School," Dr. Semergieff requested that Yuz sign the contract "and return it to me with the attached paperwork, which must be completed and returned as soon as possible." She also promised to contact him about the summer training dates.

Immediately thereafter, on June 29 and 30, 2005, Yuz completed most of the paperwork required to become an employee of the District, including a health-insurance form, tax-withholding certificate, pension application and emergent-hire form,. One week later, on July 6, 2005, he signed the contract and returned it to Dr. Semergieff. Directly above the date and signature lines, the contract contained the standard provision requiring Yuz to give sixty days written notice to the Board of any intent to resign his teaching position before the end of the academic year. By resolution adopted on July 27, 2005, the Board approved the hiring of Yuz for the 2005-2006 academic year at an annual starting salary of $44,575.

Not having heard further from Yuz, on August 3, 2005, the District's business administrator/board secretary wrote to remind him that he had still not submitted various papers, including his fingerprint card, applicant authorization and certification, two forms of identification and a tuberculosis test. When Yuz failed to reply to this letter, Dr. Semergieff telephoned him on August 10, 2005 to inquire about the missing employee forms and to confirm his expected attendance at the training program scheduled at Montclair State College on August 17, 18 and 19, 2005. In response to this telephone call, Yuz stated that, "I need to see you."

Both parties agree that a meeting took place at the Board offices on August 10, 2005 and that, during the course of that meeting, Yuz informed Dr. Semergieff for the first time that he was seeking employment elsewhere. Despite the unambiguity of the job offer set forth in Dr. Semergieff June 24th letter and his signing of the contract, Yuz claimed in his certification that he "was not really sure" whether or not he was hired because the Board had never furnished him with an original or copy of a contract signed on behalf of the District. Nonetheless, Yuz admits that Dr. Semergieff "insisted I was hired." According to Yuz, he then announced that, "I would like to tender my resignation immediately." Dr. Semergieff agrees that Yuz "verbally informed me of his resignation." When Dr. Semergieff inquired about the reason for his resignation, Yuz said that he had decided to accept another teaching position at the high-school level.

Versions differ as to exactly what happened next. Dr. Semergieff allegedly explained to Yuz that, while he could resign, "a sixty (60) days notice period was required, which would require him to teach in the District in the fall." While she indicated that she would seek a replacement teacher, she "stated that it was unlikely I could find a qualified middle school teacher of mathematics in less than sixty (60) days." Yuz contends that Dr. Semergieff told him that his resignation shortly before the start of school "should not be a problem" and that all he must do was to write a resignation letter, including an apology, to the Board. Although Dr. Semergieff's account is clearly more credible, it is unnecessary to resolve this area of disputed fact in order to dispose of this matter on summary decision. As a matter of law, only the Board possesses the statutory authority to release Yuz from his contractual obligations and Dr. Semergieff had no actual or apparent authority to bind the Board.

On the same date, August 10, 2005, Yuz submitted a handwritten letter addressed to the Board, purportedly resigning from the position of math teacher, effective as of September 1, 2005, and expressing regret for any inconvenience caused because "I couldn't keep my obligation." Thus, in his own handwriting, Yuz acknowledges his awareness that he was breaching the terms of his contractual obligation.

Any lingering doubt whether Yuz may have misunderstood his commitment to the District is completely dispelled by a letter that Dr. Semergieff wrote to him on August 19, 2005. In that letter, Dr. Semergieff notified Yuz that the Board was holding him to the sixty-day notice requirement in his contract and had accepted his resignation "effective October 10, 2005." Further, she reminded him that teachers were to report to duty on September 1, 2005 and enclosed a copy of "our opening day schedule as well as your schedule of classes." She expressly warned him that failure to honor his contractual obligations "will result in Alpine petitioning the New Jersey State Department of Education to revoke your mathematics teaching license."

Significantly, Yuz had not yet entered into a contract with any other school district and could easily have fulfilled with his contractual obligation. Ignoring his commitment to the District, Yuz discloses in his certification that he "reported to work, without a contract, at the Bergen Academies on September 1, 2005." Indeed, he did not sign an employment contract with Bergen Academies until one week later on September 7, 2005. Under that contract, Yuz was to receive a much higher salary of $59,511 per annum.

The District, and more importantly its middle-school children, suffered substantial harm as a result of Yuz's premature withdrawal on three-weeks notice. At the beginning of a new school year, there remained only "a very shallow applicant pool since highly qualified candidates had accepted positions elsewhere." Although Yuz had suggested a potential candidate to replace him, Dr. Semergieff contacted her prior employer and learned that she had been terminated because "she was not right for the position."

One day before teachers were scheduled to report to work, Dr. Semergieff managed to hire an alternate-route teacher who had sufficient mathematics credits to be awarded a provisional certificate. During the first week of school, however, she tendered her resignation "for personal reasons." Nevertheless, she continued teaching until a replacement was hired in October. Therefore, the District had to conduct three searches for the same teacher vacancy. Continuity of instruction for the students enrolled in what should have been Yuz's mathematics class was severely compromised.

CONCLUSIONS OF LAW

Based on the foregoing facts and the applicable law, I conclude that Yuz has committed "unprofessional conduct" within the meaning of N.J.S.A. 18A:26-10 and that the circumstances warrant suspension of his teaching certificate for a period of one year.

Summary decision is the administrative counterpart to summary judgment in the judicial arena. N.J.A.C. 1:1-12.5 provides that summary decision should be rendered if the papers and discovery that have been filed, together with the affidavits or certifications, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. Use of the summary procedure is aimed at the swift uncovering of the merits and either their effective disposition or their advancement toward prompt resolution by trial. Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 74 (1954). While cautioning that a judge should not weigh the truth of the evidence or resolve factual disputes at this early stage of the proceedings, the New Jersey Supreme Court has declared that, when the evidence is so one-sided that one party must prevail as a matter of law, the trial court should not hesitate to grant summary judgment. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995). Accord, Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-446 (2007). Appellate courts recognize that "[a]n evidentiary hearing is mandated only when the proposed administrative action is based on disputed adjudicatory facts." Contini v. Board of Educ. of Newark, 286 N.J. Super. 106, 120 (App. Div. 1995), certif. den. 145 N.J. 372 (1996).

N.J.S.A. 18A:26-10 provides that any teaching staff member employed by a board of education who shall, without the consent of the board, cease to perform his duties before expiration of the term of his employment "shall be deemed guilty of unprofessional conduct" and, upon receiving notice of such conduct, the Commissioner may suspend his certificate "for a period not exceeding one year." See also, N.J.A.C. 6A:9-17.9.

Since all material facts are undisputed, the Board is entitled to summary decision in its favor. Unrefuted proofs establish that a contract came into existence when Yuz accepted the District's offer of employment by signing the contract on July 6, 2005 and the Board approved his hiring by formal resolution on July 27, 2005. Abdicating his responsibilities, Yuz unilaterally abandoned performance of his part of the bargain, without giving the sixty-days notice required under the contract. He did so in order to obtain a more lucrative salary nearly $15,000 higher than the job that he had already accepted. Yuz's sudden job-hopping for personal gain had the deleterious effects of compromising continuity of instruction and making it exceedingly difficult for the District to find a qualified replacement on short notice.

Even if one were to accept Yuz's assertion that Dr. Semergieff assured him that his resignation would not present any problem (an assertion that Dr. Semergieff vigorously denies), representations made after a teacher has submitted an early resignation do not justify failure to comply with the sixty-day notice requirement. In re Suspension of the Teaching Certificate of Farran, Agency Dkt. No. 113-05 (Comm'r March 29, 2005). http://www.state.nj.us/education/legal/commissioner/2005/mar/113-05.pdf

Moreover, Dr. Semergieff made it absolutely clear in her letter of August 19, 2005 that Yuz must report to work on September 1, 2005 and that his resignation would not become effective until October 10, 2005. Only the Board has the legal authority to waive the notice requirement and the superintendent of schools cannot do so acting alone. Accordingly, Yuz has not raised a genuine dispute of material fact necessitating a hearing.

Generally, the Commission has imposed the full one-year suspension of a teaching certificate for leaving a district without adequate notice. E.g., Green v. School District. of Mount Holly, EDU 0773-02, initial decision (Sept. 5, 2002), adopted (Comm'r Oct. 25, 2002) http://lawlibrary.rutgers.edu/oaldecisions/initial/edu00733-02_1.html In re Suspension of the Teaching Certificate of Savino, EDU 11688-04, initial decision, (July 28, 2005), modified, (Comm'r Aug. 30, 2005), aff'd, (St. Bd. Feb. 3, 2006) http://lawlibrary.rutgers.edu/oaldecisions/initial/edu11688-04_1.html; In re Suspension of the Teaching Certificate of Montalbano,. EDU 3588-00, initial decision (April 24, 2001), adopted, (Comm'r June 11, 2001) http://lawlibrary.rutgers.edu/oaldecisions/initial/edu3588-00_1.html; Penns Grove-Carneys Point v. Leinen, 94 N.J.A.R.2d (EDU) 405 (Comm'r May 4, 1994); Dumont Bd. of Educ. V. Zweig, 1988 S.L.D. 904 (March 30, 1988), modified 1988 S.L.D. 914 (Comm'r May 16, 1988).

In rare circumstances in which the Commissioner has seen fit to lessen the suspension period, it was for compelling reasons. See In re Rogers, 1989 S.L.D. 1962 (May 16, 1989), adopted 1989 S.L.D. 1968 (Comm'r June 21, 1989), where the Commissioner shortened the suspension to three months because a teacher had switched employment for the "noble desire" of helping children with severe disabilities. Here Yuz abandoned the District not for charitable reasons, but rather for the self-serving purpose of earning more money. Under such conditions, there is no good reason to depart from the usual suspension period of one year.

ORDER

It is ordered that any and all of Yuz's teaching certificates be suspended for a period of one year.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 17, 2008
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Date Received at Agency:

July 17, 2008

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUL 22 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

db

#396-08

STEPHANIE TAIBI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a tenured basic skills instructor continuously employed from October 1994 until June 30, 2007 by the Board under certification as an elementary school teacher – contended that she had achieved tenure and that respondent violated her seniority rights by non-renewing petitioner while retaining non-tenured full-time elementary teachers after the district eliminated its basic skills program. Respondent argued that petitioner's appeal is time-barred because the 90-day period began to run when she received notice in May 2006 that her position as a basic skills instructor was eliminated; further, respondent contends that because petitioner's experience was limited to basic skills instruction, she is not entitled to claim tenure or seniority rights over any elementary school teacher. Both parties filed motions for summary decision.

The ALJ found that: there are no material facts in dispute, and the matter is ripe for summary decision; the petitioner's appeal was timely filed, as she did not – in May 2006 – receive appropriate notice pursuant to *N.J.A.C.* 6A:3-1.3(i) that she would not be offered a new contract, but rather received such notice on April 24, 2007 when the Board resolved not to renew her contract; and petitioner had acquired tenure under her instructional certificate and endorsement as an elementary school teacher. Accordingly, the ALJ ordered that petitioner be reinstated with associated emoluments and back pay, less mitigation.

Upon a thorough and independent review of the record, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision as the final decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

September 24, 2008

OAL DKT. NO. EDU 8090-07
AGENCY DKT. NO. 191-7/07

STEPHANIE TAIBI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.[1] The Commissioner concurs with the Administrative Law Judge (ALJ) that respondent's May 30, 2006 letter to petitioner – which stated that her position was being eliminated, but advised that she could apply for other positions in the district and enjoy continued benefits – did not constitute the type of notice of employment discontinuance that would commence the limitations period for filing appeals to the Commissioner under *N.J.A.C.* 6A:3-1.3(i).

The Commissioner further agrees with the ALJ that – in accordance with *Ellicott v. Bd. of Educ.,* 251 *N.J. Super.* 342, 349 (App. Div. 1991) – petitioner, as a RIF'd tenured teacher seeking reinstatement within the endorsements under her instructional certificate, was entitled to preference over non-tenured teachers with the same certification. This was so

[1] No exceptions were filed.

whether or not she had previously taught under the endorsement corresponding to the open position. *Ibid.* [2]

Accordingly, summary disposition is granted in favor of petitioner, and respondent's motion to dismiss is denied. Petitioner is reinstated, and shall receive any back pay, benefits and pension adjustments that are due her, less mitigation.

IT IS SO ORDERED.[3]

Lucille Edy

COMMISSIONER OF EDUCATION

Date of Decision: 9/24/08

Date of Mailing: 9/24/08

[2] In point of fact, it appears that petitioner was employed as a full-time elementary education teacher during the 2006-2007 school year. Further, there is information in the record which indicates that there is no separate endorsement for the subject "basic skills," which petitioner taught in the district for twelve years. "Basic skills" is taught by certified teachers with elementary education endorsements. Consequently, petitioner's thirteen years of experience in petitioner's district was accrued under the elementary education endorsement – the same endorsement required for the positions apparently filled by non-tenured teachers after the basic skills program was ended.

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING SUMMARY DECISION
OAL DKT. NO. EDU 8090-07
AGENCY DKT. NO. 191-7/07

STEPHANIE TAIBI,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, HUNTERDON COUNTY,
Respondent.

Stephen E. Klausner, Esq., for petitioner

Rita F. Barone, **Esq**., for respondent (Purcell, Ries, Shannon, Mulcahy & O'Neill, attorneys)

Record Closed: August 15, 2008 Decided: August 15, 2008

BEFORE **DONALD J. STEIN**, ALJ:

STATEMENT OF THE CASE

In this matter, Stephanie Taibi (Petitioner) alleges that she has achieved tenure and has been improperly terminated by the Township of Union Board of Education (Board).

PROCEDURAL HISTORY

On July 16, 2007, petitioner filed a Verified Petition with the Commissioner of the Department of Education (Department) alleging that she has acquired tenure and should be reinstated with full back pay and benefits. On September 17, 2007, the Board filed an Answer to Petition. On September 17, 2007, the case was transmitted to the Office of Administrative Law where it was filed as a contested case.

The parties agreed that there were no facts in issue. On May 22, 2008, the petitioner filed a motion for summary decision. On June 6, 2008, the Board filed a reply and cross-motion for summary decision. On July 18, 2008, oral argument was heard. The parties requested an additional three weeks to submit supplemental briefs, and the record closed on August 15, 2008.

STATEMENT OF FACTS

Petitioner has an instructional certificate with an endorsement as an elementary school teacher (P-1). Petitioner has been continuously employed by the Board since October 1994 as a basic skills instructor working fifty-five percent of a teacher's work day. She was rehired for the next four years up to and including the 1998-1999 school year. Her classroom hours were from 9:15a.m. to 1:00 p.m., and was paid for recess duty from 1:00 p.m. to 2:00 p.m. She was paid fifty-five percent of a teachers contract.

From the 1999-2000 school year up to and including the 2005-2006 school year her hours were increased to 59% of a full-time teachers day. During the 2006-2007 school year, she worked full-time.

On May 30, 2006, the superintendent advised the petitioner that her position had been eliminated and that she may apply for other positions within the school. The letter further advised petitioner that if "your employment continues with Union Township, there will be no lapse in coverage" (P-2). On April 24, 2007, the Board adopted a

resolution non-renewing petitioner effective June 30, 2007. On July 16, 2007, petitioner filed the petition.

CONCLUSIONS OF LAW

The facts involving this motion are not in dispute. Therefore, pursuant to N.J.A.C. 1:12.5(b) and Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 523 (1995), I **FIND** that there are no genuine issues of material fact and that this matter is ripe for summary decision.

TIMELINESS OF PETITION

N.J.A.C. 6A:3-1.3(i) requires that a petition be filed within 90 days "from the date of receipt of notice of final order, ruling, or other action by the District Board of Education. Respondent argues that petitioner's case is time barred because the 90-day period began to run when she received notice in May 2006 that her position was being eliminated and she would have to apply for a maternity leave position. Petitioner asserts the position that the 90-day period began to run in April 2007 when the Board adopted a resolution "non-renewing" Petitioner effective June 30, 2007.

The 90-day period commences when a teacher "knew or should have known" that he or she was not going to be offered a new contract for the following academic year. Nissman v. Board of Educ., 272 N.J. Super. 373, 379 (App. Div.) cert. den., 137 N.J. 315 (1994). Formal notice of the school board's action is not necessary to raise a claim. Indeed, the Commissioner has held that a letter from the local board secretary which provided clear and unambiguous notice of the local board's final action triggered the 90-day limitation. Kaprow v. Board of Educ. of Berkeley Twp., 255 N.J. Super. 76 (App. Div. 1992), cert. granted, 130 N.J. 16, aff'd, 131 N.J. 572 (1993).

The May 30, 2006, letter clearly holds out the possibility that the petitioner could be retained in another position and keep her benefits. The Petitioner received notice for purposes of N.J.A.C. 6A:3-1.3(i) on April 24, 2007, when the Board, by resolution,

did not renew her contract. To that end, Petitioner had until July 24, 2007 to file her appeal. The appeal was filed on July 16, 2007, and is therefore timely.

Therefore the motion for summary decision by the Township of Union Board of Education is **DENIED**.

TENURE RIGHTS

The basic tenure statute, N.J.S.A. 18A:28-5, is intended to confer tenure rights on teachers when they teach for three years and one day under the same, appropriate certificate, in a position which requires a teaching certificate.

In Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982), the Court decided that teachers occupying part-time positions could acquire tenure. It is undisputed that the petitioner taught for more than three years under the same certificate, and achieved tenure under her Instructional Certificate and her endorsement as an Elementary School Teacher. Therefore, I **CONCLUDE** that the petitioner acquired tenure.

The dispute is whether she is entitled to any position with the Board in light of the fact that it eliminated its Basic Skills Program. The Board concedes there are non tenured teachers in elementary school positions but argues Lichtman v. Board of Education, 93 N.J. 362, 364 (1983), which requires the teacher hold a certification and hold the identical position or have identical responsibilities. The Board further asserts that petitioner was only a supplementary or basic skills teacher and not entitled to that position. However, during oral argument the Board admitted that the petitioner did serve as an elementary school teacher for one year.

In Lichtman, the Court expanded upon its holding in Spiewak, and held that a tenured part-time teaching staff member with proper certification can claim, as against a non-tenured applicant, seniority rights in seeking appointment to a full-time position that is within the specific categories covered by the certification and that has responsibilities identical to those of the part-time position in which employment was actually held.

In Ellicott v. Bd. of Educ., 251 N.J. Super. 342, 350 (1991), the Appellate Division further clarified this issue and ruled that a teaching staff member has tenure in all positions for which his instructional certificate qualifies him. Ellicott further held that a tenured teacher is entitled to retention and preference in a RIF as against a non-tenured applicant with the same certification, even if the tenured teacher had no demonstrable experience under the endorsement. Capodilupo Bd of Education, 218 N.J. Super. 510 at 513-15.

Therefore, the petitioner is entitled to a position within the scope of her Certificate and Endorsement, as against non-tenured teachers.

DECISION AND ORDER

The Petitioner's motion for summary decision is **GRANTED**, and the Township of Union's Board of Education's motion for summary decision is **DENIED.**

It is further **ORDERED** that petitioner is reinstated, and is awarded (1) associated emoluments, including seniority credits and pension adjustments, and (2) back pay, less mitigation.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 15, 2008
DATE

DONALD J. STEIN, ALJ

Date Received at Agency:

August 15, 2008

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AUG 18 2008

DATE

OFFICE OF ADMINISTRATIVE LAW

/cs/bdt

EXHIBITS

For petitioner:

P-1 Teaching certificate

P-2 May 30, 2006, letter from Board Secretary

For respondent:

None

397-08

OAL DKT. NO. EDU 8117-06
AGENCY DKT. NO. 327-9/06

BOARD OF EDUCATION OF THE TOWNSHIP OF MANCHESTER, OCEAN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record of this matter, the Consent Order – executed by the parties through their respective counsel, the non-party Board of Education of Seaside Heights through its attorney, and the Administrative Law Judge (ALJ) – and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case. The matter is hereby dismissed, subject to compliance with the terms of the Consent Order.

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 9/24/08

Date of Mailing: 9/24/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8117-06

AGENCY DKT. NO. 327-9/06

BOARD OF EDUCATION OF THE TOWNSHIP OF MANCHESTER, OCEAN COUNTY,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondent.

Thomas Monahan, Esq., for petitioner (Gilmore and Monahan, P.A., attorneys)

Jennifer L. Campbell, Deputy Attorney General, for respondent (Anne Milgram, Attorney General of New Jersey, attorney)

Record Closed: August 25, 2008 Decided: August 26, 2008

This matter was transmitted to the Office of Administrative Law on October 4, 2006, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Consent Order indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

August 24, 2008
DATE

Stephanie M. Wauters
STEPHANIE M. WAUTERS, ALJ

8-28-08
Date Received at Agency:

Mailed to Parties:

AUG 28 2008
DATE

CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cmo

RECEIVED
JUN 4 2008
MONAHAN

GILMORE & MONAHAN, P.A.
Ten Allen Street
P.O. Box 1540
Toms River, NJ 08754
(732) 240-6000
Attorneys for **Petitioner, Township of Manchester Board of Education, Ocean County**

TOWNSHIP OF MANCHESTER BOARD OF EDUCATION, OCEAN COUNTY,	**OFFICE OF ADMINISTRATIVE LAW**
Petitioner,	**Docket No. EDUOS 08117-2006S**
v.	**Agency Reference No. 327-9/06**
STATE OF NEW JERSEY DEPARTMENT OF EDUCATION,	**CONSENT ORDER**
Respondent.	

RECEIVED
2008 AUG 25 A 11:45
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

This matter having been brought before the court by Thomas E. Monahan, Esq. of the firm of Gilmore & Monahan, having filed the within Complaint to contest the payment in the amount of $88,740.00, having been previously made by the Manchester Township Board of Education to the State of New Jersey, Department of Education for the education of S.B. and L.B., and Jennifer Campbell, Esq., Deputy Attorney General, appearing on behalf of the State of New Jersey Department of Education; and David M. Casadonte, Esq., the attorney for the Borough of Seaside Heights Board of Education having been consulted and contacted by the court and the parties hereto, and a claim being made by the Manchester Board of Education that the Borough of Seaside Heights Board of Education should be impleaded into this matter based upon the position of the Manchester Township Board of Education that the educational cost for the students S.B. and L.B. should be paid entirely by the Seaside Heights Board of Education and the parties having reached an agreement hereto to prevent further litigation and the costs thereof, and for good cause having been shown;

IT IS on this 25 day of August, 2008;

ORDERED that the matter is hereby settled under the following terms and conditions:

1. The State of New Jersey shall reimburse the Manchester Township Board of Education the sum of $29,580.00 representing one third of the payment previously paid to it;

2. The Seaside Heights Board of Education shall pay to the Manchester Township Board of Education the $29,580.00 representing a one third payment that was made by the Manchester Township Board of Education to the State of New Jersey. The same is being made by the Borough of Seaside Heights Board of Education directly to the Manchester Township Board of Education to avoid future litigation costs and expenses.

Stephanie M. Wanton
ALJ

We hereby consent to the form and entry of this Order.

THOMAS E. MONAHAN
Attorney for Petitioner

Dated:

JENNIFER CAMPBELL, DAG
Attorney for Respondent

Dated:

DAVID M. CASADONTE
Attorney for Seaside Heights Board of Education

Dated: 8/3/08

TEM:aae
File #3800-28

GILMORE & MONAHAN
A Professional Corporation
COUNSELLORS AT LAW
Allen Street Professional Center
Ten Allen Street
P.O. Box 1540
Toms River, New Jersey 08754

#398-08R

398-0

OAL DKT. NO. EDU 5767-08
(EDU 1170-06 ON REMAND)
AGENCY DKT. NO. 375-12/05

BRIAN LUKE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed Settlement Agreement – bearing the signature of counsel for respondent, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 9/24/08

Date of Mailing: 9/24/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 05767-08

AGENCY DOCKET NO. 375-12/05

BRIAN LUKE,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,

Respondent.

ON REMAND EDU 01170-06

Alfred F. Maurice, Esq. for petitioner (Springstead & Maurice, attorneys)

Mark A. Tabakin, Esq., for respondent (Weiner Lesniak)

Record Closed: August 19, 2008 Decided: August 21, 2008

BEFORE **CARIDAD F. RIGO**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on January 10, 2007, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

Several hearings and telephone conferences were scheduled. During the April 13, 2007 telephone conference the parties advised that the matter was settled subject to Board approval. On March 4, 2008 the OAL received a fully executed settled which is attached herewith. On April 24, 2008 the matter was remanded to the OAL because

the Settlement Agreement did not have a copy of the Board's resolution approving the settlement. On August 19, 2008 the undersigned received a copy of the Board's approval of the Settlement Agreement, via facsimile and the record closed that day.

Having reviewed the contents of the attached Stipulation of Settlement and Board Resolution, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Aug. 21, 2008
DATE

CARIDAD F. RIGO, ALJ

Date Received at Agency: 8-25-08

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AUG 25 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

ljb

& DISPUTES
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SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is made and entered into between the **Board of Education of the City of Englewood** (the "Board") and Brian Luke (Luke or Petitioner), collectively, "the Parties".

WHEREAS, Petitioner filed a Petition of Appeal with the Commissioner of Education under Agency Ref No.: 375-12/05 and Docket No. EDU-01170-2006N, claiming improper withholding of employment and adjustment increments for the 2004-2005 and 2005-2006 school years.

WHEREAS, The Board has filed an Answer to the petition denying Petitioner's claims that resulted in the matters being referred to the O.A.L. for disposition as a contested case where it was listed for trial.

WHEREAS, Petitioner continues to be employed by the Respondent as a full-time teaching staff member in the Board's employ.

WHEREAS, the Board and Petitioner, now mutually agree to settle the matters and allegations in dispute; and

WHEREAS, all parties have been afforded the opportunity to consider the terms of this Agreement with advice of counsel and/or a representative of their choice;

NOW, THEREFORE, in consideration of the promises and the mutual covenants herein contained, and for other good and valuable consideration, the parties hereby agree as follows:

1. The **"Board"**, as used herein, shall at all times mean the Board of Education of the City of Englewood, its affiliates, predecessors, successors and assigns of any and all of them, their present and former directors, officials, officers, representatives, associates, partners, servants, employees, agents, attorneys, and successors, whether in their individual or official capacities, and all other persons, firms, corporations, associations, partnerships or any other entity connected therewith.
2. **"Petitioner"**, as used herein, shall mean BRIAN LUKE and his successors-in-interest, heirs, administrators and assignees.
3. In consideration of the mutual promises set forth herein and for other valuable consideration, within thirty (30) business days of the Board's receipt of an executed copy of this Settlement Agreement, the Board shall restore the annual and adjustment increments withheld from Petitioner so that his current salary will be $97,307 effective September 1, 2007. Respondent shall pay Petitioner, in a lump sum, $3800 plus the pro rata portion of the $97,307 annual salary for 2007-2008 that he has not received to date. Respondent shall withhold all appropriate taxes and pension contributions from said lump sum payment and shall report Petitioner's corrected salary to the New Jersey Division of Pensions.
4. In consideration for the restoration of the annual and adjustment increments references above, Luke agrees to submit his irrevocable resignation of employment as a

teaching staff member of the Englewood School District effective June 30, 2010. Said resignation shall be deemed accepted by the Board upon execution of this agreement.

5. For the period through June 30, 2010, Luke shall continue in his current teaching assignment with the District. Except as set forth below, the District agrees to take no other action to affect Luke's employment with the District through the date of his resignation set forth herein. If however, Luke clearly demonstrates his inability to perform his duties in a professional manner or satisfy the minimum standards of performance for licensure as a teaching staff member, the Board may exercise its managerial rights as are provided by law.

6. This Settlement Agreement is contingent on and subject to approval and ratification by the Board.

7. This Settlement Agreement contains the full agreement of the Board and Brian Luke as respects the resolution of the issues raised in the above-referenced Petition of Appeal before the Commissioner of Education.

8. Petitioner will withdraw the Petition of Appeal under the docket numbers, with prejudice, upon the receipt of a fully executed settlement agreement from the Board with a copy of the Resolution approving the same. Petitioner will likewise release the Respondent from all employment related statutory or contractual claims existing at the time this settlement agreement is executed save for any pending workers

compensation actions. This release shall not include the release of claims governed by public policy.

9. If any term, provision or condition of this Settlement Agreement is held invalid or unenforceable by a court of competent jurisdiction, such holding shall be without effect upon the validity or enforceability of any other provision, term or condition of this Settlement Agreement other than the consideration set forth in paragraph 3, 4 and 5.

10. This Settlement Agreement shall be construed and interpreted in accordance with the laws of the State of New Jersey.

11. The parties agree to cooperate fully and execute any and all supplementary documents and to take all additional actions that are necessary or appropriate to effect the terms of this settlement agreement.

12. This Settlement Agreement may be executed in counterparts, each of which shall be deemed to be an original copy, but all of which together shall be deemed one and the same instrument.

13. This Settlement Agreement contains the entire Agreement between the Petitioner and the Board with regard to the matters set forth in it. It shall be binding upon and inure to the benefit of their officials, officers, directors, representatives, employees, associates, partners, agents, servants and successors in interest and enforceable in any court of competent jurisdiction.

14. This Settlement Agreement shall become effective immediately following approval by the Board and execution by all the following parties.

2008 SEP 12 P1 3:41

Dated: January , 2008

WITNESS:

Bd-Secretary

Dated: January , 2008

BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD

Bd President

BRIAN LUKE

Mark Tabakin
Bd-Atty.

2008 SEP 12 P1 3:41

07-P-91A APPROVAL – SETTLEMENT AGREEMENT

WHEREAS, employee JL & BL filed a demand for arbitration, which was docketed before the Public Employee Relations Commission as AR-2007-064, challenging the Board's withholding of employee's increment for the 2005/2006 school year.

WHEREAS, the parties negotiated in good faith in an effort to amicably resolve this matter; and

WHEREAS, the Superintendent recommends that this matter be settled in accordance with the terms set forth in the Settlement Agreement and General Release; now therefore, be it

RESOLVED, that the Englewood Board of Education hereby approves the Settlement Agreement and General Release settling the matter docketed as AR-2007-064, according to the terms of the attached Agreement; and be it

FURTHER RESOVLED, that the Board President and Board Secretary are directed to execute the Settlement Agreement and General Release and take such action as is necessary to effectuate the terms of the Agreement.

I do hereby certify that the aforegoing is a true and exact copy of a resolution adopted by the Englewood Board of Education on

Date

Board Secretary/Business Administrator

403-08

#403-08

IN THE MATTER OF THE TENURE	:	
HEARING OF WARREN JONES,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF TRENTON, MERCER COUNTY.	:	
	:	

SYNOPSIS

Board certified charges of inefficiency against tenured elementary school teacher, alleging that – despite assistance and a reasonable opportunity for correction and improvement – respondent failed to provide efficient instruction, document instruction and evaluation of student performance, and comply with established parameters for schedules, content, methods and pacing, consistent with the New Jersey Professional Standards for Teachers, Core Curriculum Content Standards, and Board academic achievement policies. The Board sought respondent's dismissal from tenured employment.

The ALJ found respondent to be inefficient as charged and recommended that he be dismissed, noting that the Board had complied with the procedural requirements for charges of inefficiency pursuant to *N.J.S.A.* 18A:6-11.

The Commissioner adopted the ALJ's decision and ordered respondent dismissed from his tenured employment.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

September 29, 2008

OAL DKT. NO. EDU 2152-07
AGENCY DKT. NO. 62-3/07

IN THE MATTER OF THE TENURE	:	
HEARING OF WARREN JONES,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF TRENTON, MERCER COUNTY.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have exceptions filed by respondent pursuant to *N.J.A.C.* 1:1-18.4, to which the Board of Education (Board) did not reply.

In his exceptions, respondent contends that the ALJ erred in allowing the Board to present a substantial amount of evidence that did not pertain to the charges ultimately prosecuted against him, thus losing the proper focus for a proceeding of this type; according to respondent, the Board – contrary to the well-established dictates of *Donald Rowley v. Board of Education of the Manalapan-Englishtown Regional School District,* 205 *N.J. Super.* 65 (App. Div. 1985) – submitted "reams of documentation" suggesting a general history of inefficiency and absenteeism, but "very little" pertaining to his performance, during the inefficiency correction period, as to the specific charges certified. (Respondent's Exceptions at 3-4, quotations at 3) Respondent also asserts, again citing *Rowley,* that the Board failed to provide the "positive assistance" necessary for him to overcome his alleged inefficiencies, since – notwithstanding that "there is ample evidence in the record suggesting that Rashawn Adams, the principal during the inefficiency period, held regular meetings and review sessions" with respondent – the Board made no effort, even though better work space was available, to alter the "deplorable" conditions

under which respondent was forced to work, thereby dooming him to failure and violating the law as a result. (*Id.* at 4-5)

Upon review, the Commissioner is unpersuaded by respondent's arguments and fully concurs with the ALJ that dismissal from tenured employment is warranted.

Like the ALJ, the Commissioner finds the testimony and evidence in this matter to demonstrate unequivocally that 1) respondent's inefficiencies were numerous, longstanding, evident under varying circumstances, consistently identified by multiple evaluators, and largely conceded by respondent himself, notwithstanding that he constantly sought to explain them away or attribute them to the unfairness or hostility of his superiors; and 2) respondent was given extensive assistance, objective assessments, and every reasonable opportunity to improve his teaching performance, both in the course of the eight-year period preceding the initial filing of tenure charges and during the mandatory 90-day period provided by the Board prior to certification of final charges – the proofs concerning which, contrary to respondent's assertion on exception, more than adequately attest to his failure to correct the very serious deficiencies his corrective action plan was developed to address.[1] The Commissioner also finds, like the ALJ, that respondent's desire to better the lives of disadvantaged children and his efforts to increase their confidence and self-esteem – however commendable – cannot overcome his demonstrably deficient teaching skills, and that respondent's inability to provide effective instruction will actually work to *compound* the difficulties faced by such students.

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[1] In so holding, the Commissioner categorically rejects respondent's contention – first raised on exception, since it appears in neither his post-hearing submission nor the ALJ's summation of the record, to which respondent made no objection or correction when given the opportunity (Initial Decision at 3-4) – that the Board was required to provide him with a different teaching environment during his 90-day improvement period. Even granting – solely for purposes of argument – that respondent might have performed better under less difficult conditions, it is clear that his evaluators, and the ALJ on review, took account of what all recognized as a less than ideal situation, and nothing in *Rowley, supra* – or, indeed, in any prior inefficiency matter where the Board was found not to have complied with the 90-day improvement requirement – even remotely suggests that a board's obligation for assistance extends to placing a teacher facing inefficiency charges in an environment other than the one in which he or she is ordinarily assigned to teach.

Accordingly, for the reasons expressed therein, the Initial Decision of the OAL is adopted as the final decision in this matter. Respondent is hereby dismissed from tenured employment as of the filing date of this decision, a copy of which shall be forwarded to the State Board of Examiners pursuant to *N.J.A.C.* 6A:9-17.5.

IT IS SO ORDERED.[2]

Lucille R Davy

COMMISSIONER OF EDUCATION

Date of Decision: 9/29/08

Date of Mailing: 9/30/08

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2152-07
AGENCY DKT. NO. 62-3/07

IN THE MATTER OF THE TENURE CHARGES
AGAINST WARREN JONES,
SCHOOL DISTRICT OF TRENTON, MERCER COUNTY

Rocky L. Peterson, Esq., for petitioner (Hill Wallack, attorneys)

Michael T. Barrett, Esq., for respondent (Bergman & Barrett, attorneys)

Record Closed: August 11, 2008 Decided: August 14, 2008

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

Petitioner Board of Education of the City of Trenton (BOE) brings tenure charges against respondent Warren Jones, a tenured fifth grade teacher in the Trenton public school system. The BOE alleges that the respondent failed to properly and efficiently perform his teaching duties, it suspended him from employment, and it claims that he must be dismissed from its employment. See N.J.S.A. 18A:6-10, -11, -14.

The BOE alleges that the respondent demonstrated a pattern of carelessness, a lack of dedication, and inefficiency in his teaching. He failed to establish and maintain an orderly and

supportive learning environment for his class. He had low expectations for his students, he allowed them to work on assignments below their grade level, and he failed to engage his students in appropriate learning. He refused and/or failed to comply with the schedules, content, and methods the school system had prescribed for instruction of his students. He failed to conscientiously monitor his students' work, allowing numerous spelling, grammatical, and other errors to remain uncorrected. He failed to maintain and timely submit required lesson plans and other documents to administrators. The school system administration notified the respondent of eight tenure charges (detailed below) and allowed him the statutory (90-day) period to correct and improve his performance. See N.J.S.A. 18A:6-11. The BOE alleges that, during the statutory period, despite assistance and a reasonable opportunity to correct his deficiencies and inefficiencies, the respondent failed to perform properly and efficiently. More particularly, he continued to refuse to provide and/or failed to provide efficient instruction. He continued to refuse and/or fail to efficiently comply with schedules, content, methods, and pacing, and to provide documentation prescribed for instruction and for evaluation of student performance pursuant to the New Jersey Professional Standards for Teachers and the Core Curriculum Content Standards and the BOE's ENDS Policies (detailed below.) Accordingly, the BOE found probable cause to support certification of "Charge Two," including failure to comply with the New Jersey Professional Standards for Teachers, and "Charge Three," including failure to comply with the BOE's ENDS Policies.

The respondent alleges that the prescribed instruction was inappropriate for a number of his students, who were academically below their nominal grade level. He also alleges that he taught in a distracting and difficult environment. He also alleges that, because he served as a Trenton Education Association (TEA) representative, school administrators were hostile toward him and that they did not fairly evaluate his performance, resulting in these charges. He submits that the charges should be dismissed and he demands reinstatement.

PROCEDURAL HISTORY

On October 4, 2006, Carolyn Gibson, the BOE's Assistant Superintendent of Human Resources, signed a statement of (eight) tenure charges against the respondent and a statement of evidence with exhibits attached. "Charge One" was that, despite notice of the requirement to do

so, the respondent failed to submit timely and proper lesson plans. "Charge Two" is that the respondent failed to comply with the New Jersey Professional Standards for Teachers. "Charge Three," is that the respondent failed to comply with the BOE's ENDS Policies. "Charge Four" was that the respondent had poor classroom management. "Charge Five" was that the respondent failed to maintain and/or to timely submit pertinent records. "Charge Six" was that the respondent failed to comply with administrative directives. "Charge Seven" was that the respondent failed to follow the call-out procedure. "Charge Eight" was excessive absenteeism. The school system administration notified the respondent of the charges and notified him of the statutory period allowed for improvement and correction. After the statutory period allowed for improvement and correction, the BOE certified "Charge Two" and "Charge Three" and, on January 29, 2007, Ms. Gibson signed a Notice of Uncorrected Deficiencies relative to "Charge Two" and "Charge Three." The BOE's Resolution, dated February 26, 2007, recited that it had found probable cause to support certification of "Charge Two" and "Charge Three" and the BOE suspended the respondent from employment. The BOE prepared the Certification of Determination of the tenure charges, a Proof of Service of the determination to certify tenure charges, and notice that it had suspended the respondent without pay for 120 days. N.J.S.A. 18A:6-10, -11, -13, -14, -15; N.J.A.C. 6:24-5.2. On March 1, 2007, the BOE's papers were filed with the Commissioner of Education. N.J.S.A. 18A:6-9, N.J.A.C. 6A:3-5.1. On March 12, 2007, the respondent's answers to the charges were so filed.

The Department transmitted the contested case to the Office of Administrative Law, where on it was filed, on March 16, 2007. N.J.S.A. 18A:6-11, -16; N.J.S.A. 52:14B-2(b), N.J.A.C. 6A:3-5.5. On March 28, 2007, I faxed to the attorneys a letter and order, setting forth a schedule for the case. N.J.S.A. 18A:6-16 and N.J.S.A. 52:14B-10.1. At that time, the law firm of Sumners George represented the BOE. I heard the case on June 5; September 17, 18, 21, 25 and 27; October 10, 12, 23; and November 14, 16, 29, 2007, and January 8, 16, April 16, 25, and May 27, 29, and June 3, 2008. Processing of the case was extended as a result of factors, including the illness of the respondent's mother, settlement negotiations (ultimately unsuccessful), and the change in the BOE's attorney. (The Honorable Thomas Sumners, J.S.C., then of Sumners George, started the hearing as the BOE's attorney and Regina Waynes Joseph, Esq., of that firm, continued it for the BOE.) The attorneys requested an opportunity to submit written summations, I set a schedule for that purpose, and, on June 26, 2008, I submitted to the

attorneys a proposed statement of the record and notified them that, by July 18, 2008, with their written summations, they could notify me of any error or omission they found in the summary. Neither party notified me of any such error or admission. On June 31, 2008, Ms. Joseph filed papers, notifying me that the Sumners George firm would discontinue operations and that the firm would not continue as the BOE's attorney. (By that date, Judge Sumners had taken the oath as a Judge of the Superior Court and the Honorable Harold W. George, J.M.C., was about to take the oath as a full-time judge of the Trenton Municipal Court.) On August 1, 2008, I received the substitution of attorney form, showing that Rocky L. Peterson, Esq., would represent the BOE and, by letter of that date, I notified the attorneys that their written summations should be filed by August 8, 2008. By the record closed date, I received the written summations. Neither party requested an opportunity for another submission, so I am issuing this decision.

THE RECORD

The Respondent's Background, Education and Certificate to Teach

The respondent testified that he grew up in Roxbury, Massachusetts, a disadvantaged urban area, and that he was bussed to school. His father was an alcoholic, his mother was psychologically troubled, and he had a difficult home life. He testified that, in 1978, he graduated from high school and that he went directly to North Carolina Agricultural & Technical College. However, at another time, he testified that he entered that college in 1979. He testified that he returned home for Christmas and found that he could not pay for his college loans, so he dropped out and joined a carpenters' union in Cambridge, Massachusetts. He testified that, in 1982, he entered the Air Force, from which he was honorably discharged in 1984. Thereafter, he worked in construction, started a family, and resided in Providence, Rhode Island. The respondent testified that he has two daughters, born December 20, 1984 and November 13, 1986.

The respondent testified that he visited his daughters' school in Providence, watched what happened in their classrooms; that, many times, they came home without homework; and that, over time, he developed an interest in teaching. He determined that, although much learning occurs in the classroom, parents are their children's primary teachers and, when teachers do not give homework, parents should do so. He testified that, with the idea that he might become a

teacher, he entered the "Learning Enhancement for Adults Program" or "LEAP." At one time, he described the program as (only) a "college preparatory program," which he completed in 1989. At another time, he testified that, in 1987-88, he was a freshman in college in the University of Rhode Island (URI.)

The respondent testified that, in 1990, he moved to New Jersey, where he attended Mercer County Community College (MCCC) and worked. He testified that MCCC did not accept all of his URI credits, but (nonetheless), in 1993, he received an associate's degree in humanities and social sciences from MCCC. He testified that, in 1995, he entered Rider University and that Rider also did not accept all of his previous credits. He testified that (nonetheless), in 1997, he received a bachelor's degree in elementary education and history from Rider.

In 1997, the Department of Education, State Board of Examiners issued to the respondent a provisional certificate to teach and, in December 1999, the Board of Examiners issued to him a Standard Certificate to teach as an Elementary School Teacher. R-3, R-28. During the respondent's testimony (contrary to the explicit language of the certification), he testified that he was certified to teach "K to twelve."

The 1995-96 School Year

The respondent testified that, during the 1995-96 school year, he worked as a student teacher in the Princeton Friends School and as a substitute teacher in the Trenton public school system's Columbus Elementary School where he had fifth grade students.

The 1996-97 School Year

The respondent testified that, during the 1996-97 school year, he worked as a "permanent" substitute teacher in the Trenton public school system.

The 1997-98 School Year

The respondent testified that, during the 1997-98 school year, he worked as a seventh grade teacher in the Hillsborough public school system's middle school. He testified that, because of the commuting distance, he left the Hillsborough position and he served as a substitute teacher in the Trenton school system. At another time, he testified that, teaching students in the seventh grade was "much different" than teaching those in the lower grades, which he preferred.

The 1998-99 School Year

The Trenton public school system's Clara Parker Elementary School is known as the "Parker School" and has also been referred to as "Parker Main," during school years (detailed below) when the BOE began to use buildings as the Parker School Annex and Parker Annex II elementary schools.

Willie Solomon, Jr., received a bachelor's degree in sociology from Southern University and a master's degree in social work from Rutgers. He has taken additional courses from The College of New Jersey. He is certified as a school social worker and as a supervisor and principal. In the 1990's, he served as a principal in the Trenton and Ewing Township public school systems. Mr. Solomon also served in the United States Army Reserve and retired as a major. During times relevant to this case, Mr. Solomon served as the principal of the Parker School, the Parker Annex, and Parker Annex II.

The respondent testified that, during the 1998-99 school year, he taught fifth grade part-time in the Trenton public school system's Columbus Elementary School and in the Parker School. Mr. Solomon met the respondent when he came to the Parker School to teach fifth grade. Mr. Solomon testified that he has good camaraderie with his staff, that he gets together with his staff outside of school, and that he "likes" the respondent as a person.

In September 1998, there were reports that State test scores showed that the Trenton public school system's students performed worse than the previous year on all three standardized

tests used to measure academic performance and that a standardized test used throughout the State to measure performance at the elementary school level, showed that of the BOE's 17 schools, Parker's students performance was at the bottom. More particularly, the 1998 Metropolitan Achievement Test, measuring the percent of students at or above the national average (50^{th} percentile), in Reading, Mathematics and Language, the BOE's Washington School, at the top, averaged 80.0%, but the Parker School, at the bottom, averaged 34.5%. R-4.

The respondent testified that, in his years teaching in the Parker schools he had about 25 students in his classes. Administrators estimated his classes' sizes as 15 to 20 students. The respondent also testified that his students' academic achievement was at the bottom of that the BOE's school system and that they were below their nominal grade levels academically. He testified that, after he began to teach in Parker, its students satisfied Annual Yearly Progress (AYP) standards.

By letter dated, December 23, 1998, the BOE notified the appellant that it had approved the superintendent's recommendation to appoint him to the position of teacher of the fifth grade, assigned to the Parker School. J-1, P-4.

The respondent acknowledged, during the years that the BOE employed him as a teacher, he had had "problems" with his attendance and he was absent from his teaching duties a substantial number of days. He testified that, during the 1998-99 school year, he was probably absent from his teaching duties about 15 days. He testified that he believed that, under his teachers' collective bargaining agreement, he was allowed to be absent on bereavement days, personal days, sick days, and other days and that the BOE allowed a teacher certain percentage of absent days (of the 182 yearly school days) before it would notify the teacher that he or she had exceeded his or her allotted number of days. The respondent understood from the BOE's personnel policy and procedure manual that his hours were 8:20 a.m. to 3 p.m. and, in addition to his absences, he was also tardy from time to time.

Mr. Solomon, as evaluator, completed the Teacher Final Evaluation Form, dated April 26, 1999, relative to the respondent's performance during the 1998-99 school year. Under "Areas of Strength/Commendations/Exceptional Accomplishments," Mr. Solomon wrote that the

appellant was "warm, caring and sincere." Under "Areas of Weakness – Further Improvement Needed," Mr. Solomon wrote that the appellant should work closely with his mentor and other veteran teachers to improve his knowledge of teaching strategies and techniques and that he should incorporate those strategies and techniques into his own lesson development and presentation. Nonetheless, Mr. Solomon recommended that the BOE rehire the appellant and grant an increment to him with no reservation. P-5.

By letter, dated April 30, 1999, Clarence L. Guthrie, Jr., the BOE's Assistant Superintendent for Human Services, notified the respondent that, after he presented his elementary school teacher certificate, the BOE would issue a contract to him for employment for the 1999-2000 school year. P-6.

The 1999-2000 School Year

During the 1999-2000 school year, the respondent again taught fifth grade in the Parker School.

The respondent testified that, during the 1999-2000 school year, he was probably absent about 11 days.

By letter, dated November 3, 1999, Assistant Superintendent Guthrie notified the respondent that, on September 27, 1999, the BOE approved the superintendent's recommendation to reappoint him as an elementary school teacher assigned to the Parker School at an annual salary of $32,397, effective September 1, 1999. P-7.

In the Teacher Final Evaluation Form for the 1999-2000 school year, dated May 24, 2000, under "Areas of Strength/Commendations/Exceptional Accomplishments," Mr. Solomon (again) wrote that the appellant was "warm, caring and sincere" and wrote that he was active in school-related activities, that he served as "Chairperson for the Community Involvement Committee," and that he was obtaining a master's degree. Under "Areas of Weakness – Further Improvement Needed," Mr. Solomon wrote that the appellant should work closely with the school system's Success for All (SFA) facilitators, so that he would improve in implementation process of the

school system's reading and mathematics program. Mr. Solomon testified that teachers were to sign in for the day by 8:20 a.m.; that the respondent frequently telephoned to say that he would be late getting to work, requiring the administration to obtain coverage for his class; that he had observed the respondent sign in late for work; and that the respondent's percentage of absence exceeded the acceptable five percent standard and he also wrote that the appellant must improve relative to attendance and tardiness. Nonetheless, Mr. Solomon again recommended that the BOE rehire the appellant and grant an increment to him. P-9.

The 2000-01 School Year

During the 2000-01 school year, the respondent again taught fifth grade in the Parker School. His total salary for the school year was $33,890. P-8.

The respondent testified that, during the 2000-01 school year, he was probably absent about 16 days. He testified that the causes of his absences included an unreliable automobile, doctors' appointments for himself and his family members, and his visits to sick family members who were hospitalized and that, in 2001, he took off about five days because of "stress."

The respondent testified that, in April 2001, Houston Baptist University awarded him a master's degree in education. He believed that the BOE sponsored the program to obtain the degree and he explained that he had participated in on-line classes over a two-year period and that he performed his course work by way of computer and/or telephone in a Trenton public school system elementary school. He believed that he earned 32 credits for the master's degree.

The respondent testified that, in 2001, he received a summons to appear for Superior Court (Mercer County) petit jury duty and that he understood that the procedure was that, before the date on which a potential juror was to appear, he or she should call a telephone number to learn whether (according to his juror's number) he should to appear in the jury assembly area to be available for potential jury duty.

Administrators observed the respondent teaching on November 29, 2000; February 22, 2001; and May 9, 2001. P-11. In the Teacher Final Evaluation Form for the 2000-01 school

year, dated June 18, 2001, under "Areas of Strength/Commendations/Exceptional Accomplishments," Mr. Solomon wrote that the appellant was "very friendly and out-going" and that that he demonstrated "care and concern" for his students. Teachers were required to prepare a Professional Improvement Plan (PIP) and Mr. Solomon noted that the respondent had worked towards a master's degree. Under "Areas of Weakness – Further Improvement Needed," Mr. Solomon (again) wrote that the appellant should work closely with the school system's SFA (Success For All) facilitators to improve his implementation of the school system's reading and mathematics program. Mr. Solomon testified that the respondent's attendance and tardiness had not improved sufficiently and on the form he also wrote that the appellant must improve relative to attendance and tardiness. Mr. Solomon noted that the respondent was a third year teacher, so the BOE's rehiring him would result in his attaining tenure. Mr. Solomon testified that, while he had concerns, he did not see problems sufficient to recommend that the BOE decline to rehire the respondent, although it would result in tenure for him. Mr. Solomon recommended that the BOE rehire the respondent and that it grant an increment to him, but with "Specific recommendations noted." P-11. The respondent agreed with the evaluation.

The 2001-02 School Year

During the 2001-02 school year, the respondent again taught fifth grade in the Parker School and he attained tenure. P-10.

The respondent testified that, during the 2001-02 school year, he was probably absent about 11 days. He acknowledged that Mr. Solomon discussed with him his concerns about his absences and tardiness. The respondent testified that (nonetheless), between the 1998-99 and the 2001-02 school years, he had a good rapport and very good relationship with Mr. Solomon.

The 2002-03 School Year

During the 2002-03 school year, the respondent taught 5th grade in the Parker Annex. Mr. Solomon testified that, due to overcrowding of the Parker School, the Parker Annex was utilized. The respondent's total salary for the school year was $37,020. P-12.

Mr. Solomon was the principal for the Parker schools and Peter Fland was the vice principal for the Parker Annex and respondent's direct superior.

Mr. Fland received a bachelor's degree in education from the State University of New York and a master's degree in education from Adelphi University. He received an elementary school teacher's certificate and a principal's certificate from the State of New Jersey and he received an administrator's certificate from the State of New York. He has taught elementary school, served as an elementary school principal in Sayreville's public school system, served as the chief school administrator in Franklin Township's public school system, and served as the elementary school principal in the Mountain Lakes and Dunellen's public school systems. In 1992, he came to the Trenton public school system where he served as a vice principal, in schools, including (as noted above) the Parker Annex. He described Mr. Solomon, the principal under whom he worked as "a fine gentleman." He applied for the position of principal in the Trenton public school system, but his application was not granted. In 2004, he retired from the Trenton public school system and, since that time, he has worked in education on a per diem basis. He has been part of a team that audits and prepares reports on curricula of Abbott schools.

Mr. Fland testified that his duties included supervising the school building and staff and providing advice, support, and direction to the staff. He described his relationship with the school staff as "professional" and testified that he participated in holiday outings with the staff.

Mr. Fland testified that, as an Abbott school, Parker Annex was to develop and implement the SFA program for instruction and evaluation of student learning. Administrators provided the teachers, including the respondent, with regular SFA training sessions and a strong package of SFA materials. The SFA program prescribed lessons, teaching methods, materials, and homework. The program was intended to instruct, encourage, correct, and evaluate students. Administrators observed teachers in their classes and there was to be demonstrable timely and proper presentation of lessons. Consistent with the program, teachers were to engage students so that they would become active learners. Under the No Child Left Behind education laws, the school was to achieve and maintain Adequate Yearly Progress (AYP) as shown by identifiable educational goals.

Mr. Fland testified that he observed the respondent teaching numerous times and that the respondent did not appear to be prepared, that he did not properly present the lessons as prescribed, and that, e.g., instead of presenting a Listening Comprehension (LC) lesson himself, he allowed a substitute teacher to do so. Also, the respondent's attendance was "spotty" and his reasons for his absences form his teaching duties, e.g., to accompany his wife to her doctor, were questionable. Mr. Fland directed memoranda to the respondent and he testified that he repeatedly provided him with advice and supportive direction. For example, Mr. Fland sent to the respondent a memorandum recounting a class wherein one student read a passage and "droned on," while the others "sat passively." P-15. Eventually, Mr. Fland determined that the respondent had not raised his teaching performance and he came to believe that the respondent should not be a classroom teacher.

The respondent testified that, during the 2002-03 school year, he was probably absent about 11 days and that the causes of these absences included his taking days off for his and his family's medical and dental appointments. Mr. Solomon testified that he saw that the respondent demonstrated a pattern of absences on days before and after weekends.

The respondent testified that some of his Parker Annex students had been fourth graders in Parker School and he was familiar with them. Some of his students were from a neighborhood where there was troublesome gang activity. The respondent testified that he was familiar with the SFA teaching methods and that, consistent with SFA methods, during the first couple of weeks of the school year, he determined his students' respective academic levels; they had a mix of academically high, middle and low levels; and he reestablished SFA methods with them. He taught using cooperative learning and he used hand signals, for example, putting his index finger to his head to tell students to take a moment to think and using hand signals to quiet students.

During the 2002-03 school year, the respondent was part of a team of Trenton school system educators that worked on a "STAR-W" grant application to obtain computer equipment for the school system. For this purpose, he dedicated personal time on evenings, weekends and during a school break. The application was successful and, he testified that, in 2003, the school was awarded about $250,000 in equipment, including cameras, computer carts, laptops, printers, and white boards. However, he testified, after the equipment was delivered, Mr. Solomon kept it

stored in a closet and he did not allow it to be distributed to teachers and students. The respondent testified that the teachers were anxious to get the equipment. The respondent testified that he raised the subject with Mr. Solomon during a staff meeting and that Mr. Solomon said that he didn't want the equipment distributed because the teachers might lose it. Thereafter, Mr. Solomon had the some of the equipment distributed for students to prepare reports. The respondent testified that Mr. Solomon did not allow release of other equipment until May 2004.

During the 2002-03 school year, the respondent began to serve as the Trenton Education Association (TEA) representative for Parker Annex (because TEA representative Nora Stackhouse was ill.) The respondent testified that, as a TEA representative, he kept the teaching staff informed about union activities, the staff came to him with their concerns, and he dealt directly with Mr. Solomon. The respondent testified that, after Mr. Solomon presided over staff meetings, he (the respondent) would discuss union matters with the staff. The respondent testified that, several times, he sat with teaching staff members and Mr. Solomon and they discussed grievances. The respondent testified that, before the 2002-03 school year, he had regular interaction with Mr. Solomon, who told him he was performing well, but that, after he became a TEA representative, Mr. Solomon visited his classroom less frequently, they talked less frequently, and Mr. Solomon was less friendly. Mr. Solomon denied that he was unfriendly towards the respondent. Mr. Solomon explained that, when the TEA gained increased salaries and benefits for the teachers, increases in the administrators' salaries followed. Therefore, he would not be less friendly toward a teacher who is a TEA representative and the respondent's service as a TEA representative did not cause him to be less friendly to him. However, the respondent's performance as a teacher was problematic for Mr. Solomon.

In a memorandum, dated May 1, 2003, Mr. Fland documented his observation of the respondent's teaching of a SFA reading lesson. Mr. Fland wrote that students were working with meaningful sentences utilizing posted vocabulary words and the SFA principles were utilized. The information posted showed "Day 4" was the lesson taught, but the respondent appeared to be teaching "Day 2." In the memorandum, Mr. Fland advised the respondent, "Remember, it is your responsibility to update the posted information daily. I expected your stuff to be together since I informed you at the SFA conference that I would be in for a formal observation upon our return." P-13.

In the Teacher Final Evaluation Form for the 2002-03 school year, dated May 6, 2003, under "Areas of Strength/Commendations/Exceptional Accomplishments," Mr. Solomon (again) wrote that the respondent was "warm [and] caring," wrote that he worked well with the school's students and staff, and noted that he had become the TEA representative. Mr. Solomon also wrote that the respondent had planned well and provided appropriate instruction, that he was a "vital member" of the successful STAR-W grant team and that he had participated in professional development activities associated with SFA, including attending the National SFA conference. Relative to "Areas of Growth" and the respondent's PIP, Mr. Solomon wrote that, for the 2002-03 school year, the appellant identified two goals: (1) to increase his understanding and application of the SFA Math and Reading programs and (2) to increase the use of instructional technology program in his classroom. However, Mr. Solomon wrote, that because the respondent had not submitted a requested document, he did not know whether he had attained the stated objectives. Under "Areas of Weakness – Further Improvement Needed," Mr. Solomon wrote that the appellant should demonstrate a more positive attitude in his job relative to attendance, that the respondent had been frequently absent on either a Friday or Monday, and that he had either been absent or requested a half day immediately before or after holidays. Mr. Solomon also wrote that, although the respondent had not been called for jury duty, he had taken days off purportedly for that purpose. Mr. Solomon again recommended that the BOE rehire the appellant and grant an increment to him, but with "Specific recommendations noted." P-13. The respondent testified that he agreed with the evaluation.

During the 2002-03 school year, the BOE required its teachers to take professional development courses, totaling 100 hours within a five-year period and, for this purpose, in-service classes were presented in the BOE's schools, including Parker. In the respondent's Record of Professional Development Hours, dated May 13, 2003, submitted to BOE administrators, he represented that he had completed 43 such hours. P-13.

The 2003-04 School Year

During the 2003-04 school year, the respondent again taught fifth grade in the Parker Annex. His base salary for the year was $39,840. P-14.

During the 2003-04 school year, the respondent continued to serve as a TEA executive representative and he represented teaching staff in buildings in addition to Parker.

The Professional Standards for Teachers and School leaders, adopted by the State Board of Education, are intended "to improve the quality of instruction for New Jersey's children to that they are equipped to work and succeed in an ever-changing and increasingly complex global economy." N.J.A.C. 6A:9-1.2(a). The Professional Standards provide for a "standards-based, rigorous system of licensure, designed to support improved student achievement of the Core Curriculum Content Standards" (CCCS.) N.J.A.C. 6A:9-1.2(b). See also P-2.

The regulations state:

> (a) The Core Curriculum Content Standards define what all students should know and be able to do by the end of their public school education.
>
> 1. The Core Curriculum Content Standards specify expectations in nine academic content areas: the visual and performing arts, comprehensive health and physical education, language arts literacy, mathematics, science, social studies, world languages, technological literacy, and career education and consumer, family, and life skills.
>
> 2. The Core Curriculum Content Standards are further delineated by cumulative progress indicators at benchmark grade levels. These cumulative progress indicators further clarify expectations for student achievement.
>
> (b) The Core Curriculum Content Standards, including cumulative progress indicators, enable district boards of education to establish curriculum and instructional methodologies for the purpose of providing students with the constitutionally mandated system of "thorough" public school instruction.
>
> (c) The Statewide assessment system is designed to measure student progress in the attainment of the Core Curriculum Content Standards.

> (d) The results of the Statewide assessments shall facilitate program evaluation based on student performance and shall enable district boards of education, the public, and government officials to evaluate the educational delivery systems of all public schools.
>
> [N.J.A.C. 6A:8-1.1]

The Professional Standards for Teachers state:

> 1. Standard One: Subject Matter knowledge. Teachers shall understand the central concepts, tools, on inquiry, structures of the discipline, especially as they relate to the [CCCS], and design developmentally appropriate learning experiences making the subject matter accessible and meaningful to all students.
>
> . . .
>
> 2. Standard Two: Human Growth and Development. Teachers shall understand how children and adolescents develop and learn in a variety of school, family and community contexts and provide opportunities that support their intellectual, social, emotional and physical development.
>
> . . .
>
> 3. Standard Three: Diverse Learners. Teachers shall understand the practice of culturally responsive teaching.
>
> . . .
>
> 4. Standard Four: Instructional Planning and Strategies. Teachers shall understand instructional planning, design long- and short-term plans based upon knowledge of subject matter, students, community, and curriculum goals, and shall employ a variety of developmentally appropriate strategies in order to promote critical thinking, problem solving and the performance skills of all learners.
>
> . . .
>
> 5. Standard Five: Assessment. Teachers shall understand and use multiple assessment strategies and interpret results to evaluate and promote student learning and to modify instruction in order to

foster the continuous development of students.

. . .

6. Standard Six: Learning Development. Teachers shall understand individual and group motivation and behavior and shall create a supportive, safe and respectful learning environment that encourages positive social interaction, active engagement in learning and self-motivation.

. . .

7. Standard Seven: Special Needs. Teachers shall adapt and modify instruction to accommodate the special learning needs of all students.

. . .

8. Standard Eight: Communication. Teachers shall use knowledge of effective verbal, nonverbal and written communication techniques and the tools of information literacy to foster the use of inquiry, collaboration and supportive interactions.

. . .

9. Standard Nine: Collaboration and Partnership. Teachers shall build relationships with parents, guardians, families and agencies in the larger community to support students' learning and well-being.

. . .

10. Standard Ten: Professional Development. Teachers shall participate as active, responsible members of the professional community, engaging in a wide range of reflective practices, pursuing opportunities to grow professionally and establishing collegial relationships to enhance the teaching and learning process.

. . .

[N.J.A.C. 6A:9-3.3.]

Each of the above standards is followed by enumerated descriptions of the subject matter teachers should know and understand, descriptions of values to which teachers should be committed, the requirement that teachers plan appropriate instruction, and the requirement that

teachers in the classroom make effective use of instructional time. The BOE's administration distributed materials, held meetings, and provided training for the Trenton teachers in the Professional Standards for the Trenton teachers and the CCCS.

In 2003, the BOE adopted and made available Governance Policies and ENDS Policies for the school system, to set forth ultimate goals of the district's new policies. P-3. Relative "Academic Performance," the ENDS Policies incorporated the CCCS and stated:

> **ACADEMIC PERFORMANCE – E-2** (Monitoring: Internal – Annually – September)
> All students, regardless of ethnicity, race, culture, socioeconomic factors, orientation, or disabilities, will achieve to their level of potential while meeting or exceeding grade level expectations.
>
> 2.1 Students will demonstrate mastery of NJCCS
>
> 2.1.1 Literacy
> Reading is the highest priority for students. All students demonstrate reading mastery at or above grade level and will write competently in a variety of content areas for varied purposes and audiences.
>
> 2.1.2 Numeracy
> All students demonstrate mathematical competency by applying mathematical principles to real life problems.
>
> 2.1.3 Technology
> All students, individually and cooperatively, demonstrate sufficient knowledge and skill to be effective users of modern information technology.
>
> 2.1.4 Science
> All students demonstrate understanding of scientific concepts as well as proficiency in problem solving using the scientific method.
>
> 2.1.5 Social Studies
> All students demonstrate an understanding of history and world cultures in order to participate as productive and responsible citizens.
>
> 2.1.6 Visual and Performing Arts
> All students integrate the arts for exploration, communication and self-expression.

> 2.1.7 World Languages
> All students acquire and use knowledge of other cultures while developing foreign language skills.
>
> 2.1.8 Health and Physical Education
> All students demonstrate an understanding of the components of good health and engage in physical activity in order to develop healthy and rewarding lifestyles.
>
> [P-2.]

As shown above, the CCCS and Professional Standards for Teachers are codified in the Department of Education regulations, which Mr. Solomon referred to as the "bible" for public school educators. See N.J.A.C. 6A:1-1.1 et seq. Mr. Solomon described the CCCS as providing benchmarks, indicators and elements for knowledge and progress by students through the grade levels. Mr. Solomon testified that the Trenton public school system held workshops to ensure that teachers would be familiar with the CCCS and Professional standards. The school system provided the teachers with materials and CD ROMs. These standards also provide a measure of whether the teacher is effective. For example, Mr. Solomon testified that a fifth grade teacher must teach certain subjects and basic content areas, including literacy, numeracy, science, social studies. Also, specialist teachers assist with the arts, health and physical education, computers, and technological literacy. Mr. Solomon testified that the school system provides materials for the New Jersey Assessment, Skills and Knowledge (ASK) tests that lower grade elementary students must take to assess their progress in knowledge and content consistent with the No Child Left Behind law. Mr. Solomon testified that, according to Annual Yearly Progress (AYP) standards, the Parker school was successful and Parker was not identified as a school needing improvement. Mr. Solomon described the progression in testing percentages of knowledge in grades from lower to higher over succeeding the school years with increasing percentages required for s school's success.

When the respondent was asked for his understanding of the Professional Standards for Teachers, he responded that the question was a "hard one." He then described the Professional Standards as the "basic knowledge" and "wealth of general knowledge" that teachers should have and that passing the Praxis was the measure of whether a teacher had such knowledge. Provided

a copy of the Professional Standards to review while in the witness chair, the respondent acknowledged that he had previously seen them. He testified that he was familiar with the substance of the above-quoted standards, from his masters' of education class, a psychology course at Rider, and because it was in "science books." Relative to the above-quoted "Standard Ten: Professional Development," the respondent testified that, since 2001, the BOE had not paid for teachers' professional development. He also testified that, by way of his master's studies, he was well on his way to satisfying the 100 hours or credits required for each teacher as of the 2003-04 school year, but that because he had become a TEA representative, Mr. Solomon refused to "sign" and acknowledge his attaining the credit. Mr. Solomon testified that, despite his requests, the respondent never provided documentation of his supposed credits.

The respondent acknowledged that he was required to teach according to the CCCS and he was asked to identify or describe the CCCS. He testified that the CCCS were "the standards that every teacher should be teaching." He testified further that the CCCS encompassed mathematics, reading, science, writing, social studies and technology. He testified further that teachers' materials included lessons plans and assignments (presumably consistent with the CCCS), that the teacher's manual included the CCCS for a specific subject, that the manual spelled out what content level to teach, and that the teacher was to "integrate it" with the subject, for example, social studies, math, etc. He testified that he incorporated the CCCS in his instruction. He characterized the CCCS as intended to result in the teachers' teaching "in unison." P-76. The respondent testified that, from 1999 until 2001, when he took the masters in education class, he learned about integration of technology into the CCCS. (However, as noted above, the CCCS was adopted in 2003.)

Asked how he taught science with reference to the CCCS, the respondent testified that it was "difficult." He testified that, during the 2005-06 school years, the school system supplied teachers' manuals with CCCS for each lesson and that he used the science teacher's manual that came with materials. He recalled that he had performed a watermelon experiment: cutting up the watermelon and observing that a yeast substance liquefied it at a greater or lesser rate. He testified that he also taught the hydrological cycle, involving clouds, precipitation, surface water and heat and evaporation. He taught his students about electricity. He taught his students about animal types, including mammals, reptiles, etc. He taught his students about plant growth. He

taught his students about cell reproduction. He taught his students about photosynthesis. He taught his students about the rain forests. He testified that, after a lesson, he tested his students and that most of them passed the Terra Nova tests, demonstrating that, in large part, they accomplished their goals.

The respondent testified that he taught reading, starting with smaller groups and short stories and moving to longer passages and stories. He would ask his students to identify the "subject," by which he meant, "What is the story about?" He would ask the students to identify the story's main characters and to describe the plot. From each child's reading, he determined if the student was a fluent reader. He asserted that, although his fifth graders were to read from the Toll House Books at a fifth grade level, many were not at that reading level. He testified that, using a Houghton Mifflin book, he taught grammar and vocabulary with synonyms and antonyms. He took the majority of his lessons from the book. He had a list of vocabulary words that each student should know by the end of the fifth grade, each student had a dictionary available, and he gave a spelling test about once every other week. Students who needed to learn words were to look them up in the dictionary, write sentences using the words, and write the words five times. Relative to grammar, the respondent testified that he taught his students how to "diagram" sentences to identify subject, predicate and use of punctuation marks. He testified that, by the end of the fifth grade, most of his students could not identify subjects and predicates in sentences. He testified that, in this context, "predicate" is another word for "verb." That is, the respondent did not describe "predicate" as a unit of a sentence, according to the dictionary definition:

> a syntactic unit that functions as one of the two main constituents of a simple sentence, the other being the subject, and that consists of a verb and of all the words governed by the verb or modifying it, the whole often expressing the action performed by or the state attributed to the subject as *is here* in *Larry is here.*
>
> [The Random House College Dictionary, Rev'd Edition, 1982.]

When asked to provide an example of a diagrammed sentence, the respondent could not do so. Instead, he wrote a simple sentence and underlined the subject and predicate. Contrast P-80 and P-80A.

The respondent testified that, having taken a STAR-W course, he understood that technology should be infused into every subject and that he taught on a computer. He testified that he assisted technology teachers Kathy Eckard(sp?) and Denise Scotch, and that (using computers) the students downloaded (information from) websites. He testified that fifth graders were partnered with first graders, they went to an aquarium, and that (using computers) they went to websites (and downloaded pictures) and to create booklets. He testified that each student had a laptop computer, but he also testified that his students never received laptops.

Asked how he taught social studies, the respondent testified that he taught from a book (provided by the BOE), with bench marks for learning, and that each student was given a workbook for the course. He described the fifth grade curriculum as an overview that basically included United States history and he recalled that he taught about Benjamin Franklin, "1776," Lincoln, the Civil War, emancipation, Martin Luther King, and Women's Liberation. He testified that the fifth grade social studies book taught about other peoples, e.g., how to identify and distinguish people in Asia from those in the West and their climates, clothing, foods, etc. Using other books, he also taught about different cultures, regions, foods, and shelter. After a lesson he would give a quiz to determine the students' comprehension of the lesson. Sometimes he gave "open-book" quizzes and sometimes he gave "group" tests.

Mr. Fland testified that, on September 10, 2003, he observed the respondent teaching and, in a memorandum of that date, he notified the respondent of the following: The respondent, while teaching health, had asked a student to read from a text and while this was going on and the student "droned on," everyone else sat passively. The respondent should integrate the SFA strategies to be implemented in the curriculum and the respondent should have instructed his students to read a paragraph, decide how to make life better, share the thought with a partner, and signal when ready. This method would move every student from a passive to an active mode. Planning was important and the respondent should speak with (fellow teacher) Ms. Davis about strategies across the curriculum. Finally, the respondent should have his students read longer selections, so that they would not be inhibited by Terra Nova selections. P-15.

Mr. Fland and Mr. Solomon discussed the respondent's performance. They believed that,

since the respondent had been teaching for several years, he should have been much more effective and reliable and they were disappointed in him.

The respondent contradicted Mr. Fland. He testified that September 10, 2003 was still (about) the beginning of the school year and he needed time to determine his students' abilities. Complying with Mr. Fland's suggestion would have bypassed the important step of determining students' abilities and re-establishing SFA methods. He had his students volunteer to read from "Getting Along Together," so that he could hear their voices and determine their reading levels. Some students refused to read. Readers read short passages, for only a few minutes, and did not drone on. Mr. Fland was "very closed" and often not responsive in conversation. Mr. Fland did not provide the same level of cooperation (as the respondent felt Mr. Solomon had provided.) He (the respondent) requested reading aid from administrators and he received some help from Bernadette Trapp, then the reading coordinator.

In a memorandum to the respondent, dated September 25, 2003, Mr. Fland wrote the following: In the three years preceding the date of the memorandum, SFA trainers entered Parker Annex classrooms to observe teachers instructing and they functioned at a high level commensurate with their experience and years in the SFA program. Mr. Fland observed that (on the date of the memorandum) the respondent did not demonstrate an appropriate level. More particularly, the respondent was not adequately prepared to conduct class. Chairs and equipment were moved, losing significant time. The respondent did not demonstrate sufficient command of the problem to easily assist and support his students' analyses. The respondent's transition from fact test to instruction consumed almost ten minutes, so that it was not efficient. Losing ten minutes of instruction time each day results in 30 hours of lost time over the year and that is too much time lost during mathematics instructional time. The respondent sent home inappropriate homework. Given these circumstances, Mr. Fland directed the respondent to use and follow all SFA materials, observe all timelines scrupulously, and limit furniture movement to the minimum. Mr. Fland ended, with the opinion that the school system had invested years in the respondent, but that he did not demonstrate a refined level of instruction and with the warning that the respondent should take the memorandum as "serious." R-21.

In a memorandum to the respondent, dated September 26, 2003, Mr. Fland wrote that

teachers were notified in advance of SFA training days and the school system booked substitute teachers for such days (to allow the teachers SFA training.) Consistent with the established practice, in advance of such days, teachers were to prepare materials for substitutes and, on such days, teachers were to conduct their reading groups, to maintain the integrity of the reading program, and substitutes were to take over classes, beginning at 11 a.m., so that teachers could then attend the SFA training. Nonetheless, Mr. Fland observed that, on September 26, 2003, an SFA training day, the substitute was conducting LC, while the respondent worked at his desk. Mr. Fland strongly suggested that the respondent reconsider his daily practices and take steps necessary to assure that all SFA instruction occurred daily and as intended. P-21.

Mr. Solomon testified that he reviewed the memoranda and forms relative to the respondent's teaching performance and that Mr. Fland advised him that he was offering facilitators and other assistance to the respondent, so he could improve his performance.

The respondent contended that Mr. Fland was mistaken in his assertions set forth in his memoranda. The respondent testified that he had planned SFA reading instruction for September 26, 2003, and that, consistent with the common practice in the school, the substitute (teacher) was reading (to the students) before he asked questions, in order to allow him to get together a few things while she read.

On October 1, 2003, Mr. Fland observed the respondent's class for 35 minutes and, in a memorandum to him, Mr. Fland wrote that he had squandered time, the students engaged in continual cross discussions, and that he spent as much time controlling behavior as teaching. Mr. Fland wrote that fifth graders should not be acting in that way. Mr. Fland wrote that teachers were to perform their duties according to the schedule and the prescribed teaching methods and techniques, the respondent started his instruction late, and students walked to the bathroom before the end of the instruction period. Mr. Fland wrote that the respondent announced to the children that he would use "number heads" method, a cooperative learning technique, but he then used "random sticks," another technique. Mr. Fland attached materials to show the respondent what "numbered heads" is. P-21.

Teachers were to submit their lesson plans to the administration in advance and by e-mail

and, for planned absences, they were to leave information and materials for substitute teachers who would cover their classes.

On October 2, 2003, Mr. Fland prepared a memorandum to the respondent wherein he noted that the respondent was out on that day for a planned absence, but that, despite directions provided in the school bulletin and by way of meetings, notifying teachers of what should be left for the substitute teacher, neither the substitute teacher, nor he (Mr. Fland) could find the information and materials that the respondent should have left for the substitute. Mr. Fland reiterated the directions that a teacher should leave the following on the desk top or in the center drawer:

> Class roster
> Description of daily routine,
> Daily schedule,
> List of special problems or needs,
> Lesson plans/emergency plans/split list and work packets/work packets,
> Attendance report form.
>
> [P-21.]

Mr. Fland notified the respondent that there was a "high degree of dissatisfaction with what [was] going on in his classroom" and that he should take corrective action. P-21.

On October 2, 2003, Mr. Fland prepared a memorandum to the respondent wherein he wrote that a major aspect of SFA instruction was managing students in the classroom to create a teachable learning environment, but that he had observed poor cooperation by respondent's students and it was necessary for the respondent to continually lecture his students about their lack of cooperation. Mr. Fland wrote that he had visited other classes with students of the same or similar age and that other students did not demonstrate the same behavior. Mr. Fland urged the respondent discuss SFA classroom management with fellow teachers Ms. Davis and Ms. Walker. P-21.

The respondent testified that Mr. Fland walked by his classroom but did not actually observe (what was occurring inside.) The respondent testified that he found it difficult to relate

to and communicate with Mr. Fland, in particular, who harassed him with negative and "nasty" memoranda. Relative to Mr. Fland's above-described September 26, 2003, memorandum, the respondent testified that he was preparing for the next lesson while the substitute conducted the LC lesson. The respondent found that the school system's schedule for lessons was inflexible and he testified that, after a student subject to the schedule could was not allowed to go to the lavatory and urinated on himself, Mr. Fland allowed more flexibility.

In the Teacher Observation/Conference Form, dated October 9, 2003, under "Classroom Observation Instructional Competencies," Mr. Fland noted his opinion that the respondent did not organize his lesson according to an observable structure with introduction, content and summary; he did employ a variety of appropriate materials and activities; he did not maximize time on task; he did make clear the objective of the lesson; he did foster high expectations for his students; he did effect an atmosphere of order, cooperation and purpose; he did not maintain a classroom appearance that stimulated learning; he interacted positively with students; and he did show enthusiasm for teaching. Under "Professional Competence," Mr. Fland noted that the respondent did not maintain accurate and complete records, he did not provide substitutes with plans that complemented course objective, he did not submit reports, grades, etc., on time, and he did not follow the district's approved course outline. Under "Personality Traits," Mr. Fland noted that the respondent did not accept suggestions and criticism. P-28. Mr. Fland provided a copy of the form to Mr. Solomon.

Mr. Fland prepared notes relative to the above-described observation wherein he wrote that class began promptly at 12 noon. He found deficits. Relative to "Check-In," he noted that children need to be integrated into teams, but there was no evidence of team set-up. Relative to "Active Instruction," he noted that, if the respondent had followed the manual in the specific way the lesson was orchestrated, the teaching would have been far more effective and that a discussion (of prime numbers) had bogged down the instruction. Relative to "Team Work," he noted that teams are to be given a point structure to foster cooperative learning strategy and that, at the end of this section, the respondent had given each team five points, but a total of five points did not reflect the intent of the point system nor did it demonstrate that the management strategy is being utilized and it did not appear that all teams were able to record their points and that was the only time points were issued. Further, the respondent should have confirmed that

his students had materials, e.g., homework sheets, he directed them to work with. The respondent directed his students to work on their homework sheets, but Mr. Fland saw that (at least) one student had no homework sheet. Relative to "Reflection," a logbook is a tool that is intended to help the student account for what he has learned and the respondent issued logbook sheets and said that he would collect them, but he did not do so and there was no evidence of previous logbooks and how they were stored. Mr. Fland advised the respondent that he should meet with fellow teachers Ms. Davis and Ms. Walker to confirm he had the required supports for reading and math. He directed the respondent to properly review and implement the SFA manuals which clearly describe the teacher's actions and instructional responsibilities. He notified the respondent that he should be prepared to be observed on a regular basis in reading and math until his instructional delivery reached acceptable standards. Finally, Mr. Fland wrote, "Hopefully," for the benefit of the students and the respondent, the respondent's deficiencies would be corrected quickly. P-28.

The respondent acknowledged that administrators may have observed him on days when he was not "on his game", but he testified that the administrators' observations provided only a limited view of his teaching.

The respondent asserted repeatedly that, after he became a TEA representative (during the 2002-03 school year), administrators' opinions of his teaching were increasingly negative.

The respondent testified that, in 2003, he received a summons to appear for Superior Court petit jury duty and that he notified Mr. Solomon, Mr. Fland, and fellow teachers of the summons. The respondent testified that he notified the jury management officials that he was a teacher and that they notified him that he was excused and that they would call him at a later date. By letter, dated October 1, 2003, the Superior Court Jury Manager for the Mercer Vicinage notified the respondent that his jury service was be deferred and that his new appearance date was Monday, December 8, 2003. R-5.

Mr. Solomon testified that teachers' submission of lesson plans was essential and that teachers were to submit their lesson plans in advance and every two weeks. The respondent failed to submit his lesson plans well into October 2003. Consequently, Mr. Solomon sent the

respondent a memorandum, dated October 16, 2003, wherein he confirmed that he had not submitted any lesson plans for the 2003-04 school year. Mr. Solomon also notified the respondent that Mr. Fland, having observed his (the respondent's) lessons, found that he demonstrated a lack of prior planning and Mr. Solomon advised the respondent that if he needed assistance, he should speak with Mr. Fland or with him. P-16.

Mr. Solomon testified that Implementation Visit (IV) days, related to Whole School Reform, were scheduled in advance for contractors to enter the Trenton public schools, observe teachers presenting lessons in classrooms to assess SFA progress, talk with teachers, and consider other indications that the school system was properly operating and educating its children. IV days also provided opportunities to improve teachers' functioning in the SFA program and teachers knew or should have known that IV days were important to the school system. Nonetheless, during the 2003-04 school year and in prior years, the respondent was absent on IV days, causing the administration to scramble to obtain a substitute teacher for his class or to divide his students for placement in other teachers' classes. Mr. Fland, by way of a memorandum, dated November 3, 2003, reiterated all of this to the respondent, who was absent without prior notice to the school system and who returned to school with the excuse that he had accompanied his wife to a doctor's visit. P-17.

In Observation Notes, dated November 19, 2003, Mr. Fland described his observations of the respondent's performance as he taught a mathematics class. Mr. Fland began his comments, writing that, in many ways, this was a significantly better class than he had observed previously. Mr. Fland listed a number of such improvements. For example, there was improvement in utilization of material, student attention was clearly on the teacher, and there was significant improvement in the use of SFA management signals. However, he pointed out that the respondent did not implement sections of the plan and team points, a way to guide and reinforce behavior, were not assigned. P-25.

In the Teacher Observation/Conference Form, dated November 20, 2003, under "Classroom Observation Instructional Competencies," Mr. Fland recorded his observation that the respondent did not employ a variety of appropriate materials and activities and he did not maintain a classroom appearance that stimulated learning. Mr. Fland showed that the respondent

performed sufficiently in the numerous other categories, but (when testifying) he would not agree with the characterization of the respondent's November 20, 2003 performance as improved compared to his October 9, 2003 performance. P-18.

In the Teacher Observation/Conference Form, dated December 5, 2003, under "Classroom Observation Instructional Competencies," Mr. Fland recorded his observation that the respondent did not maximize time on task and he did not foster high expectations for his students. Under "Professional Competence," Mr. Fland noted that the respondent did not satisfy the district's staff attendance and/or punctuality policy and he did not provide substitutes with plans that complement course objectives. Under "Personality Traits," Mr. Fland noted that the respondent did not accept suggestions and criticism. P-19.

Mr. Solomon observed the respondent teach literature and mathematics, he reviewed copies of the forms and reports on the respondent's teaching performance, and he and Mr. Fland discussed the respondent's performance. Mr. Solomon testified that the respondent had been teaching in the SFA program to be used in the Trenton public school system for a substantial period, but he was not demonstrating proficiency commensurate with his experience. The respondent was to teach literacy in an uninterrupted block of time. When Mr. Solomon observed Sharon Davis, the reading facilitator, with the respondent's students, the students were more responsive than they were with the respondent, who appeared to have a cavalier attitude about teaching.

The respondent testified that he prepared a packet for the substitute teacher for his class for the days he would be out and that, on December 8, 2003, he reported for jury duty. He testified that he was present for a jury orientation that lasted until about noon; that he returned for the afternoon; and that, at about 2:15 or 2:30 p.m., he left the courthouse and went home (although his teacher's hours were 8:20 a.m. until 3 p.m.) A letter, dated December 8, 2003, from John Saunders, the jury manager, states that, on December 8, 2003, the respondent reported for jury duty and that, "upon arrival Mr. Jones was excused for the day with the understanding that he would call each evening for further service." R-5. The respondent testified that (consistent with the jury management office's procedure) he called the jury management telephone number; that he was directed to appear for jury duty on December 9, 10 and 11, 2003;

that he did appear for jury duty; he remained in the jurors' assembly area where he graded his students' papers; and that, each day, he was released without serving on a jury. A handwritten note on Mr. Saunders' letter, states that the respondent "also came in on" December 9, 10 and 11, 2003 and is signed "Pattianne Swain, Team Leader." Ibid.

The respondent also testified that jury management officials notified him that he was released and that he should not appear for jury duty on Thursday, December 11, 2003, and Friday, December 12, 2003. The respondent testified that he talked with fellow teachers who advised him that, if the school system had obtained a substitute for their classes for a week, they would not report for their teaching duties. He acknowledged that no school administrator had told him that, when a substitute had been obtained for his class for his potential jury duty, even if he was released from jury duty, he need not report for his teaching duties. Nonetheless, he did not appear for his teaching duties on Thursday, December 11, 2003, and Friday, December 12, 2003. He testified that, on Friday, December 12, 2003, he called the school and left a message that he would not be in and that he gave no reason for his absence. He testified and, upon his return to school, Mr. Solomon was unhappy with him because he had taken the days off without approval and that he agreed that he would not to do so again.

In a memorandum to the respondent, dated December 9, 2003, Mr. Fland wrote the following: On Friday, December 5, 2003, he asked the respondent about jury duty and the respondent responded that Mr. Solomon was attempting to get him excused, but Mr. Solomon did not know of such circumstances. The respondent was on jury duty and absent from his teaching duties on Monday, December 8, and Tuesday, December 9, 2003. The respondent did not provide school officials with the official notice, showing that jury duty caused his absence. The respondent's conduct had prevented school officials from obtaining a substitute teacher and had caused school officials to split his class to provide coverage, inconveniencing his peers. Fellow teacher Ms. Davis covered the respondent's class for reading and, thereafter, the respondent's students were significantly more "on task." Mr. Fland asked Ms. Davis to again model for the respondent, so that he would see that "positive reinforcement . . . is a continual factor" and so that he would use it more often. Finally, the school system trained its teachers extensively in delivery of instruction in reading, mathematics, language arts and conflict resolution skills; it was essential that teachers teach those subjects daily; and the respondent

should perform all SFA instruction daily and in the manner intended to ensure appropriate academic achievement. P-20.

In an addition to the above-described memorandum, dated December 11, 2003, Mr. Fland wrote the following: On December 11, 2003, the respondent had represented by voice mail for Mrs. McDonough that he would be out of work for the rest of the week and the respondent asked if she had received his previous messages. However, the school received no such message from the respondent on Mrs. McDonough's or on Mr. Fland's telephones. The respondent had been repeatedly notified that he should contact Mr. Fland or Mrs. McDonough (relative to absence.) However, instead, the respondent contacted Mrs. Shank. On December 11, 2003, Mr. Fland contacted the Superior Court jury management office and Ms. Swain, of that office, stated that no jurors would be called for service on Friday, December 12, 2003. However, the respondent had called (school officials) and stated that he would be out on Friday. P-20.

Mr. Fland testified that the SFA program provided a format of routine and consistency for students. Teachers who studied the programs materials, prepared for their lessons, and followed the program's instructions would timely implement the program and keep a pace that kept the children involved with the lessons, allowing every student a turn to participate in the lesson. The respondent had had years of experience in the SFA program and Mr. Fland assigned instructors and teachers, including Ms. Davis, Ms. Walker, and Ms. Bradshaw, to model and assist the respondent in developing skills in presenting lessons and in teaching reading and mathematics. Mr. Fland testified that, nonetheless, from his observations of the respondent with his students, the respondent did not develop and improve as a teacher and the respondent's students were not learning what he was required to teach them.

By memorandum, dated December 16, 2003, Ms. Gibson transmitted to the respondent copies of memoranda, alleging failure to perform duties and deficiencies to be corrected, from September and October 2003, and notified him that copies were to be placed in his HR personnel file. P-21.

In January 2004, Mr. Fland, Mr. Solomon, the respondent, and TEA representative Tom Moore met relative to the respondent's jury duty and absences from school on December 8, 9, 10,

and 11, 2003. The respondent testified that he presented the above-described letter, showing when he had appeared for jury duty and that he left the meeting, and that he believed that Mr. Solomon was satisfied. R-5. The respondent testified that, after he received a letter (memorandum) from Ms. Gibson, charging misconduct involving jury duty and recommending the withholding his increment, he brought a grievance of the matter.

In a memorandum to the respondent, dated January 12, 2004, Mr. Solomon wrote the following: Teachers were required to submit lesson plans weekly and once week in advance on Fridays, unless specified differently. E-mail was the preferred method for submission of lesson plans, but teachers could also submit them on paper by placing them in Mr. Solomon's mail box. Records showed that the respondent had failed to submit his lesson plans for approximately a month. Prior planning precedes a good lesson and his failure to submit lesson plans demonstrated poor planning, which was also reflected in his teaching performance, as Mr. Fland had reported. P-23.

The respondent acknowledged that Mr. Solomon was correct about his submission of lesson plans. He testified that he tried to timely e-mail his lesson plans, but that his computer server reported that his e-mails "bounced back." In a memorandum to Mr. Solomon, dated January 14, 2004, the respondent wrote that his e-mail had "bounced back" from Mr. Solomon's computer and that, on January 12, 2004 (Monday), he had given a paper copy of a lesson plan to Mr. Fland. The respondent wrote that he would send Mr. Solomon lesson plans weekly via e-mail and also give Mr. Fland "hard copies." R-6.

In a memorandum to the respondent, dated January 16, 2004, Mr. Fland wrote the following: The respondent's lesson plans for the week were time-stamped at 9:49 a.m., January 16, 2004, a Friday, i.e., during time that he should have been teaching. BOE policy provided that, during the time that teachers were to be instructing according to the SFA program, they were not to use e-mail or computers, e.g., to create lesson plans. Additionally, the respondent had repeatedly and for extended periods of time rung the school building's outside bell, until school officials opened the door for him, and he had thereby disturbed the school. There was access to the school through the back door near the parking area provided for the respondent and, in the future, he should enter through that door. P-23.

The respondent testified that, on the day he was ringing the outside bell, a blizzard had occurred and a parent had told him she was unable to enter the school building. No one had responded to the bell and he knocked at the door until a secretary came to the door. He tried to talk with Mr. Fland, but Mr. Fland just rolled his eyes and, later, told him that the door's "Buzzer" was not operating.

The BOE's policy required appropriate dress for teachers, who were to serve as models for students, and, in a memorandum to the respondent, dated February 3, 2004, Mr. Solomon wrote that, on February 2, 2004, Mr. Fland had observed the respondent in a tank top, i.e., inappropriately attired in his classroom and, because, prior to that date, they had discussed the matter of attire, the respondent's inappropriate attire was of great concern. P-23.

The respondent testified that, in February 2004, he, TEA representative Thomas Moore, Mr. Fland, and Mr. Solomon met relative to his jury service and his absence from his teaching duties in December 2003. The respondent testified that he presented the letter from the jury official and a tape to show the days that he had appeared for jury duty. The respondent testified that Mr. Fland and Mr. Solomon seemed "unhappy" with his actions, but they did not notify him of whether they would take the matter further.

The respondent testified that he requested that Mr. Fland advise him of a good time to sit down and discuss their differences and that Mr. Fland responded by e-mail that he could talk with the respondent almost every day, but that he (the respondent) did not have the time to do so.

The respondent testified that, during the 2003-04 school year, he used "maybe" 23 sick days and that the causes of these absences (again) included his taking days off for his and his family's medical and dental appointments. Additionally, (as detailed below) he testified that, in February 2004, he learned that his mother, who was in Massachusetts and/or Rhode Island, had been diagnosed with multiple myeloma and he requested Family Medical Leave Act (FMLA) leave to serve as her primary caregiver. He also testified that, in March or April 2004, a secretary in the BOE's Human Resources (HR) office provided him with materials with information about how to request FMLA days off. At another time, the respondent testified that, in February 2004,

the HR secretary provided him with the FMLA information.

By letter, dated March 26, 2004, Ms. Gibson notified the respondent that the BOE had approved the superintendent's recommendation to appoint him to participate in the STAR-W workshop at a rate of $28 per hour, for the period February to June 2004. P-22.

Bernadette Trapp received a bachelor's degree in education and a master's degree in school administration from Trenton State College (now The College of New Jersey) and she is certified as a teacher of elementary education, as a teacher of the handicapped, and as a school administrator, supervisor and principal. In 1985, Ms. Trapp began service as a teacher in Trenton's public school system. Ms. Trapp testified that she first got to know the respondent, during the 1989-90 school year, when they were both teaching in the Parker school, and she found him to be "very personable and friendly." Thereafter, Ms. Trapp served as a Whole School Reform (WSR) administrator. In 2004 and 2005, Ms. Trapp served as a vice principal in Parker Annex. Thereafter, Ms. Trapp was reassigned to another school in the Trenton public school system.

By way of a memorandum, dated March 29, 2004, Ms. Trapp summarized her observation of the respondent's conduct of a Listening Comprehension lesson. She wrote that he appropriately asked the students what skill they were working on and he kept the students interested and involved. However, certain teaching techniques were necessary for the lesson to be effective. For example, every lesson should have an introduction, body and closure. The respondent should have posted the subject (story) with the title, author and skill objective visible at the start of the lesson. Eighty percent of people are visual learners and the posted information should have been visible. The teacher should review skill, character feelings and definition. The teacher should ask questions and responses should be recorded in a Graphic Organizer. Upon completion, the teacher should review the skill and how it related to the story to bring about closure. P-28.

By way of a memorandum, dated March 31, 2004, Ms. Gibson transmitted the above-described memoranda, dated January 12, January 16, and February 3, 2004, to the respondent and notified him that he could (1.) acknowledge that he had read the documents; and (2.) respond to

their contents. R-23.

By letters, dated April 20 and 26, 2004, Ms. Gibson notified the respondent that, by April 17, 2004, he should contact the BOE's assistant secretary if he wished to appear before the BOE, relative to the recommendation to withhold his increment for the 2004-05 school year. The letters also transmitted to the respondent copies of documents, including memoranda and Teacher Observation/Conference Forms, to be considered by the BOE. These included Mr. Fland's memoranda alleging poor performance, Mr. Solomon's memorandum relative to lack of instructions left for the substitute teacher covering the respondent's class, Mr. Solomon's and Mr. Solomon's memoranda relative to Implementation Day visitation, and Mr. Fland's memorandum relative to jury duty. The letter also notified the respondent of relevant procedures, that the BOE would consider the matter of the increment in closed session, unless he requested that the discussion be public, and that the Open Public Meetings Act provided the BOE with the power to exclude the public from the portion of the meeting during which it discussed matters of employment, etc. P-24, P-25.

Administrators (including Mr. Solomon) and the respondent and a TEA representative appeared at the BOE meeting when the BOE considered whether to grant an increment to the respondent's salary. The respondent testified that he explained that Mr. Fland merely walked by his classroom, so that he did not observe his performance at other times. He acknowledged that his misuse of jury days was a reason for the recommendation to withhold. He testified that the BOE accepted his explanations and granted his increment.

In the Teacher Observation/Conference Form, dated April 27, 2004, under "Classroom Observation Instructional Competencies," Ms. Trapp recorded her observation that the respondent did not organize his lesson according to an observable structure with introduction, content and summary; he did not employ a variety of appropriate materials and activities; he did not maximize time on task; he did not make clear the objective of the lesson; he did not foster high expectations for his students; he did not effect an atmosphere of order, cooperation and purpose; and he did not maintain a classroom appearance that stimulated learning. Under "Professional Competence," Ms. Trapp noted that the respondent did not satisfy the district's staff attendance and/or punctuality policy, he did not provide substitutes with plans that

complement course objectives, and he did not follow the district's approved course outline. Under "Personality Traits," Ms. Trapp noted that the respondent did not accept suggestions and criticism. P-28.

Ms. Trapp prepared a detailed memorandum, dated April 27, 2004, wherein she provided further detail relative to her observations. She wrote, for example, that the respondent had not conducted the lesson as designed by the WSR model, Success For All. She reminded the respondent that the LC portion of a Reading Wings lesson was to be the first 20 minutes of each lesson; that, during that time, he was to use literature to teach the skills on which he was to focus; and that he had been provided with a list of skills for the marking period the respondent did not teach. She concluded, writing to the respondent that he must improve his teaching. Ms. Trapp attached to the memorandum another copy of the list of skills. P-28.

In a short memorandum, dated April 27, 2004, the respondent wrote to Ms. Trapp that relative to her observation, she left out "a few very important facts" and that he would "respond formally . . . upon completion of the Terra Nova testing." P-26.

In the Teacher Final Evaluation Form for the 2003-04 school year, dated April 28, 2004, under "Areas of Strength/Commendations/Exceptional Accomplishments," Mr. Solomon wrote that the respondent was "very pleasant and friendly" and that he had planned well. Mr. Solomon noted that the respondent had served as a TEA representative. Under "Areas of Weakness/Further Improvement Needed," Mr. Solomon wrote of the respondent's problematic "attendance patterns" established during the school year, that he had wrongfully used jury duty as a basis for his absence from his teaching duties, that there had been unsatisfactory administrative formal and informal observations of his teaching performance; and that it was well-documented that his overall job performance was in question. Mr. Solomon recommended that the respondent be rehired, but that he be denied an increment. P-28. The respondent testified that Mr. Solomon was mistaken and that he reported for jury duty on the subject days and he denied misconduct in that regard. The form for the Record of Professional Development Hours, usually attached to the Teacher Final Evaluation Form for the respondent was blank, except that printed on it was the statement that the dates and programs would be "forthcoming." Mr. Solomon testified that he received copies of some documents related to the dates and programs, but that he

never received the requested original documentation from the respondent.

On May 12, 2004, the respondent executed his employment contract with the BOE for the 2004-05 school year. P-27.

By memorandum, dated May 25, 2004, Ms. Trapp notified the respondent that he had not submitted his lesson plans for the week of May 24, 2004 and she reiterated that (as shown in the weekly bulletin) every employee was responsible for submitting the weekly plans by the Friday preceding the week. She wrote further that, given the respondent's attendance problems and his lack of plans for substitute teachers, the weekly plans were particularly important. She concluded, reminding the respondent that he was in the school system for the students and that his lack of planning and preparation was detrimental to their educational program. P-30.

In a memorandum to the respondent, dated May 28, 2004, Ms. Trapp noted that he had been absent 11 of the past 13 days; that, consequently, his teaching responsibilities had fallen on his colleagues; and that the administrators and the respondent's students had received inadequate work from him for his students. Ms. Trapp noted that Mr. Fland, by memorandum, dated October 2, 2003, had reminded him of his responsibilities when preparing for absence and for a substitute teacher and that he had failed to comply with those responsibilities. For example, the respondent had failed to make available a class roster, list of daily routines, the daily schedule, a list of special problems or needs, lesson plans/emergency plans, and an attendance report form. Further, even when the respondent was present, he had failed to attend to numerous items, including responding to the administrator's request for possible retentions and he had failed to respond to the need for his students Fifth Grade Exercise Form. Ms. Trapp concluded, reminding the respondent that as the school year wound down there were numerous activities for which he was responsible. P-29.

In a memorandum to the respondent, dated June 16, 2004, Ms. Trapp noted that he had called in at 7:52 a.m. to say that he was taking a half or possible a full day off and that he would "definitely" call before the end of the half day to report his intentions, but he failed to do so. Ms. Trapp notified that respondent that, "once again," his conduct left his students "neglected" with "their instructional program interrupted." Ms. Trapp notified the respondent that his conduct

inconvenienced his teaching colleagues and saddled them with the added responsibility of preparing his students for an upcoming event. Ms. Trapp notified the respondent that his conduct was unprofessional and a violation of BOE policy. P-30.

In another memorandum, dated June 16, 2004, Ms. Trapp reminded the respondent that she had specifically spoken to him about substitute plans and that she had requested that he prepare and make available substitute plans. Nonetheless, on the date of the memorandum, when Ms. Trapp entered the respondent's room, he had failed to leave plans for use by a substitute. Ms. Trapp concluded, writing that the respondent's ignoring her directive was "unprofessional and inconsiderate." P-30.

In a memorandum to the respondent, dated June 21, 2004, Ms. Trapp confirmed the following: She and Mr. Solomon had met with the respondent that morning. The respondent stated that he had taken June 15, 2004 off to investigate why his paycheck had been withheld and because he "had no idea of how many days [he] had left to take." Mr. Solomon reminded the respondent that it was his responsibility to keep track of his attendance. Ms. Trapp reminded the respondent that he had failed to provide a doctor's note relative to the week of May 24 to 28, 2004 and he represented that he would take care of it. Ms. Trapp reminded the respondent that, as of June 21, 2004, he had an "unacceptable" 17% absence rate for the 2003-04 school year, so there were "very serious concerns" in that regard. Ms. Trapp asked the respondent if there was anything else he would like to discuss and he had no such request. P-30

The 2004-05 School Year

During the 2004-05 school years, the respondent again taught fifth grade in the Parker Annex where Bernadette Trapp served as vice principal (Mr. Fland having retired.)

Ms. Trapp prepared a staff observation memorandum, dated September 23, 2004, wherein she noted that, in the respondent's writing/language arts lesson, he did not present an introduction to the lesson and she made recommendations to him and that, in the future, his lesson should have (1.) an introduction, (2.) a body, and (3.) closure. She also wrote that there was a large gap of time in the writing/language arts instructional block indicative of the

respondent's failure to prepare for the entire instructional time adequately. P-35.

The respondent testified that, during the 2004-05 school year, he was absent more than 21 days. He testified that, during that school year, the causes of his absences were the same as in the previous years, plus he was absent to provide care for his mother. The respondent testified that he made his mother's circumstances known to school administrators and staff; that, during or about September 2004, he told Mr. Solomon and Ms. Trapp that he would be taking FMLA days to serve as his mother's primary caregiver; and that he did not know what days he would need to take. He testified that he took intermittent days off to care for his mother. At another time, the respondent testified that he was unsure of his rights, but that he believed that he was allowed up to 12 weeks of FMLA days. The respondent testified that, by October, 2004, he had exhausted all of his sick and personal days and that, for seven days beginning on October 10, 2004, he did not report for his teaching duties in order to provide care to his mother. He also testified that, in October 2004, he returned from FMLA days off. He testified that he called into the school's substitute teacher office, but he could not say whether he did so at the start, middle or end of the period when he was away from his teaching duties. In October 2004, Ms. Trapp contacted Ms. Gibson about the respondent's absences.

The respondent acknowledged that, when a teacher knew he would be absent from his teaching duties, he should call the school to give advance notice of the intended absence. The respondent testified that, to the best of his ability, he followed the requirements for giving the advance notice of his absences. However, he acknowledged that there were occasions when he did not give the school system advance notice. The respondent acknowledged that, upon his return from absence from his teaching duties, he was not prepared to teach. He explained that he needed time to assess what his students had learned in his absence, before teaching them.

By memorandum, dated September 28, 2004, Ms. Trapp reminded the respondent that BOE policy required a teacher intending to be absent to give notice to both the school and the substitute office. Ms. Trapp also confirmed that, on the morning of September 28, 2004, the respondent had called the school to give notice that he would be late and administrators arranged for his class to be greeted. However, prior to 9:15 a.m., the respondent called to say he would be taking the day off. Ms. Trapp concluded, "Your absence today and your failure to follow

procedures has resulted, once again, in the interruption of the instructional cycle." P-32.

Ms. Trapp observed the respondent's reading and Listening Comprehension (LC) class and sent him a memorandum, dated October 18, 2004, wherein she reminded him of the importance of implementing the process as designed. P-35.

By memorandum to the respondent, dated October 19, 2004, Mr. Solomon documented that he had been notified of procedures for requesting time off. Mr. Solomon wrote further that the respondent must submit to HR the original medical note from a doctor justifying his time off; the medical documentation the respondent had provided covered his absence only from October 18 to 22, 2004; the respondent must submit additional documentation to support additional time off; and the respondent must utilize his three family illness days, before he requested time off under the FMLA, which allows twelve weeks of unpaid leave. P-33.

In a memorandum to the respondent, dated October 19, 2004, Mr. Solomon wrote the following: The respondent had been advised of requirements for taking time off from his teaching duties. To comply with such requirements, respondent should submit the original note from the doctor (justifying any day off) to HR. The documentation the respondent had provided covered his absences only from October 18 to 22, 2004 and he should submit additional documentation for additional days off. The respondent must utilize his three family illness days first, as he was requesting days off for family illness, and he could then request an FMLA leave of absence (LOA), which would entitle him to twelve weeks of unpaid leave. R-11, R-33.

By letter, dated October 20, 2004, Ms. Gibson notified the respondent that the BOE had approved the superintendent's recommendation to appoint him to the Geometer's Sketchpad, at a salary of $28 per hour. P-31.

The respondent testified that he met with Ms. Gibson and Fougere Aupont, of the BOE's HR department, who administered leaves. He testified that Mr. Aupont advised him to take his sick and personal days before using FMLA LOA. Mr. Aupont told him to keep him (Mr. Aupont) informed about the matter and Ms. Gibson and Mr. Aupont advised him to keep all documentation relative to his absences and FMLA LOA. He (the respondent) understood that he

was to submit documentation from a physician, showing that an FMLA LOA was necessary and he understood that he was to provide the school system with prior notice of his absences. The respondent testified that, in October 2004, he applied for approval of days off and for twelve weeks of FMLA days, to care for his mother, on days which would be "intermittent." He testified that he had a "verbal response" and that he believed that he had approval for twelve weeks FMLA LOA. During the hearing of this case, he presented no written approval of any absence or LOA. He testified that, in November 2004, Ms. Gibson and Mr. Aupont allowed him to take "blocks of time" or to take off days intermittently, subject to prior notice to school officials. Mr. Solomon told him that he did not believe that the FMLA allowed intermittent leave days and that he (Mr. Solomon) wanted specifics relative to the purported LOA. The respondent acknowledged that, sometimes, he was unable to give the school prior notice of his absences and that school officials did not have a permanent substitute to cover his class in his absence. See R-11.

Mrs. J.B. had two students in the Trenton public school system and M.B., one of her children, was in the respondent's class. In Mrs. J.B.'s letter, dated November 10, 2004, to Mr. Solomon, a copy of which she forwarded to James Lytle, Ed.D., superintendent of the Trenton public school system, she wrote that she was very concerned about the number of the respondent's absences and the quality of teaching in his absence. She wrote further:

> It is the middle of November and more times than I can count [M.B.] has had no homework. As you know, homework is an essential part of school as well as a great form of communication for the parents. In contrast to previous years, there have been no letters from Mr. Jones explaining what the children are learning or doing in the classroom and I feel he knows very little about my son or his educational needs.
>
> [P-36.]

In a memorandum, dated November 16, 2004, to Ms. Gibson, Mr. Solomon wrote the following: As of that date, the respondent had out for 13 days and he was taking a "few days here and there." The lack of continuity in the respondent's days off caused administrators to "improvise . . . at best." Mrs. J.B. had sent a letter expressing concern about the respondent's teaching. Mr. Solomon requested notice of the BOE's action on the respondent's request for a

LOA and he suggested that a long-term substitute be provided to assure continuity of instruction. R-10.

The respondent testified that, in November 2004, TEA representative Cynthia Price advised him that he was allowed to take intermittent leave days and that, in November 2004, before Thanksgiving, because of his mother's illness, he was absent from his teaching duties for about seven days. He testified that he notified the school that he would be absent and he characterized these as FMLA days.

In a memorandum to the respondent, dated December 1, 2004, Ms Trapp confirmed that, on October 19, 2004, the school administration notified the respondent of the process for requesting an FMLA LOA. Ms. Trapp confirmed, more specifically, that the administration notified him that, in order to obtain FMLA LOA, he was required to request an LOA from the BOE; that he was required to present documentation for the LOA that specified "the exact days" involved; and that he could not "just call in and request such days." Ms. Trapp further confirmed that, on Monday, November 29, 2004, the respondent had called the school system to say he would not be in to teach that day and he requested a FMLA day and that, because he did not comply with the above-described process, the school system would "charge him with an "A" day on November 29, 2004. Ms. Trapp concluded, notifying the respondent that the "number one concern is the education" of the students and that "in your unplanned, sporadic absences, it is impossible to provide your students with a quality education." P-33.

In a memorandum, dated December 6, 2004, Ms. Gibson wrote to the respondent about his absences and, by memorandum, dated December 16, 2004, the respondent wrote that he had requested and received information for applying for FMLA LOA and that, in October 2004, he submitted an application and a request to use his "A, N, and C days in conjunction with the unpaid FMLA days." He alleged that, thereafter, his request was approved, but he continued to receive memoranda regarding "absenteeism and failure to cooperate with board policy." He requested that Ms. Gibson consider this information in maintaining his personnel file. R-12.

In the Teacher Observation/Conference Form, dated December 9, 2004, under "Classroom Observation Instructional Competencies," Ms. Trapp recorded her observation that

the respondent did not organize his lesson according to an observable structure; he did not employ a variety of appropriate materials and activities; he did not make clear the objective of the lesson; he did not foster high expectations for students, he did not effect an atmosphere of order, cooperation and purpose; he did not provide an environment that encouraged student responses and questions, and he did not maintain a classroom appearance that stimulated learning. Under "Professional Competencies," Ms. Trapp noted that the respondent did not satisfy the district's staff attendance and/or punctuality policy; he did not maintain accurate and complete lessons; he did not submit reports, grades, etc.; on time; and he did not follow the content of the district approved course outline. Under "Personal Traits," Ms. Trapp noted that the respondent did not participate in district activities which promote professional growth and he did not assist as assigned to other duties, projects and committees. P-35.

Ms. Trapp prepared a Staff Observation memorandum, dated December 9, 2004, wherein she reminded him that he should have posted the relevant definition and posted and referred to the Graphic Organizer as part of the introduction to the lesson. Ms. Trapp also reminded the respondent that every lesson needed closure and that he should remember to preplan for his lessons. P-35.

Ms. Trapp instituted a trial period for an electronic grade book (E-grade book) and distributed the program for teachers so they would e-mail their grades. The overwhelming majority of the teachers successfully e-mailed their grades according to the E-grade book program. The respondent acknowledged that at least 75% of the teachers were successful with the E-grade book program. The respondent was unsuccessful with the E-grade book program; he never completely mastered it. In an undated e-mail, the respondent invited Ms. Trapp to review his (paper) grades. He testified that, during 2005-06, the E-grade book program was abandoned. R-9.

In a letter, dated December 15, 2004, to Mr. Solomon, with copies to Ms. Trapp and Dr. Lytle, Mrs. J.B. wrote of additional concerns about the quality of education the respondent was providing for her son. She wrote:

On Wednesday, December 8, 2004, I attended a

parent/teacher conference with Mr. Jones and I was really disappointed and upset when I left the classroom.

First of all, there was an absence of material (schoolwork, tests) which would show me what my child had done in the past four months. When I asked to look at them, Mr. Jones told me he did not have anything but he can get it to me by Friday (which did not happen), but he managed to pull out of my child's folder two papers. Also, I did not see any grades from any subject.

I attended many conferences for my two children but this was a first.

I asked Mr. Jones about the curriculum and how far they are in math and what they are learning. He told me that teachers were informed in the beginning of the school year that every school in Trenton has to do the same math program, which meant that he had to change the way he is teaching. He also told me that, unfortunately, teachers need time to adjust to these changes as well. This comment made me feel very uncomfortable and all of this makes me question the whole situation even more. Is he unprepared because he is absent so much or is he absent so much because he is unprepared?

I don't think that the grades on my son's report card are justified. . . . Mr. Jones said that it is the truth that he was absent a lot and so the kids did not have that much homework, . . .

[M.B.] has a B- (80-84%). How is that possible if Mr. Jones tells me that [M.B.] is always the first one to finish his work, because it is easy for him. The problem then is that he has nothing to do so he gets impatient. Of course, he is and there is a simple solution: Motivate him more, challenge him more, give him more work! But, according to Mr. Jones, it is impossible because he never had some many children in the class who don't want to or can't learn. Wrong!

. . .

I feel strongly that this teacher should be replaced by someone who wants to do the job. Do not let this behavior continue.

I look forward to hearing from you soon.

[P-36.]

Mr. Solomon testified that he met with the respondent relative to Mrs. J.B.'s concerns

and that the respondent stated that he did not have documentation relative to his teaching and M.B.'s grades. Thereafter, Mr. Solomon and Ms. Trapp continued to monitor the respondent's performance.

In the Teacher Observation/Conference Form, dated December 12, 2004, under "Classroom Observation Instructional Competencies," Ms. Trapp recorded her observation that the respondent did not organize his lesson according to an observable structure; he did not employ a variety of appropriate materials and activities; he did not make clear the objective of the lesson; he did not use the vocabulary of instructional curriculum guides; and he did not maintain a classroom appearance that stimulated learning. Under "Professional Competencies," Ms. Trapp noted that the respondent did not satisfy the district's staff attendance and/or punctuality policy, he did not maintain accurate and complete lessons, and he did not submit reports, grades, etc., on time. Under "Personal Traits," Ms. Trapp noted that the respondent did not participate in district activities which promote professional growth. P-35.

Ms. Trapp testified that teachers had training and were provided materials for the program of scheduled, very scripted lessons they were to present to their students. Materials and graphic organizers were made available to teachers to post, to facilitate visual learning, so students would see the objectives of the lesson. Ms. Trapp prepared a Staff Observation memorandum, documenting her observations of the respondent's mathematics lesson on December 17, 2004. The respondent had not posted the materials for the lesson and Ms. Trapp did not see that he presented an introduction to the lesson. The respondent did not comply with the scripted lesson plan and the lesson, as he presented it, did not appear to Ms. Trapp to challenge his students. When the bell rang to signify the time to start with reading, Ms. Trapp observed a lag in the respondent's compliance with the schedule. P-35.

Ms. Trapp also provided the respondent with a detailed Staff Observation memorandum, wherein she referred to the TERC Investigations teachers' manual and she wrote that, although the respondent provided an introduction, he did not provide an acceptable lead into the lesson designed and that, in the future, he should use the introduction provided by the program. Ms. Trapp concluded, advising the respondent that he should raise the level of his instruction. P-35.

In a memorandum to the respondent, dated January 25, 2005, Ms Trapp referred to her "Formal Math Observation," on December 17, 2004, during which she found that the respondent was unprepared. Ms. Trapp acknowledged the respondent's representation that he was facing "hardships." However, she pointed out that her December observation preceded the "hardships" that he represented began in early 2004. Finally, Ms. Trapp wrote:

> You also mentioned the fact that you had missed a number of preparation periods. Please be reminded that, as per your contract, you are compensated for those time periods. But, as a professional whose main objective is to provide quality instruction, to the students in your charge, it would be to your advantage to NOT rely entirely on those times to prepare your lessons.
>
> [P-33.]

Ms. Trapp testified that she walked the respondent through the computer system and spreadsheets for recording, calculating, and reporting grades, but he did not efficiently make use of the system. By memorandum to the respondent, dated January 25, 2005, Ms Trapp confirmed the following:

> The administration had directed the respondent to provide to her a copy of his Homeroom and Reading Profile Sheets (from the E-grade book), but he had not submitted them. On December 10, 2004, Mr. Solomon and she had met with the respondent and reviewed his class profiles and student performance for the first marking period and he had not entered grades in his E-grade book. They directed him to begin documenting grades on a consistent basis, so that he would be prepared for the next marking period to avoid repetition of his inability, during a Parent/Teacher conference, to demonstrate for parents the basis of their children's grades.
>
> On January 3, 2003, 2005, Ms. Trapp had directed all staff to complete their mid-term deficiency notices, send them home, and provide her with copies of their Homeroom and Reading class profile sheets from the E-grade book. The respondent had received upsetting news that his sister had passed away and, understandably, he left work in the middle of the week.
>
> When the respondent returned to school, Ms. Trapp sent a memorandum, dated January

18, 2005, directing him, by January 20, 2005, to send the deficiency notices and to provide her with a copy of his Homeroom and Reading class profile sheets from the E-grade book.

By January 20, 2005, the respondent had not submitted the profile sheets and, during a meeting with the fifth grade teachers, Ms. Trapp repeated her direction to him to provide the profile sheets and, at his request, she agreed to an extension to January 24, 2005.

On January 25, 2005, Ms. Trapp entered the class room of the respondent, who had not submitted the profile sheets, and he stated that he did not have access to a computer but that he would provide her with the paper grade book and Ms. Trapp advised the respondent that he could use his class computer during his preparation period.

Despite the above, as of dismissal time on January 25, 2005, the respondent had not provided M. Trapp with "ANY copy of ANY grades." P-33.

The respondent's conduct "could be interpreted as complete insubordination" and warranted the recommendation that he not receive an increment for the 2005-06 school year. P-33.

Ms. Trapp directed the respondent to record his students' grades in the E-grade book and to submit a copy of his homeroom and reading class profile sheets.

On February 15, 2005, Ms. Trapp prepared a detailed memorandum of her observation of the respondent teaching that day. Ms. Trapp noted that the respondent did not begin the lesson at the time scheduled, causing the loss of 20 minutes of instruction time. Ms. Trapp noted that, in September 2005, the TERC program was implemented in the district and there had been regular staff development and training. She recommended that the respondent attend the training to avoid future loss of instructional time. P-35.

The respondent testified that the E-grade book program, which Ms. Trapp had distributed, had a glitch and that his attempts to enter his computer and to provide the information to Ms. Trapp, were unsuccessful. He testified that he had his grades in a green (paper) grade book. He testified that, from September to December 2004, he had been out of work about 11 school days and that (apparently thereafter) he had been out on FMLA days numerous times and for a total of six weeks, "a week here and two weeks there" and a substitute had covered his class. He testified that it was after he had been away from his teaching duties that Mrs. J.B. inquired about

his inability to produce the record of her son's grades. He also testified that the inquiry came during a report card handout, which was not a time to review the record of the students' grades, and that her inquiry had not (as Ms. Trapp wrote) come during a Parent/Teacher conference. Further, he offered to gather the student's grades and meet with the mother at another time. He testified that, by January 25, 2005, he had completed and submitted the reading profile information from his homeroom and that, thereafter, he submitted the class profiles.

In a memorandum to the school system, dated February 17, 2005, the respondent wrote the following:

> It is necessary that I attend to family matters. I will be absent from school from February 18th through the 24th. Please secure a substitute teacher for my fifth grade students at Parker Annex School. I apologize for the short notice but as you know this is an urgent matter.
>
> [R-11.]

Although (as written above) the respondent advised school officials that he expected to be out of work through February 24, 2005, he testified that, on February 22, 2005, he telephoned and left a message for Ms. Trapp that he "would be in" on February 23, 2005, and that, on the morning of February 23, 2005, at 8:15 a.m., he reported to the school "with the intent of working." By that time, Ms. Trapp, who had already obtained a substitute for the respondent, asked him what he was doing in school. The respondent alleges that Ms. Trapp (who was dealing with a fight among three students) told him to call Mr. Aupont and to help the substitute get situated in his class and that he did so. At about 8:30 a.m., Ms. Trapp entered the respondent's classroom where he and the substitute were present, as was Anthony Rogers, who was taking attendance. Ms. Trapp told the respondent he should call Mr. Aupont "in the near future" and she left the classroom. The respondent then left the classroom and went home and called Mr. Aupont, who told him that, once the teacher arrives, the substitute should leave and that he (the respondent) should return to his classroom. The respondent returned to school and Ms. Trapp told him that he should tell the substitute to fill in for Ms. Cody until she arrived in class. R-8. Ms. Trapp e-mailed the respondent, expressing concern about the events of February

23, 2005, and requesting that he explain why he left his class, etc. R-11.

Ms. Trapp testified that, on March 1, 2005, the respondent was late picking up his students in order to escort them from their special class to his class and, in an e-mailed memorandum him, dated March 1, 2005, she wrote the following: His scheduled daily preparation time was 1:00 to 1:40 Monday through Friday. On March 1, he did not return to his classroom until 1:55, i.e., fifteen minutes late. In the future, he should be prompt when picking up his students from their specials. P-34.

In a memorandum, dated March 1, 2005, Ms. Trapp reminded the respondent that she had not received his response to her earlier memoranda, requesting his version and an explanation relative to the (above-described) events of February 23 and March 1, 2005. P-34. The respondent prepared an undated e-mail with his account of the events of February 23, 2003 and he testified that Ms. Trapp appeared to be satisfied with his account. R-8.

In a memorandum to Mr. Aupont, dated March 12, 2005, the respondent wrote the following: In February 2004, his mother was diagnosed as having multiple myeloma and he notified the Parker administration and staff of her "potentially critical condition." At that time, he was not familiar with procedures for applying for FMLA days. In September 2004, he informed the Parker administration and staff that he had received the information necessary for applying for FMLA leave. In October 2004, he submitted an application for FMLA days "along with a request to use [his] A, N and C days in conjunction with the unpaid FMLA days." His mother does not drive and his brother and his sister were in the military service and unavailable, so his care of his mother was "mandatory." Although his FMLA request was approved, he continued to receive memoranda regarding absenteeism and failure to cooperate with board policy and the reprimands did not acknowledge that he requested use of FMLA days. "Except for cases of emergency," he notified the Parker School prior to absence using FMLA days. On March 10, 2005, he and Mr. Aupont had met and Mr. Aupont requested that he account for the days he requested to use under the FMLA. R-11.

The respondent was absent from his teaching duties in March and April 2005 and his testimony about the matter can be summarized. In March 2005, he learned that an ambulance

had taken his mother to the hospital (in Providence.) There a hospital worker repeatedly and unsuccessfully attempted to take a blood sample from her and she became upset. Without notice to the school system, he was absent from his teaching duties, so that he could travel to Providence. At the hospital there, he came to believe that his mother had been "mishandled," causing him to be "completely blown away." He called TEA officials Price or Moore and, thereafter, he spoke with Jim Lopes, another TEA official. Mr. Lopes agreed that he was "in no condition to be in school" and told him that he (Mr. Lopes) would "take care of everything." He traveled from Providence to Florida where he entered an unspecified facility for "counseling." He remained in Florida for about 30 days, during which time, (in addition to counseling) his activities included going to barbeques, going to a gym, going on group trips, and going shopping. During that time, he did not communicate with the school system and he did not specify any mental or medical condition that prevented him from performing his teaching duties or that caused his absence from work. He left it to Mr. Lopes to "handle the school." He believed that he may have been suffering from a traumatic incident that occurred during his childhood and, after about 30 days, he was able to get to the bottom of the issues troubling him. He believed that his allowable leave time would extend to May 1, 2005 and, on April 15, 2005, the counseling facility in Florida released him to return to his teaching duties. He returned to school, thinking he would return to his teaching duties, but that Mr. Solomon and Ms. Giddens-Green advised him that he should see the BOE's physician to be cleared to resume teaching. He saw the physician, who cleared him and he returned to school in May 2005, by which time he had exceeded his allowable leave, so that he was docked about two weeks pay.

Ms. Trapp testified that she monitored and personally covered the respondent's class and, in a memorandum, she wrote the following to him: During time that should have been used for reading instruction, he allowed his students to play games and color. The respondent's students should have been engaged in substantive work, such as preparing for the Terra Nova® tests. The respondent's students were on a wide range of pages in their Terra Nova® Test books, the respondent had not reviewed their work books, and they were on a low-numbered page. Teachers were allowed preparation periods daily and the copy machine was available in the evening. Nonetheless, while the respondent should have been providing instruction in Language Arts/Writing, he was using the copy machine while his students were in the hall making noise and administrators had to quiet them. P-36. Administration (Ms. Trapp) provided coverage of

the respondent's class (while he attended training) and he left no evidence of the lessons he had covered and checked. In response to Ms. Trapp's request, the respondent had not produced an organized record of his students' grades until months later.

In the Teacher Final Evaluation Form for the school year, dated April 8, 2005, under "Areas of Strength/Commendations/Exceptional Accomplishments," Ms. Trapp, as evaluator, wrote that the respondent had a demonstrated ability to relate to his students and their concerns. She noted that, as of March 31, 2005, the respondent's attendance rate was only 78%, that his absenteeism for the prior three years exceeded the expected rate, and that he had excessive absenteeism. She wrote that, even acknowledging that the respondent had requested FMLA leave and factoring in these days, his absenteeism still exceeded the expected five%. She wrote that the respondent's planning was inadequate and that he made inconsistent use of instructional strategies, making it impossible to gauge the level of growth toward the goal of assisting his students in acquiring content knowledge and that he lacked instructional and behavioral consistency. He did not comply with the time blocks for instruction and he did not present and complete instruction in the prescribed sequence of days. She listed numerous areas of improvement for the respondent to provide his students with quality instruction. For example, he should "[d]evelop and implement lesson plans with the following structure: Introduction, Direct Instruction, Active Instruction and Closure." P-35. The respondent did not disagree that his attendance was as stated.

In the spring, the BOE's students took standardized tests. On April 18, 2005, the elementary school students took the TerraNova® test, to provide a measure of success, including knowledge, skills, and concepts in areas, including Reading/Language Arts, Language, Science, Social Studies, and Mathematics Computation. R-13. The elementary school students also took the NJ ASK test to provide a measure of success in Language Arts and Mathematics. The respondent submitted documents showing the following: (1) Of the 17 fourth graders who took the test who, during the 2005-06 school year, were in Ms. Cook's fifth grade class, none scored below the 200 standard in both tested areas. (2) Of the 18 fourth graders who took the test who, during the 2005-06 school year, were in Ms. Butler's fifth grade class, only four scored below the 200 standard in both tested areas. (3) Of the 14 fourth graders who took the test and who, during the 2005-06 school year, were in Ms. Alvarado's fifth grade class, six scored below the 200

standard in both tested areas. (4) Of the 10 fourth graders who took the test and who, during the 2005-06 school year, were in the respondent's fifth grade class, six scored below the 200 standard in both tested areas. R-14.

By letter, dated May 3, 2005, Ms. Gibson notified the respondent of the upcoming meeting when the BOE would consider the recommendation to withhold his increment for the upcoming school year and provided him with documents in that regard. P-36.

On May 24, 2005, Mr. Solomon and Ms. Trapp met with the respondent and a TEA representative and they discussed their recommendation, based on his performance and attendance, that his increment for the 2005-06 school year be withheld. Mr. Solomon confirmed the meeting by way of a memorandum. P-36.

The respondent testified that, in June 2005, he took five additional FMLA days to provide care for his mother and he believed that he notified the school of the circumstances.

Ms. Trapp described her observations of and experience with the respondent. The respondent did not have a good work ethic. His attendance was deficient. Preparation is necessary for a teacher to efficiently present a lesson and the teachers' contract provided for a preparation period every day. However, the respondent did not prepare sufficiently. Hand-held counters, other visual materials, and graphic organizers were available to teachers. However, the respondent did not make efficient use of the materials in presenting his lessons. He did not implement the program prescribed for instruction. He did not timely submit lesson plans and he did not maintain records required to document the education he was to provide to his students. He failed to have his class in place ready for instruction. He did not teach lessons as they were designed to be taught. He failed to ask his students critical questions to take them to the next level and develop critical thinking. He did not provide instruction sufficient for his students to move up to the next grade and he did not give homework assignments consistent with the school system's learning program. The respondent's students did not perform as well as they had in their previous school year. Terra Nova tests showed that his students' achievement dropped. Ms. Trapp provided the respondent with materials and recommendations for improvement of his performance and educators, including a reading facilitator, provided assistance to the respondent

by presenting model instruction using the programmed materials. Heather Jackson, Ed.D., observed the respondent and she found a lack of preparation on his part. Ms. Trapp walked the respondent through the computer system with spreadsheets for use in recording and reporting grades, but he was unable to use them. The respondent's grade book did not include details, including dates, subjects, and other factors sufficient to establish the bases for the grades he gave to his students. He could not demonstrate to parents a reasonable record to substantiate their children's grades. He failed to accept recommendations made for his improvement. In summary, the respondent did not demonstrate significant improvement in teaching, recordkeeping, etc. and he was inadequate as an educator.

Ms. Trapp testified that a teacher should prepare and provide his or her students with quality lessons and her testimony and opinions were based on the respondent's performance. Relative to the respondent's contention that Mr. Solomon was unfair with him, she testified that Mr. Solomon never told her that she should give the respondent a bad evaluation.

The 2005-06 School Year

During the 2005-06 school year, Mr. Solomon remained principal of the Parker schools and Deborah Giddens-Green was the vice principal of Parker Annex II, which had third, fourth and fifth grade classes.

Ms. Giddens-Green received her bachelor's degree in education and a master's degree in education from Trenton State College (now The College of New Jersey) and she is presently in an Ed.D. program at Rowan University. She is certified as an elementary school teacher, a supervisor and an administrator. Between 1980 and 1985, she served as a substitute teacher and a full-time teacher in the Trenton public school system. From 1985 to 1995, she was employed in private industry. In 1995, she returned to public education in the Trenton public school system, serving as a teacher and as a technology and literacy facilitator, in which capacity she trained the school system's staff in the SFA program's methods and materials. In 2004-05, she served as vice principal in the Grant Elementary School and, during the 2005-06 school year, she served as vice principal for Parker Annex II.

Ms. Giddens-Green testified that she did not know the respondent before the 2005-06 school year.

The respondent testified that, in August 2005, Gloria Shank, a BOE secretary, advised him that he had been reassigned to teach Parker Annex II's one fifth grade. He testified that in his Parker Annex II classroom area he found only about 12 desks, which were in poor condition and mismatched chairs and that he took desks and chairs from other classrooms. Also, using his personal car, he transported materials, including old social studies books he had accumulated, to his Parker Annex II classroom area. The respondent did not notify administrators that he was going to do this and, in September 2005, Mr. Solomon sent a memorandum directing teachers not to move BOE property from one building to another. The respondent testified that he later returned a chair to the other classroom.

The respondent testified that, during the 2005-06 school year, he was (again) absent more than 21 days and that the causes of these absences were the same as in the previous year, plus his own illness caused some absences. Ms. Giddens-Green testified that records she reviewed for the 2005-06 school year showed that the respondent's attendance was below the 95% standard. Ms. Giddens-Green prepared a memorandum, dated April 30, 2006, and a chart showing the record and pattern of his absences and she discussed these with him. P-75. The respondent did not disagree with her findings and he stated that he was "going through some issues" (related to his absences.)

Ms. Giddens-Green testified that she met with and monitored teachers; by way of TECHPATHS, she checked to confirm that they had submitted information and lesson plans every two weeks; and the respondent failed to submit timely or adequate lesson plans. Availability of the lesson plans was necessary so that someone who entered a teacher's class would know what was to be taught.

Ms. Giddens-Green testified that, during the 2005-06 school year, she also found deficiencies in the respondent's performance. Ms. Giddens-Green found, for example, that he taught his students below their grade level, that he had not put the students' learning centers in place, and that his students did not understand his lesson objectives in the core subject areas.

The respondent did not use the prescribed instructional plan and materials for such students, and he had not distributed and used an available science kit. The respondent did not appear to utilize pacing guides and rubrics. History (social studies) books remained in an unopened box and he had not taught from them. In December 2005, without notice to the administrators, the respondent left the school premises during a preparation period, preventing the specials teachers from picking up their students on time. Ms. Giddens-Green also observed that the respondent's students did not respect him. The respondent did not timely submit his quarterly information, potentially delaying progress reports about students. Ms. Giddens-Green was very concerned and she wrote to the respondent, expressing concerns about his performance of his teaching duties. She testified that the respondent's basic deficiencies were lack of preparation, ineffective classroom management, and lack of consistency with his students, resulting in part from his poor attendance.

During the 2004-05 school year, Parker Main had attained AYP and Trenton school administrators wanted Parker to attain it again (in the 2005-06 school year.) For example, the administrators did not want Parker to exceed standards for class sizes. The respondent testified that the administrators also wanted to avoid placement of students with lower academic abilities and with behavioral problems in Parker Main in order to avoid their lower scores from preventing Parker from again attaining AYP. The respondent testified that, consequently, the administrators moved such students from Parker Main to Parker Annex II, an "overflow school," for the 2005-06 school year. The respondent testified that many of his 2005-06 school year students were "at risk" children from deprived backgrounds. He testified that, for example, such parents were not at home with their children and they did not see to it that their children received proper supervision and care. The Trenton public school system provides breakfast for indigent children and the respondent testified that some parents of such children did not see to it that they arrived in time for breakfast. When these hungry students were in his class, they repeatedly asked what time it was and when they could go to lunch and they did not concentrate on their academic work. The respondent testified that many of his Parker Annex II students were academically below the fifth grade level, some could not read or spell, and he did not grade them at a fifth grade level.

The respondent testified that, at the start of the school year, he reviewed rules of

classroom behavior, including: students must raise their hands before speaking, students must not leave the classroom without permission, students should not fight, students should put their names on their papers, students should do their homework every night, students should put their homework in the appropriate homework box, and students should treat others as they would like tot be treated. Additionally, he instructed students that, if there was a problem, they should see him and to try to solve it. Most of his students understood the rules and most were "fine." However, some misbehaved, did not respect him, or were otherwise problematic. Some of his students did not understand and/or did not comply with the rules of behavior and just did what they wanted to do. For example, he had an angry and aggressive student with a longstanding feud with another student and administrators should not have placed them in the same class. Another student falsely alleged that he (the respondent) had said that the student would grow up to be a "drug dealer", but that he met with the parent and the parent acknowledged that he had not done so. Another "very energetic" student called his fellow students "niggers" and told his fellow students that their mothers were "strippers and pole dancers" and he (the respondent) met with the student's parent and BOE educators to get the student to behave properly. Another student beat and kicked a first grader until pulled off and security escorted him to the office and, the respondent testified, Ms. Giddens-Green was made aware of what had occurred, but he knew of no consequence for the student.

The respondent testified that he tried to accent the positive with his students. Sometimes he did not immediately respond to a student's misconduct; feeling it was better to wait for, e.g., lunch time, to speak with and counsel the student. The respondent testified that Parker Annex II did not always have a guidance counselor available and that, as a more effective means of control, he and fellow teachers Katherine Flowers and Nancy Cody collaborated and sometimes referred troublesome students to one another, depending on who had better rapport with certain students. The respondent pointed out that, in October 2005, Ms. Giddens-Green also sent him a note complimenting his work with his students' behavior issues. R-18. Also, in a school publication's column entitled "My African-American Heros" (sic), a student wrote, "My hero is Warren Jones. He is my hero because he helps me learn the stuff I need to know." R-22.

Ms. Giddens-Green obtained numerous examples of the respondent's students' papers from the 2005-06 school year on which he had written large C's (conventionally showing that the

teacher had examined a student's work and determined it to have been timely and competently performed) but on which the respondent had not corrected or noted arithmetic, spelling and other errors in his students work. The uncorrected errors were obvious and numerous, for example: in arithmetic: "8 + 1 = 8," "2 x 3 = 8, "6 x 7 = 16," "9 x 4 = 17," and in writing: "crack's" (possessive) instead of cracks (plural), "earths (plural) instead of earth's (possessive), "exsidoe" instead of explode, "Gawtamal" and "guetemola" instead of Guatemala, "Hawiic" instead of Hawaii, "volcanoe," instead of volcano, and a number of words that were unintelligible. P-75, "Front Pocket."

The respondent testified that he marked students' papers with a "C" to show that they were "pretty good work" or a "pretty good effort" or an "honest effort" by the students. He acknowledged that he did not grade all of his students' papers all of the time. He alleged that it was "impossible" for him to correct all of his students' papers. He had to "pick and choose" in making corrections. He testified that, while he was working in class with one student or a group, another would interrupt him and/or request that he look at a paper and he would tell such a student to just put the paper somewhere so that he could look at it later. The respondent's students' papers were displayed on his classroom wall and school administrators pointed out to him that some of the papers displayed had errors and they recommended that only A or A+ work should be displayed. However, the respondent testified that, if only A or A+ papers were displayed, the work of some of his students would never be displayed. The respondent felt that the school system treated the Parker Annex as an unwanted "step-child." He testified that, for example, during the 2005-06 school year, tickets to a circus were made available to Parker students but not his class. His testified that he encouraged his students to believe that "they can be successful, even if it's not academically, by "being the best person they can be" and that "more than anything, they should learn that there is nothing they can't do." The respondent testified that he allowed his students additional time to complete their assignments.

By way of a January 26, 2006, memorandum, the respondent responded to Ms. Giddens-Green. He apologized for the delay in submitting his student and sample work for the "Strategic Inquiry and Shadow Project." He represented that the death of a friend and his attending a funeral had hindered his gathering of the material. R-17. The respondent testified that, during the 2005-06 school year's first and third marking periods, he taught history and social studies

science and, during the second and fourth marking periods, he taught science. In his memo responding to Ms. Giddens-Green, he wrote that he received Social Studies materials on January 24, 2006, but because he would not resume teaching social studies until the third marking period, he did not feel compelled to distribute the materials. He also wrote that his students' progress was "hindered" by the following: "1." He did not know that he would be in the Parker Annex II building until late July. "2." He did not receive a "Copy Machine, Math or Reading Materials until late November." "3." He did not receive his "Social Studies Materials until January 24, 2006. "4." He did not have a computer teacher until January. "5." There was a lack of laptops that "STAR-W Project [had] promised." "6." He had been "admonished several times for transporting the outdated social studies books [he] used last year and requesting excess materials from Parker Annex I." R-17. He testified that, not having the new books during the first marking period, he used the older books. He testified that a box of science materials did not arrive until January 24, 2006 and, although Ms. Giddens-Green had told teachers that they would be instructed on their use, there was not such instruction, the teachers did not know what to do with them, and he made little use of them. The respondent also testified that he discussed with Ms. Giddens-Green his concern that his class was conducted in an area that was open to distractions from students passing through that adversely affected his students' performance on the NJ ASK test.

The respondent testified that, to avoid supervision by Mr. Solomon, in February 2006, he completed a form to request a transfer from the Parker Annex II and that, at the end of the 2005-06 school year, he spoke to Ms. Trapp about a possible transfer. He testified further that, since he believed that, at the end of the 2005-06 school year, Mr. Solomon was transferred from the position of principal of the Parker schools, he did not submit the form to HR. Mr. Solomon contradicted the respondent. He testified that, because he had had success in a previous school, Dr. Lytle asked him to consider reassignment to a problematic school in order to help it achieve success and that the possibility of reassignment became known within the school system. However, he was not reassigned.

Betty Blackwell is certified as a counselor, she has been employed in the Trenton public school system since 1974, and she deals with students with behavioral problems. She also served as a TEA representative. She testified that, during the 2005-06 school year, the Parker School

was closed for reconstruction and that the Parker Annex II was not designed to serve as a public school, but it was adapted and used for that purpose. The appellant's fifth grade class, the library, and a stage where music class was conducted were all on Parker Annex II's third floor and it was not a good environment for teaching or learning. P-79. Ms. Blackwell testified that, during the school day, students and parents passed through the third floor area, coming to and going from her office and the sounds from them and from the classes that were conducted there could be heard. Ms. Blackwell requested improvements, but they were never made. Since she served as a school counselor in the Parker Annex II, she got to know the appellant and she counseled the appellant's students. She saw nothing unusual about the appellant's students and their test scores spanned several levels. She believed that, during the 2005-06 school year, the appellant's fifth grade class students performed better than other students.

Lori Novis holds a master's of library science degree and, between 2005 and 2007, she served as the librarian and media specialist in the Trenton public school system. In 2005, she was assigned to the Hedgepack-Williams Middle School. From September 2006 to January 2007, she was assigned to Parker Annex II library, where she conducted classes. The library, the area where the respondent taught his fifth grade, the stage where Benjamin Seabrook conducted music classes, an area for club meetings, and the teachers' lounge were all in this area. Also, students passed through the area. Sounds from students, Mr. Seabrook's musicians, and others could be heard in the area and it was an environment that interfered with teaching and student concentration.

Ms. Novis' typical day included five classes, during which she instructed the students on how to use the library, she read stories to them, and she escorted them back to their regular classrooms. Ms. Novis had the respondent's students in her classes and she found they had a wide range of abilities. Ms. Novis heard the respondent discuss with his students his own upbringing by a single parent in an urban environment and the importance of good character and she believed that his students respected him. Ms. Novis was aware that administrators regularly observed the respondent's classes and, in December 2006, the respondent advised her that he was the subject of tenure charges. Because she believed that the respondent was an exceptional teacher, she offered to assist him. Ms. Novis made the BOE administrators aware of the problems in the library area. R-27. Other classrooms had internet access, but the respondent's

class area did not have it. Ms. Novis and the respondent asked the administration about internet access and, by October 2006, a long cable connected to a jack in the library was used to gain internet access for the appellant's class. The administration advised her that the BOE did not have sufficient money for the changes and resources that she thought were needed.

Mr. Solomon and Ms. Giddens-Green received a copy of a letter, dated March 15, 2006, on the letterhead of Mark G. Agresti, M.D., Diplomat of the American Board of Psychiatry, stating that the respondent had been under his care since March 15, 2006, for a "medical condition", that the respondent would remain under his care "till medically cleared," and that the respondent had a "temporary discharge date of June 15, 2006." P-75, Other Communications. This was the first notice to the administrators that the respondent would be absent from his teaching duties during that period and they received no diagnosis for him. Mr. Solomon directed Ms. Giddens-Green to document that the respondent was on medical leave. Another letter, dated April 14, 2006 and also on Dr. Agresti's letterhead, stated that the respondent had "successfully completed treatment," that he had a "discharge date of April 4, 2006," and that he was "medically cleared to return to work with no restrictions as of April 17, 2006." P-75, Other Communications. The respondent represented that he wished to return to work on April 17, 2008. However, the respondent provided no diagnosis accounting for his absence and Ms. Giddens-Green testified that HR requested copies of medical records related to his absence and required medical clearance for his return.

Mr. Solomon and Ms. Giddens-Green signed a notice of Withhold of Increment/Tenure Charges, dated March 17, 2006, with supporting documents attached. The notice listed as Reasons:

> Mr. Jones is a veteran teacher of 8 years, but his methods of instruction and interactions with students resembles that of a novice teacher. After providing Mr. Jones with action plans, professional development, and peer observations, he continues to:
> - not create a supportive learning environment
> - not consider preferred learning styles
> - not connect learning to real-life issues
> - not give feed back to his students
> - not build in time for reflections
> - not provide for student choice and

not negotiate the curriculum

[P-40.]

By letter, dated April 25, 2006, Ms. Gibson notified the respondent and administrators that the respondent was on administrative leave and authorized to be absent and that an appointment with Perry Shaw, M.D., was scheduled to determine his fitness for return to work. P-41. An HR Personnel Action Request, dated May 1, 2006, stated that the respondent should return to duty. P-43.

Ms. Giddens-Green signed a Teacher's Final Evaluation Form, dated April 28, 2006, recommending that the BOE not rehire the respondent for reasons, including the following: the respondent failed to plan for his lessons to gain and maintain his students' focus on the lesson; he had lesson plans directly from the textbook, which did not consider different learning styles in his classroom; he failed to conduct lessons that met objectives of NJ CCCS; he failed to use posters and charts in his lessons; he failed to use science kits; he did not use TECHPATHS; and he failed to develop learning centers. P-42. By letter, dated May 4, 2006, Ms. Giddens-Green confirmed with the respondent that they had met to discuss the recommendation that his increment for the 2006-07 school year be withheld and she notified him that the BOE would consider the matter. P-44

Ms. Giddens-Green found some positive aspects in the respondent's teaching, but she testified that his performance had key deficiencies and these included his lack of preparation for class, (ineffective) classroom management, and inconsistent attendance, resulting in failure to provide students with needed consistency. Ms. Giddens-Green testified that educators should recognize that all students do not learn and progress in the same way and at the same rate and that some learn through the arts or "by doing" and teachers should teach accordingly. However, she testified the respondent did not teach accordingly.

Ms. Giddens-Green, an SFA facilitator, testified that the respondent's students' work (as shown by the above-described and above-quoted examples) was below their grade level. Ms. Giddens-Green found that the respondent's students' writing did not demonstrate that they had thought through the subject matter and their writing was too brief and/or was incomplete. In

mathematics, the respondent's students should have progressed beyond simple multiplication and division, but they did not have basic mathematics skills. The respondent's class was not neat. He did not open boxes of Social Studies materials in his classroom that he should have utilized to provide instruction and continuity for his students. Ms. Giddens-Green explained that as students move year-to-year though the school system, CCCS are benchmarks to gauge academic progress and determine whether students are meeting State standards. Quarterly assessments are utilized to document the school district's students' progress, but, until requested several times, the respondent did not report scores for that purpose.

In the spring of 2006, the Trenton public school elementary school students again took the NJ ASK test to provide a measure of success in Language Arts and Mathematics. R-15. Ms. Giddens-Green testified that, as vice principal, she looked at Parker Annex II's students NJ ASK scores and she saw that, after being in the respondent's class, some of his students' (mathematics and language arts) scores dropped substantially. In mathematics, only two improved and in language arts, only four improved. Ms. Giddens-Green testified that, during the respondent's absences, teachers including Andrea Harris, Denise Schoch, and Ebony Tucker covered his class; that those teachers appropriately taught the respondent's students; and that, for example, as a result of their teaching, a student who was above grade level and who was not sufficiently challenged by the respondent's teaching, improved his writing skills. Ms. Giddens-Green testified that students looked to see who had been honored with their photographs posted as the student of the month and that the respondent also failed to provide a photograph for that purpose.

On May 5, 2006, after the respondent left his students on the stairs without supervision, out of his view and near an exit, Ms. Giddens-Green met with him about the potential for trouble of such circumstances and his response was that they were going outside to play and he was just getting his mail.

Ms. Giddens-Green testified that, having observed the respondent, she had concerns about his teaching performance. About March 2006, she spoke with Mr. Solomon and Dr. Lytle about the respondent and, about April 2006, she prepared an "Unsatisfactory Evaluation Report" of the respondent's performance during the 2005-06 school year with numerous exhibits. The exhibits included records of observations of the respondent's performance; samples of students'

work; memoranda, letters, and e-mails; charts and graphs related to the respondent's attendance (and absences); evaluations of the respondent's performance over the years; records related to increments to this salary; and the Teacher Final Evaluation Form. P-75.

Ms. Giddens-Green made suggestions to the respondent to improve his performance up to and including June 2006. She described the respondent as having a "wonderful personality," but his teaching did not improve. Ms. Giddens-Green denied harassing the respondent and asserted that her concern was about his performance as a teacher.

The respondent forwarded to Ms. Giddens-Green a memorandum, dated May 12, 2006, wherein he wrote that he was disappointed with his evaluation, "Especially considering we are an overflow school that was conceived a month before school started in September of 2005." He noted that, in September and October 2005, Ms. Giddens-Green had praised him for assisting first-year teachers and he concluded, "I was not the best teacher, however, I should have rated much higher considering he adversities I had to overcome." P-47.

On June 14, 2006, Ms. Giddens-Green conferred with the respondent and forwarded to him a memorandum wherein she summarized the conference, which identified problematic areas since his return from his LOA:

1. Tendency to allow your class to wander in the halls while you are on the computer.
2. Releasing the students before the specialists have arrived or verified their presence.
3. Lack of effective preparation of materials, possibly resulting gin poor classroom management.
4. Improperly holding conferences with parents and child study member on the second and main hallways of the building.
5. Leaving the room in disarray, students should be taught to respect their surroundings by picking up debris from the floor.

[P-52, P-75, Other Communications.]

Ms. Giddens-Green testified that she witnessed the above-described conduct, except that specialists reported "2." She testified that a custodian asked her to observe the condition of the respondent's room, which was disorganized with papers thrown about. She testified that, when a

teacher takes pride in his room, students will also. When she discussed the condition of the respondent's room with him, his response was, "You know what kind of students I have."

By letter, dated, June 27, 2008, Ms. Gibson notified the respondent that the BOE had approved the superintendent's recommendation to accept his return to his teaching duties from a medical LOA without pay, effective May 1 to June 30, 2006. P-50.

Notice having been provided to the respondent, the BOE considered the administrators' recommendation that an increment for the 2006-07 school year be withheld. P-51.

The 2006-07 School Year

During the 2006-07 school year, Mr. Solomon remained the principal of the Parker Schools and RaShawn Adams was the building principal of Parker Annex II.

Mr. Adams received a bachelor's degree in education and history and an M. Ed. in education from Trenton State College (now The College of New Jersey.) He holds certifications as a teacher, school administrator, supervisor and principal. He has served as an elementary school teacher in the East Orange public school system, as an administrator in the Irvington public school system, and as a vice principal in the Newark school system. He then began service in the Trenton public school system as principal of an elementary school and, during the 2006-07 school year, he was vice principal in the Parker Annex II. He testified that, despite recommendations based on merit, because of "politics," the BOE did not renew his contract and thereafter, he began employment in another school system.

The respondent received an Employment Contract for the 2006-07 school year and he again taught the one fifth grade in Parker Annex II. P-46.

At the start of the 2006-07 school year, Mr. Adams held an organization day with the Parker Annex II staff, he reviewed with the staff their duties under their contract and the staff handbook, including those related to attendance, his expectations, and consequences for the staff members who failed to meet their duties. P-62. Mr. Adams met the respondent when they began

the 2006-07 school year. Mr. Adams found that the Parker Annex II building was not the best for teachers or students.

Mr. Adams used forms to check and document his staff's compliance with their teaching duties and to notify them of improvement needed. He explained that he checked to confirm and document whether there was continuity and rigor in instruction. He emphasized that teaching must be consistent with the CCCS, so that students develop and acquire skills and knowledge in content areas such as math and reading. Mr. Adams explained, for example, that each morning, fifth grade students should use their journal entries to focus on the day and thereby enhance thinking and that they learn words in context for effective expression and correct spelling. Mr. Adams used his "Lesson Plans Monitoring Checklist" form documented the staff's compliance with their duty to timely file lesson plans consistent with the CCCS; to include in the plans teaching strategies, activities, and assessments; to set forth objectives; to assign homework; and to submit weekly assessments. Mr. Adams testified that he reviewed the lesson plans biweekly and notified the staff if he had concerns.

Soon after the start of the school year, the respondent failed to report to work on time and, by written notice, dated September 14, 2006, Mr. Adams notified him that improvement was needed. P-53. Mr. Adams also talked with the respondent about the matter.

In a lesson plans checklist, dated September 25, 2006, Mr. Adams noted that the respondent's plans were acceptable, but he asked the respondent if he was using the TERC Math program and he directed the respondent to see him. Mr. Adams also gave to the respondent a lesson plan to use as a model. Nonetheless, in October 2006, Mr. Adams found that the respondent's lesson plans were deficient because, for example, they did not make reference to the CCCS, there was no journal writing, and goals were omitted and he notified the respondent of his deficiencies. P-54.

Using a "Classroom Checklist," Mr. Adams checked and documented the teachers' and students' performances according to detailed categories, including the following: clear posting of objectives and essential questions in the classroom, consistent with the CCCS; display of meaningful print in the classroom and hallway; students appropriately engaging in writing; books

well organized and accessible; wordwork, including enhanced decoding, comprehension and spelling; literacy centers and individual centers; implementation of flexible grouping; inclusion of students in the instructional process; students engagement in substantive conversation with the teacher and with one another and in critical listening activities; and the teacher's administration of assessments, including cumulative assessments.P-54.

In a classroom checklist, Mr. Adams noted that, in October 2006, the respondent did not initiate or was incomplete in a number of the above-described categories. For example, the respondent did not post the objectives and essential questions relative to the CCCS. P-54. Mr. Adams also collected examples of the respondent's students' writing with numerous errors uncorrected by the respondent. Mr. Adams found that the respondent did not have high expectations for his students, he did not differentiate his students' abilities, he did not tailor his level of education to them accordingly, and there was insufficient academic rigor in his class. The respondent did not follow the prescribed checklist and, on October 5, 2006, Mr. Adams e-mailed to the respondent suggestions for improvement. P-56.

The respondent testified that, between the start of the school year and January 2007, he was absent about 11 days and, in January 2007, he injured his knee for which he had surgery and that the surgery and recovery caused the balance of his absences. He testified that altogether, during the 2006-07 school year (before his removal in March 2007), he was absent for about four months or about 120 days.

The respondent testified repeatedly that there were disparities among his students' academic levels and testified that he made Mr. Adams aware of this. He testified that he considered his students' abilities and relationships and that he placed them in small, cooperative learning groups, so they could interact socially and so that higher performing students could help lower performers. He testified that some of his students misbehaved and that many of his fifth grade students, during the 2005-06 school year, had been fourth graders in Ms. Weber's class and that she had come to him frustrated about her difficulty controlling some of them. He reiterated that his class was in an open area in which there were many distractions.

Ms. Novis testified that she did not like Mr. Adams. Ms. Novis alleged that Mr. Adams

used a loud voice to direct and control the students and he was sometimes abrasive with them. She also believed that Mr. Adams was unfair with the faculty and staff. As an example, she testified that, during a faculty meeting, Mr. Adams distributed a book for the teachers to read and to discuss during the next meeting. The TEA's Betty Blackwood said that the book assignment was "outside of the contract" and the teachers, except for Mr. Seabrook, refused to read the book. Mr. Adams told the teachers to read the book during the next faculty meeting, unpleasant exchanges followed, and the union grieved the matter. Ms. Novis did not know the result of the grievance. As another example, Ms. Novis testified that Mr. Adams told Kathy Eckhart, the school webmaster, that he did not like the website she had created and that she should change it immediately and she later observed Ms. Ekhart crying. Ms. Novis also alleged that Mr. Adams told a student that, if he did not sit, he would "rip his face off." However, Ms. Novis admitted that she did not witness the alleged incident, that Ms. Ekhart had reported the alleged incident to her, and (although Mr. Adams had allegedly made an egregious threat) she did not report or make a record of it. Ms. Novis testified that, because of the administration's lack of support, poor discipline in the school system, and a dangerous work environment, in 2007, she left the BOE's school system for a position as a full-time library media specialist in Washington Township.

Ms. Blackwell testified that, during the 2006-07 school year, the Parker School reconstruction was completed and that school reopened, Parker School II continued to serve as an overflow school, and the respondent was Parker Annex II's only fifth grade teacher. Ms. Blackwell testified that, during the 2006-07 school year, teacher Shaniqua(sp?) Jones' fourth graders' disruptive behavior was not conducive to learning in the Parker Annex II environment, but she (Ms. Blackwell) never had to speak with the respondent about his classroom management, although she understood he had problems with his class.

On October 14, 2006, Ms. Gibson signed charges and a statement of evidence with exhibits, including memoranda from preceding years and these papers were served upon the respondent. The allegations and eight charges are summarized below.

"Charge One" was that, despite notice of the requirement to do so, the respondent failed to submit lesson plans.

"Charge Two" was that the respondent failed to comply with the New Jersey Professional Standards for Teachers. More particularly, it was charged that the respondent failed to follow the standards relative to TECHPATHS and pacing provided by the district and as addressed in Ms. Giddens-Green's memorandum, dated March 9, 2006. P-40. It was charged that the respondent was notified that he should integrate strategies across the curriculum to promote active student participation in learning, as addressed by Mr. Fland's memorandum, dated September 10, 2003. P-25. It was alleged that the respondent was not adequately prepared to conduct class, that he did not have sufficient control of a problem to readily assist and support analysis of the problem for the students, that he was not functioning at a level commensurate with his experience and years in the program, and that he failed to follow curriculum manuals, as documented in Mr. Fland's memorandum, dated September 25, 2003. P-25. It was alleged that the respondent squandered time and spent too much time controlling behavior, as documented in Mr. Fland's memorandum, dated October 1, 2003. P-25. It was alleged that, on October 2, 2003, the respondent was absent and that he failed to leave substitute teacher instructions and other documents necessary to teach his class, as documented in Mr. Fland's memorandum, dated October 2, 2003. P-25. It was alleged that, at the start of the 2003-04 school year, the respondent failed to submit lesson plans, as documented in Mr. Solomon's memorandum, dated October 16, 2003. P-16. It was alleged that the respondent was absent from school on an important "Implementation Day" staff meeting, continuing his pattern of absenteeism, as documented in Mr. Solomon's and Mr. Fland's memorandum, dated November 3, 2003. P-17. It was alleged that the respondent did not employ a variety of appropriate instructional materials and activities to maintain a classroom appearance that stimulated learning, as documented by Mr. Fland's Teacher Observation/Conference Form, dated November 20, 2003. P-18. It was charged that the respondent did not maximize his time on task, foster high expectations for students, provide substitute teachers with plans that complement course objectives, and implement suggestions and criticism for improvement, as documented in Mr. Fland's Teacher Observation/Conference Form, dated December 5, 2003. P-19. It was alleged that, during a week when the respondent was subject to potential jury duty, he took two days off without giving the school official notice of his intended absences, resulting in other teachers teaching his students and causing inconvenience to the school system, as

documented by a memorandum from Mr. Fland, dated December 9, 2003. P-20. It was alleged that the respondent did not demonstrate competence in instructional planning and strategies by designing lessons based on the CCCS and employing a variety of developmentally appropriate strategies, as documented by a memorandum from Mr. Solomon and Ms. Giddens-Green, dated December 5, 2005. P-40. It was alleged that, despite assistance and action plans on instruction, the respondent failed to demonstrate competence in using results from multiple assessments to evaluate, modify instruction and promote student learning, as documented in the above-described memorandum. P-40. It was alleged that, despite assistance and action plans on instruction, the respondent failed to demonstrate competence in understanding how students learn best and how to provide opportunities that support their intellectual, social, emotional and physical development, as documented in the above-described memorandum. P-40. It was alleged that, despite assistance and action plans on instruction, the respondent failed to demonstrate competence in adapting and modifying instruction to accommodate the special learning needs of all students, as documented in the above-described memorandum. P-40. It was alleged that, despite assistance and action plans on instruction, the respondent failed to create a supportive and safe learning environment that encouraged positive social interaction, active engagement in learning and self-motivation, as documented in the above-described memorandum. It was alleged that, despite assistance and action plans on instruction, the respondent failed to participate as an active, responsible member of the professional community, that he did not engage in a wide range of reflective practices, that he did not pursue opportunities to grow professionally and that he did not establish collegial relationships to enhance the teaching and learning process, as documented in the above-described memorandum. P-40. It was alleged that the respondent did not perform according to the expectations required of a tenured teacher, more particularly, that he failed to create a supportive learning environment, consider preferred learning styles, connect learning to real-life issues, give regular feedback to his students, build in time for reflections, provide for student choice, and negotiate the curriculum, as documented in Mr. Solomon's recommendation, dated March 2006, that an increment be withheld. P-40.

"Charge Three" was that the respondent failed to comply with the BOE's ENDS policies.

More particularly, it was alleged that the respondent failed to comply with the BOE's ENDS policies: "Academic Performance," E-2, stating that students will achieve to their level of potential while meeting or exceeding grade level expectations, as documented in the memorandum, dated March 10, 2006, from Ms. Giddens-Green. It was alleged that the respondent failed to comply with the BOE's ENDS policies: "Character" E-4, stating that all students shall demonstrate good character in order to lead fulfilling, mutually respectful lives and to positively impact and contribute to their families, school, local and world communities. It was alleged that, in direct violation the BOE's ENDS policies: "Academic Performance," E-2, the respondent's students were working on assignments that were below the fifth grade level. It was alleged that, in violation of the BOE's ENDS policies: "Character" E-4, the respondent's students lacked respect for him. It was alleged that the respondent had excessive student control problems. P-40. See also P-3.

"Charge Four" was that the respondent had poor classroom management.

"Charge Five" was that the respondent failed to maintain and/or timely submit pertinent records.

"Charge Six" was that the respondent failed to comply with administrative directives.

"Charge Seven" was that the respondent failed to follow the call-out procedure.

"Charge Eight" was excessive absenteeism.

The school system allowed the respondent a 90-day period, between October 2006 and December 2006, to correct and overcome the alleged deficiencies and inefficiencies consistent with a Corrective Action Plan (CAP.) Mr. Adams met with the respondent, discussed the CAP, and prepared a detailed memorandum, dated October 10, 2006, confirming their conversation. Mr. Adams wrote:

> . . . As a result of those areas deemed deficient you will be required to adjust your activities and align them with those that are

consistent with educational Best Practices.

1. A weekly meeting on Friday during your prep period to discuss your weekly work performance.
2. Topics that will be discussed and reviewed will include, but not be limited to, the following:

a. Instructional practices
b. Instructional environment
c. Attendance
d. Lesson plans

The areas noted in the documentation from the law offices of Sumners, George highlighted, "failure to submit lesson plans, failure to comply with the New Jersey Professional Standards for Teachers, failure to comply the Trenton Board of Education's ENDS Policies, poor classroom management, failure to maintain and/or timely submit pertinent records, failure to follow administrative directives, failure to follow the call-out procedures and excessive absenteeism.

[P-57.]

During the 90-day period, Mr. Adams regularly observed the respondent teaching and met with him and his TEA representative. Mr. Adams had numerous conversations with the respondent about the respondent's teaching and he provided the respondent with materials to improve his performance. Mr. Adams recorded his observations and he prepared detailed memoranda to the BOE administration and to the respondent relative to his observations, the respondent's performance, and suggestions for improvement with reference to the CAP.

In a memorandum, dated October 10, 2006, Mr. Adams wrote to the respondent that he not corrected his chalkboard to comply with a directive or classroom checklist distributed to the staff. P-57. In a memorandum, dated October 13, 2006, Mr. Adams reminded the respondent that he should: a. plan appointments after school hours, b. keep incidental attendance at the district benchmark of 95%, c. sign-out in the staff sign-out book in the main office, and d. not utilize another school's (e.g., Parker Main's or Parker Annex I's) materials or equipment without written approval. In that memorandum, Mr. Adams also wrote of improvements needed in the respondent's instructional practices. P-59. In a memorandum, dated October 17, 2006, Mr. Adams noted that, in violation of the BOE's cellular phone policy, the respondent left a staff meeting to talk on his phone. See also P-73.

In response to the allegation that he was teaching below his grade level, the respondent testified that, he gave preliminary tests in a fundamental fifth grade level to determine his students' academic levels; that he found many of his students could not add or subtract and some could not read a grade level; and that a majority of his students were below grade level. P-61. He testified that, given these test results, he modified his class material.

Mr. Adams' memorandum, dated October 20, 2006, noted that the respondent had been tardy to work on several of days and he notified respondent that he (Mr. Adams) had visited his classroom on several days. Mr. Adam noted his observations, including those of the respondent's teaching, meetings with the respondent, the respondent's failure to implement specifically identified parts of his instructional plans, and the respondent's reactions to Mr. Adams' recommendations. P-57, P-63.

In late October 2006, Mr. Adams sent a memorandum to the respondent, noting that on October 23, 2006, he (the respondent) was absent and that he left no lesson plan for use by the teacher called in as a substitute. P-64.

In a detailed memorandum, dated October 20, 2006, Mr. Adams noted that he had observed the respondent in class on several identified days for 30 minutes to an hour each day. Mr. Adams noted that the respondent had been tardy for work on two days and he noted substantive teaching improvements that were required, including implementation of specified items in the CAP. Mr. Adams had collected examples of the respondents' students' papers with obvious uncorrected errors, on which the respondent had written a "C" and he attached copies of those papers to the memorandum. P-63. On one such paper, entitled "Writing," the student wrote the following rules for behavior in school:

1. We is not to be running or screaming in the hallway.
2. We is not to be talking in the hallway.
3. We is not to be playing around in the hallways.
4. Don't Desturb the other Class rooms.
5. Be respect ful to the other teachers that are teaching.
6. Keep your hands to your self in the hallways.
7. Don't never stomp in the hallways . . .

[P-55.]

As another example, a student wrote:

> And when I was leaving for Halooween I was going trickertreating and I was getting a lot of candy. Me and my two brothers was the first ones to get candy and we was very happy by eating it. But when are mom came from work she told us to stop eating are candy but we said can we could have some on the next day and she said yes.
>
> [P-55.]

Another student's uncorrected creative writing, was entitled, "The One Specail Place I like to Explor And Why," and the student wrote:

> On October, 7 my dog and I are going to Hollywood and bebbuly hills. We will sky dive and land in the water. My dog will have a parashut and live jacket. We will sky untile we throw up. We mite get disy.
>
> I will make a tv show could, Whats Going On, it is a talk show. I will get rich and famuse. I will sing odogafs and make speechs.
>
> [P-55.]

For example, "Calfornia," "I'am," "july" and "never" were written repeatedly and not corrected. Another example of writing that the respondent left uncorrected is shown by the following:

> I would like to explore chucky cheese me and my little brother and my mom drove to chucky cheeses when we go there me and my brother bet chucky up because to have fun and get free pizza chucky cheese is out in p.a. we went to chucky cheese Octorber the +3 on party night to have fun and play game's
>
> [P-65.]

The respondents' students' uncorrected misspellings also included, but were not limited to the following: "specil" instead of special, "granpa's" instead of grandpa's, "cozin's" instead

of cousin's, "somthing" instead of something, "dinning room" instead of dining room, "dinning room" (again) instead of dining room, "were" instead of where, and "coin's" (possessive) instead of coins plural. Additionally, there were uncorrected sentences such as, "I want it so bad." P-63. Additional examples of the respondents' students' and papers and had numerous and obvious uncorrected errors. Mr. Adams found that students in the respondent's class showed unsatisfactory progress.

When the respondent was asked why he did not note or correct the errors on his students' papers, he answered that he did not have time to grade every paper his students submitted. Asked to explain further, the respondent testified that he corrected most of his students' work "as a group." He also testified that his "C's" on papers with uncorrected errors, meant that his students' work was "in the ball park." He also testified that he entered a check on homework that he received or, if not submitted he entered a minus (presumably in his teacher's grade book.) He testified that homework could be of more or less importance and that he accorded heavier weight or importance to answers to tests or quizzes. He did not mark every paper every day. He did not grade every paper. He testified that some of the papers with uncorrected errors may have been early drafts to be further improved by his students. He then testified that, when he wrote a "C" on a paper with uncorrected mistakes, it could mean that numerical grade and he might enter (also) a "70" in his grade book. He also testified that his methods were intended to encourage his students to give their best efforts and that he might "get with them" (relative to their misspellings and other mistakes) "at a later date."

In Mr. Adams' memorandum, dated October 27, 2006, Mr. Adams noted that the respondent's students should be writing journals, that the respondent had not implemented the writing process, and that the respondent had not been providing modeling for his students.

In a memorandum, dated October 25, 2006, Mr. Adams noted that, on Monday, October 23, 2006, the respondent left a voice message in the main office that he would be absent from his teaching duties and that his lesson plans were on his desk. However, when the substitute teacher and Mr. Adams searched the area of the respondent's desk, they found no lesson plans for the week. They found lesson plans only for prior weeks. P-64, P-65.

Mr. Adams testified that, during the 90-day period for improvement he continued to observe the respondent teaching, he collected examples of the respondent's students' work, and he continued to forward memoranda to the respondent, identifying compliance and noncompliance with the CAP. See, e.g., P-66, P-70. Mr. Adams did not see substantial improvement in the respondent's performance. For example, Mr. Adams, who was familiar with the quality of writing expected for students in elementary school grades, saw that the respondent's students' papers did demonstrate appropriate thinking and the respondent had not appropriately corrected their papers and/or addressed writing errors. Also, (despite instruction to post material for visual learning) the respondent was not teaching according to the material posted on his classroom wall.

In Mr. Adams' memorandum, dated November 3, 2006, relative to the CAP, he noted that the respondent had made some improvement, but that, for example, there was no progress through certain the levels of instruction and he had unsatisfactory incorporation of the Higher Order Thinking Skills from Bloom's Taxonomy. P-66. Mr. Adams pointed out to the respondent the importance of summarizing his lessons and building in time for their reflections on lessons. Other school administrators also completed and provided the respondent with assessments of his teaching performance.

Mr. Adams' memoranda, dated December 8 and 19, 2006, reviewed his numerous observations in October, November, and December 2006. P-71, P-72. Mr. Adams provided a detailed review of the respondent's performance. Mr. Adams testified that the respondent had not followed through on his (Mr. Adams') suggestions, the respondent's lessons lacked sufficient rigor, and the respondent failed to submit required documentation to the administration. The lessons were not at a level to sufficiently challenge fifth graders. Mr. Adams found the respondent's teaching to be more like a first year teacher.

The respondent testified that Mr. Adams did not remain for his entire class presentations, so Mr. Adams did not see all that he did. The respondent testified that his students wrote in their journals every morning. Mr. Adams advised the respondent that, every day, he should look at his students' journals, but the respondent testified that he disagreed with Mr. Adams: he believed his students needed privacy in their journals. In any event, the respondent testified that, by the end

of the year, he observed improvement in his students' performances. However, the administrators found that he did not comply with the school system's plan of instruction and he persistently failed provide effective instruction. Mr. Adams did testify that, during the 90-day period, the respondent's attendance was good.

During the 2006-07 school year, Ms. Blackwell and the appellant met with Mr. Adams relative to the appellant's performance. The respondent testified that Ms. Blackwell was "very supportive" and that she advised him to demonstrate to the administrators he was complying with the CAP. The respondent testified that there were instances when his teaching was not up to (an acceptable) standard, but that he did adapt and modify his teaching according to Mr. Adams' advice. Ms. Blackwell testified that she did not see anything negative or harmful in the appellant's teaching and that his students performed better than some other students. Ms. Blackwell testified that, although she had input, when she told Mr. Adams of the problems with the respondent's fifth grade class, he responded that he did not see it. Asked if Mr. Adams was "fair," Ms. Blackwell testified that he was "kind of picky."

Mr. Adams met with the respondent and advised him that he was recommending that charges proceed. Mr. Adams also prepared a memorandum, dated January 5, 2007, constituting his "Summary and Recommendations" to document his numerous observations in October, November and December 2006, to ascertain the respondent's instructional performance, including all aspects of his assigned duties during the 90-day period of the CAP. Mr. Adams addressed the memorandum to Ms. Gibson and a copy was provided to the respondent. In the memorandum, Mr. Adams listed the (19) dates and times he had observed the respondent in his classroom. Mr. Adams noted that he held weekly meetings with the respondent and TEA representatives Betty Blackwell or Cynthia Price, during which they discussed deficiencies of the week and Mr. Adams provided instructional suggestions, materials, time management guidance, professional development books, instructional videos, and content-related strategies for implementation to be imbedded in the respondent's daily instruction practices for the next week. The professional development information was in addition to the professional development discussed during grade level and staff meetings. Reasonable time lines for compliance were set. In addition to the weekly meetings, Mr. Adams sent other memoranda to the respondent to outline other concerns to be addressed. Mr. Adams set forth categories of performance with

reference to the CAP.

Under the category of "Attendance," Mr. Adams wrote that the respondent's attendance had been satisfactory during the 2006-07 school year.

Under the category of "Instruction Portion" of the CAP, Mr. Adams wrote that, of nine (enumerated) areas to be addressed, he had observed that the respondent had implemented several of the areas, but that the following still needed to be addressed: "1. Sharing major instructional topics and issues," "2. Assessing student work," "4. Planning to reinforce a study skill, literacy strategy, or pedagogical practices," "5. Meet with school personnel, administration, counselor, specialist," "6. Discussing students' work (academic challenges and achievements)," and "7. Holding collaborative meetings with colleagues and/or meeting with parents."

Under the category of "All Content Subjects (Literacy, Mathematics, Social Studies and Science), Mr. Adams wrote the following: Recommendations had been made and discussed and partially complied with and implemented, but that he had not seen assurance that the respondent was holding his students to rigorous standards for the fifth grade consistent with those of the CCCS. The respondent's students' "journaling" was "uneven." The respondent had been reluctant to address all areas of the writing portion of his improvement plan and that his students' writing showed minimum improvement in skills that lacked "rigor and high expectation." Despite discussion since the start of the school year, he observed that the respondent made minimal use of data to "drive instructional focus" of the students. Despite instructional support aides that were given to assist the respondent's instructional methods, the respondent did not incorporate Higher Order Thinking Skills (HOTS) in instruction and this was evident in the quality of the students' work. Despite in-service instruction in use and infusion of instructional guidelines and expectations in lessons to ensure that the respondents' students were exposed to State standards, Mr. Adams did not see that the respondent used them.

Under the category of "Instructional Practices," Mr. Adams wrote the following: The respondent delivered only rudimentary content information. Of the 13n specified areas to be addressed by the respondent to improve during the period of his CAP, despite consistent notation of areas needed for improvement during that period, lessons have only been presented in two areas. The time respondent engaged in "teacher talk" minimized

his instructional interaction with students. In the weeks preceding the January 5, 2007 memorandum, the respondent had begun to prepare lessons so that he no longer appeared to be "winging" the lesson. However, his students were engaged in "seatwork activities," instead of engaging in meaningful, hands-on , focused, task-oriented activities.

Mr. Adams concluded that, "[u]nfortunately, during the 90-day CAP, the respondent's teaching performance "had not improved to a satisfactory level" so that he recommended that the dismissal process continue. P-73.

On January 29, 2007, the BOE prepared a Notice of Uncorrected Deficiencies relative to certain charges and, on February 26, 2007, the BOE prepared a Resolution, reciting that it had found probable cause to support certification of the charges set forth in "Charge Two" and "Charge Three" and prepared a Certification of Determination of the tenure charges. The BOE prepared a Proof of Service of the BOE's determination to certify tenure charges and notice of the suspension of the respondent without pay for 120 days. N.J.S.A. 18A:6-10, -11, -14, -15; N.J.A.C. 6:24-5.2.

The respondent testified that an incident in February 2007, demonstrated that the school system treated the Parker Annex II as an unwanted "step-child." The respondent (who is African-America) testified that, on February 6, 2007, Ms. Shank e-mailed notice, addressed to "All Staff," of a Black History month luncheon. The respondent testified further that he inquired about the luncheon and that Ms. Shank e-mailed him that, the e-mail was sent to Parker Annex II in error and that the luncheon is only for Parker Main and Parker Annex and that she requested that he inform the Parker Annex II staff of her mistake. R-25. However, thereafter, the respondent was invited to the luncheon. The respondent testified, another time, tickets for a program at the Trenton War Memorial were provided for Parker Annex II students except for his class and that Mr. Adams told him that there were not sufficient tickets for his class.

On January 29, 2007, Ms. Gibson signed a Notice of Uncorrected Deficiencies and the notice was filed with the Department on March 1, 2007. The notice cited N.J.S.A. 18A:7A-45 and N.J.A.C. 6A:3-5.1, recounted that, the school system had served the respondent with the tenure charges and statement of evidence and that the school system had afforded the respondent

a 90-day period to correct areas of inefficiency, and stated that, based on Mr. Adams' memorandum, dated January 5, 2007, the respondent had failed to correct areas of deficiency as asserted in "Charge Two" and "Charge Three." See P-73.

The Notice of Uncorrected Deficiencies, "Charge Two, Failure to Comply with the New Jersey Professional Standards for Teachers," states the following:

> Teacher, Warren Jones (hereinafter referred to as the "Respondent") has failed to comply with New Jersey Professional Standards for Teachers. Specifically:
>
> Respondent has not performed the required expectations of a teacher by:
>
> a. failing to create a supportive learning environment;
> b. failing to consider preferred learning styles;
> c. failing to connect learning to real-life issues;
> d. failing to give regular feedback to his students;
> e. failing to build in time for reflections; and
> f. failing to provide for student choice and does not negotiate the curriculum.
>
> Respondent has not demonstrated competence in instructional planning and strategies by designing lessons based upon knowledge of the New Jersey Core Curriculum and Content Standards and employing a variety of developmentally appropriate strategies. Respondent has thus failed to:
>
> a. assess prior knowledge;
> b. understand the needs of the students;
> c. promote higher order thinking;
> d. focus on core concepts;
> e. ask open questions;
> f. facilitate dialogue;
> g. encourage alternative solutions; an
> h. personalize learning.
>
> Despite receiving assistance and several action plans on instruction, Respondent has failed to demonstrate competence in using results from multiple assessments to evaluate, modify instruction, and promote student learning.
>
> Despite receiving assistance and several action plans on instruction, Respondent has failed to demonstrate competence in

> understanding how students learn best and how to provide opportunities that support their intellectual, social, emotional, and physical development.
>
> Despite receiving assistance and several action plans on instruction, Respondent has failed to demonstrate competencies in adapting and modifying instruction to accommodate the special learning needs of all students.
>
> Despite receiving assistance and several action plans on instruction, Respondent has failed to create a supportive and safe learning environment that encourages positive social interaction, active engagement in learning and self-motivation.

The Notice of Uncorrected Deficiencies, "Charge Three" states the following:

> The Respondent has failed to comply with the Trenton [BOE's] ENDS Policies. Specifically:
>
> Respondent's students are working on assignments that are below fifth grade level contrary to Academic Performance E-2.

The BOE suspended the respondent from his teaching duties, effective March 1, 2007.

The respondent testified that, during the 2006-07 school year, he attempted to transfer from the Parker schools to avoid Mr. Solomon. On cross-examination, the respondent testified that he made his request to transfer in March 2007 (after he had notice that he had been suspended.)

Mr. Solomon testified that he had no objection to a transfer of the respondent to another school and he and Ms. Trapp agreed that a transfer of a teacher can give the teacher a fresh start with the supervising administrator that can lead to a successful performance.

The respondent was afforded an opportunity to testify relative to the notice of uncorrected deficiencies. He spoke of the deprived backgrounds of some of his students. He testified that, for students at lower academic levels, he notified parents of the circumstances, he provided such students with lower than fifth grade materials, e.g., second grade, shorter reading materials, and allowed them to read slowly, in an effort to move their reading levels up, e.g., to a third grade

level. He considered his students' preferred learning styles and he attempted to provide a supportive learning environment for them. He requested one-to-one reading assistance for a student. He placed students of varying academic levels and different talents in groups wherein their talents led to their roles as leaders, recorders, "go getters," et al. in completing projects. The projects included portrayals of scenes from reading materials by means including drawings and rap, so that students could express themselves and learn from one another in styles in which they were comfortable. He asserted that they did so in a style in which they were comfortable. He reiterated that conducting class in Parker Annex II's third floor's open space was distracting.

The respondent was afforded an opportunity to testify about whether students in his class learned to read and write and to competently perform grade-level mathematics. He testified that, having raised two children who had entered college, he understood that responsible parents read to their child, participate in their children's education, turn off televisions or radios, work with their children's teachers, monitor their children's school work, have their children show what they are learning, and reinforce what is taught in school. He reiterated that many of his students were from deprived backgrounds. Half of his students did not have good home environments and their parents were teenagers or just beyond their teens, parents who were involved in drug dealing or other substance abuse or parents who for many reasons were not in the home. For example, one student had no adult at home and walked the streets of Trenton late at night. Such students did not have parents who participated in the education of their children. He testified that a lower grade teacher advised him that she had students who were not at their nominal grade level in reading and mathematics. He acknowledged that he did not always teach at a fifth grade level and that he sometimes taught at a lower, e.g., third grade, level. However, he asserted that he did so to reach students who were at lower academic levels. Some of his students did not know, e.g., multiplication; but, by the end of the school year, they progressed and, e.g., had begun to understand multiplication. He characterized himself as "patient,' "caring," and "extremely supportive." He attributed these attributes to his desire to overcome a home in which his alcoholic father ignored him. He denied that he had failed as a teacher or that he had caused or contributed to his students' inability to perform at a fifth grade level. He is a good "role model" who cares about his community and, when he sees a student or other young person with troublesome people, like gang members, he takes the time to say, "Where are you going? School is the other way." He is concerned about his students' progress. He showed respect to his

students and he got their respect. Recently, the mother of a former student had told him that he "turned around" her daughter's life and that she had entered college.

The respondent was afforded an opportunity to comment on his absences from his teaching duties. He acknowledged that he had a substantial number of absences and that his absences affected the education of his students. Asked for a recapitulation of the number of days he was absent during each (182 school days) school year, he testified as follows: during the 1998-99 school year, he was absent about 11 days; during the 1999-2000 school year, he was absent about 11 days; during the 2000-01 school year, he was absent about 10 days; during the 2001-02 school year, he was absent about 24 days, in part due to hospitalization; during the 2002-03 school year, he was absent about 11 days; during the 2002-03 school year, he was absent about 11 days; during the 2003-04 school year, in February 2004, he learned his mother had been diagnosed as having cancer and he was absent about 36 days; during the 2004-05 school year, he was absent about 26 days; during the 2005-06 school year, he was absent about 34 days; and, during the 2006-07 school year, he was absent about 11 days. The respondent testified that, by the 2006-07 school year, other family members were able to assist his mother, so his absenteeism decreased.

The respondent was afforded an opportunity to testify in response to the opinions of Mr. Solomon, Ms. Giddens-Green, Ms. Trapp, and Mr. Adams that he had not performed properly and efficiently as a teacher. He reiterated that, before he became a TEA representative, the evaluations of his performance were very fair, but that after he became a TEA representative, the evaluations were unfair. He alleged that Mr. Solomon, in particular, was unfair with him after he became a TEA representative and he believed that Mr. Solomon caused the other administrators to unfairly criticize his performance. He asserted that relevant circumstances were omitted from some evaluations. For example, during one observation he had another teacher's students in his class area, which was disruptive. He acknowledged that the administrators' evaluations included observations and facts that were true, but he asserted that Mr. Adams, for example, had told him he was doing an excellent job at some times. He described Ms. Trapp (who join with the other administrators in the opinion that he did not perform efficiently and/or properly) as a very competent and dedicated educator and he testified that he could say nothing bad about her. He acknowledged that his increment was fairly withheld, but he believed that his performance did

not warrant the tenure charges. He characterized the SFA educational program as extremely rigid and not sufficiently flexible for his students. He contended that his mother's bad health had contributed to his performance problems. He reiterated that the school system did not treat him or his Parker Annex II students fairly, testifying that, for example, without notice, he was moved and "exiled" to Parker Annex II and that when the school system provided laptops to other students, his students did not receive them until much later than the students in the other Trenton schools. He did acknowledge that, during the school year, his students had access to computers in the computer laboratory (once or twice weekly) when Ms. Eckhard made time for them. He acknowledged that he had some deficiencies as a teacher involving, for example, being prepared for class and being absent "quite a bit."

The respondent was afforded an opportunity to testify relative to the Professional Standards for Teachers, CCCS and ENDS Policies. He denied that he failed to demonstrate competencies. He essentially testified that, even though he had fifth graders who were academically below that grade level, he complied with the CCCS and the ENDS Policies. He reiterated that, at the start of the school year, he assessed the academic levels of his students and that he worked a great deal with lower level students and that, having such students, he did not always teach at the fifth grade level. He adopted and modified instruction to accommodate their learning needs, playing to their strengths and developing them. He asserted that creating a supportive environment for his students was high on his list and he alluded to his establishing rules of behavior at the outset of the school year.

The BOE's administrators were in agreement that the respondent had a pleasant personality, but they testified that, despite opportunities for improvement, (as charged) he failed to make, maintain, and timely submit proper documentation such as lesson plans; he did not prepare for his lessons; and, most importantly, he failed to effectively and efficiently provide instruction as prescribed and required.

The respondent testified that, since the BOE suspended him, he has been asked to teach a course sponsored by the College of New Jersey to be presented in a YMCA in Trenton for the Future Engineers of America related to that group's design of a car that can withstand a crash. He also testified that he sees himself as a "role model", that he interacts with young people in his

community, and that he tells them that, like practicing basketball to become better players, if they work at academics, they will become better students. The Boys and Girls Clubs of America have asked him to mentor students who are considering careers as teachers and he tells these students that they should be life-long learners and that they "can accomplish anything."

FINDINGS OF FACT

The respondent testified that he had a troubled childhood in a disadvantaged area of Massachusetts. There is no dispute that he received a bachelor's degree in elementary education from Rider University and that he holds a certificate to teach elementary school. He was uncertain and inconsistent in his description of his education and relative to the authority of his certificate to teach.

After teaching elsewhere, from the 1998-99 school year until the 2006-07 school year, the respondent taught in the Trenton public school system. He taught fifth grade in the Clara Parker Elementary School, Parker Annex, and Parker Annex II and Willie Solomon, Jr., served as principal of those schools.

Mr. Solomon, who served honorably in the military service, who has had many years of experience in education, and who is a dedicated educator, was a credible witness. Mr. Solomon and other school administrators repeatedly provided the respondent with constructive comments and they offered assistance to encourage him to improve his attendance and performance. The respondent testified that, coming from a troubled family and troubled urban area, he appreciated disadvantages confronting his students, who came from similar backgrounds. However, it is fair to say that the respondent's conduct displayed a careless and cavalier attitude towards his duties as a teacher.

Each year that the respondent was employed as a teacher in the Trenton public school system, despite repeated warnings from administrators, he was late for and/or absent from his teaching duties a substantial number of days. The respondent's excuses for his lateness and absences included an unreliable automobile, doctors' and dentists' appointments for himself and family members, visits to sick family members, and "stress."

A teacher's lateness and absence has an obvious detrimental effect on continuity of instruction for his students. The respondent acknowledged that Mr. Solomon discussed with him his lateness and absences and that Mr. Solomon notified him in writing that he must improve. Nonetheless, each year the respondent continued to be absent from his teaching duties an inordinate number of days. In 2003, after the respondent reported for several days of possible jury duty and jury officials notified him that he was no longer required to report for the balance of the week, instead of appearing for his teaching duties, he took off and was absent for the balance of the week.

During the 2002-03 school year, Peter Fland, was the vice principal of the Parker Annex where the respondent taught fifth grade. Mr. Fland, who has had many years of experience in education and who is a dedicated educator, was a credible witness. Mr. Fland observed the respondent teaching numerous times. The school system trained its teachers extensively in delivery of instruction in reading, mathematics, language arts and conflict resolution skills; it was essential that teachers teach those subjects daily; and the respondent was to provide Success For All (SFA) instruction daily and in the manner prescribed to ensure his students had an opportunity for academic progress. As Mr. Fland found, the respondent did not engage his students, some of whom sat passively in class; the respondent did not post and otherwise make efficient use of materials and technology to orient and instruct students; he did not teach according to the SFA-prescribed schedules and principles, intended to provide a format of routine and consistency to assure that school's students were making adequate yearly progress. Mr. Fland repeatedly directed memoranda to the respondent with suggestions for improving his teaching performance and made exemplary teachers available as models for the respondent. Mr. Fland observed that, nonetheless, the respondent did not develop into an effective teacher and his students did not progress appropriately. Mr. Fland observed that when another teacher covered the respondent's class, the students were significantly more "on task." The respondent did dedicate time to an application for a STAR-W grant, which was successful and resulted in an award and computer equipment for the school system. The respondent's unacceptable absences continued and he had a pattern of absences on days before and after weekends and holidays.

The respondent testified that, during the 2002-03 school year, he began to serve as a Trenton Education Association (TEA) union representative and he alleged that, after his TEA service began, Mr. Solomon was less friendly toward him. However, Mr. Solomon credibly denied the allegation and testified that his concern was the respondent's failure to improve his teaching, despite his years in the school system.

The State Board of Education adopted Professional Standards for Teachers and School Leaders to improve the quality of instruction for New Jersey's school children with reference to Core Curriculum Content Standards. N.J.A.C. 6A:9-1.1 et seq. During or about the 2003-04 school year, the BOE's administration distributed materials, held meetings and provided training for Trenton public school teachers in the Professional Standards and the CCCS. When asked about the Professional Standards and CCCS, the respondent failed to demonstrate a true grasp of their substance.

During the 2003-04 school year, Mr. Fland observed that the respondent's teaching remained ineffective and inefficient. Mr. Fland observed that, for example, the respondent was not prepared for class, he did not teach subjects at scheduled times, he allowed valuable time to be spent moving chairs and equipment around, and he did not utilize prescribed teaching techniques. The respondent failed to submit to administrators timely and complete records, including lesson plans, related to his teaching. For example, on a planned absence day, the respondent failed to leave plans and materials for the substitute teacher. On a scheduled Implementation Visitation (IV) day, when observers entered the school to assess it for SFA progress, the respondent was absent without notice to administrators. The respondent did not create an environment conducive to teaching and learning for his students. He also failed to contact the designated BOE official to give notice that he intended to be absent. In December 2003, he was called for jury duty, but after he was released he did not report for his teaching duties. Instead, he took the day off without giving a reason to the school system. Mr. Solomon made known to the respondent that his conduct and teaching performance were unsatisfactory.

Mr. Fland forwarded memoranda to the respondent pointing out his inefficiencies and providing recommendations for improvement. The respondent did not accept well-founded, constructive criticism and he alleged that Mr. Fland was "nasty" toward him. However, I find

that Mr. Fland's concern (like Mr. Solomon's) was the education of the school system's students and the respondent's failure to teach efficiently. I do not accept as credible the respondent's explanations and excuses for his ineffective and inefficient teaching. In December 2003, Assistant Superintendent Carolyn Gibson also transmitted memoranda to the respondent, notifying him of his failure to perform duties and that he should correct his deficiencies. In January 2004, Mr. Solomon, Mr. Fland, the respondent, and a TEA representative met to address the respondent's unsatisfactory performance. Shortly thereafter, by memorandum, Mr. Solomon notified the respondent of ongoing deficiencies, including his failure to timely and properly submit lesson plans.

The respondent testified that, in February 2004, he learned that his mother, who resided in New England, was ill with cancer and the BOE provided him with information and materials relative to requesting Family and Medical Leave Act leave to care for her.

Mr. Fland left the Trenton public school system and, in 2004 and 2005, Bernadette Trapp served as vice principal in the Parker Annex. Ms. Trapp, who has had many years of experience in education and who is a dedicated educator, was a credible witness.

Ms. Trapp documented her numerous observations of the respondent's teaching. For example, in March 2004, she wrote that the respondent's teaching was deficient because, structurally, he did not present it with an introduction, body and closure; because he failed to post available material relative to the skill to be taught; and because, in concluding the lesson, he failed to review the skill taught and how it related to the story the class had read. In April 2004, she wrote that the respondent did not organize his lesson according to an observable structure with introduction, content and summary; he did not employ a variety of appropriate materials and activities; he did not maximize time on task; he did not make clear the objective of the lesson; he did not foster high expectations for his students; he did not effect an atmosphere of order, cooperation and purpose; and he did not maintain a classroom appearance that stimulated learning. Ms. Trapp also noted that the respondent did not satisfy the district's staff attendance and/or punctuality policy, he did not provide substitutes with plans that complement course objectives, and he did not follow the district's approved course outline. Ms. Trapp also noted that the respondent did not accept suggestions and criticism. In May 2004, Ms. Trapp forwarded

a memorandum to the respondent, notifying him of his numerous absences and deficiencies, including his failure to submit lesson plans, his failure to submit plans for substitute teachers, and failure to give timely and proper notice of his intention to take days off and the reasons therefor. Ms. Trapp advised the respondent that his conduct was "unprofessional and inconsiderate," a violation of BOE policy, that it left his students "neglected," and that it caused his students "instructional [to be] program interrupted." P-30. In June 2004, Ms. Trapp documented that the respondent had an unacceptable absence rate and that he had taken a day off to investigate why his paycheck was supposedly withheld. In the final evaluation for the 2003-04 school year, Mr. Solomon noted the respondent's problematic attendance patterns and that it was well-documented that his overall job performance was in question.

School administrators recommended that the BOE withhold an increment to the respondent's salary for the 2004-05 school year and administrators, including Mr. Solomon appeared before the BOE as did the respondent and a TEA representative, but the BOE accepted the respondent's explanations and granted him another contract and the increment.

During the 2004-05 school year, Ms. Trapp continued to observe and document the respondent's deficiencies in teaching. For example, in the respondent's writing/language arts lesson, he did not present an introduction to the lesson and she made recommendations to him and that, in the future, his lesson should have (1.) an introduction, (2.) a body, and (3.) closure. She also wrote that there was a large gap of time in the writing/language arts instructional block indicative of the respondent's failure to prepare for the entire instructional time adequately. The respondent testified that, during the 2004-05 school year, he was absent a substantial number of days and a number of intermittent days to provide the transportation and care for his mother. He testified that, at the start of that school year he advised administrators that he would take FMLA leave to provide the transportation and care. He acknowledged that there were occasions when he did not give the school system advance notice of his absences and, by memoranda, Ms. Trapp notified him that his "failure to follow procedures had resulted, once again, in the interruption of the instructional cycle" and notified him that his "unplanned, sporadic absences" had prevented a quality education for his students. P-32, P-33. Parental letters complained to school administrators about the quality of the respondent's teaching and that the respondent appeared to know very little about his students' educational needs. Ms. Trapp directed to the respondent

additional memoranda pointing out his deficiencies in his teaching duties and detailing suggestions for improvement, but his performance remained deficient.

The respondent testified that, in March 2005, after witnessing his mother's condition and inartful medical care, he suffered such emotional difficulties that he was unable to return to his teaching duties. He also believed that residuals from a difficult childhood may have contributed to his condition. He received counseling and he was absent from his teaching duties In March and April 2005. In May 2005, the respondent was medically cleared to return to teaching.

Ms. Trapp found that the respondent had failed to keep the prescribed pace of instruction; he failed to leave records showing lessons he had covered and checked; and, despite her request, he did not produce an organized record of his students' grades until months later. In the Teacher Final Evaluation Form for the school year, Ms. Trapp noted that the respondent had demonstrated ability to relate to his students and their concerns. However, he had substantial deficiencies: As of March 31, 2005, the respondent's absenteeism for the prior three years exceeded the acceptable rate (even factoring in his FMLA leave). His planning was inadequate and he made inconsistent use of instructional strategies, making it impossible to gauge the level of growth toward the goal of assisting his students in acquiring content knowledge and that he lacked instructional and behavioral consistency. He did not comply with the prescribed time blocks for instruction and he did not present and complete instruction in the prescribed sequence of days. Ms. Trapp listed numerous areas of improvement for the respondent to provide his students with quality instruction. For example, he should develop and implement lesson plans with structure: "Introduction, Direct Instruction, Active Instruction and Closure." P-35.

Ms. Trapp and Mr. Solomon recommended that the BOE not grant a salary increment to the respondent for the next school year.

Ms. Trapp detailed her observations of and experience with the respondent. The respondent did not have a good work ethic. His attendance was deficient. Preparation is necessary for a teacher to efficiently present a lesson and the teachers' contract provided that a preparation period every day. However, the respondent did not prepare sufficiently. Hand-held counters, other visual materials, and graphic organizers were available to teachers. However, the

respondent did not make efficient use of the materials in presenting his lessons. He did not implement the program prescribed for instruction. He did not timely submit lesson plans and he did not maintain records required to document the education he was to provide to his students. He failed to have his class in place ready for instruction. He did not teach lessons as they were designed to be taught. He failed to ask his students critical questions to take them to the next level and develop critical thinking. He did not provide instruction sufficient for his students to move up to the next grade and he did not give homework assignments consistent with the school system's learning program. The respondent's students did not perform as well as they had in their previous school year. Terra Nova® tests showed that his students' achievement dropped. Ms. Trapp repeatedly provided to the respondent recommendations, materials, and assistance for improvement and educators, including a reading facilitator, presented him with model instruction using the programmed materials. Heather Jackson, Ed.D., observed the respondent and she found a lack of preparation on his part. Ms. Trapp walked the respondent through the computer system with spreadsheets for use in recording and reporting grades, but he was unable to use them. The respondent's grade book did not include details, including dates, subjects, and other factors sufficient to establish the bases for the grades he gave to his students. He could not demonstrate to parents a reasonable record to substantiate their children's grades. He failed to accept recommendations made for his improvement. In summary, the respondent did not demonstrate significant improvement in teaching, recordkeeping, etc. and he was inadequate as an educator.

During the 2005-06 school year, Deborah Giddens-Green served as vice principal in the Parker Annex II, where the respondent taught fifth grade. Ms. Giddens-Green, who has had many years of experience in education and who is a dedicated educator, was a credible witness.

Ms. Giddens-Green was conscientious about monitoring the performance of the Parker Annex II teachers. She found that the respondent had an unusually high absence rate and that he failed to submit adequate and/or timely lesson plans, which are necessary for observers to see that appropriate lessons are being taught and for substitutes who might need to cover a class for an absent teacher. She also observed deficiencies in the respondent's teaching. For example, that he taught his students below their grade level, that he had not put the students' learning centers in place, and that his students did not understand his lesson objectives in the core subject

areas. The respondent did not use the prescribed instructional plan and materials for such students, and he had not distributed and used an available science kit. The respondent did not appear to utilize pacing guides and rubrics. History (social studies) books remained in an unopened box and he had not taught from them. In December 2005, without notice to the administrators, the respondent left the school premises during a preparation period, preventing the specials teachers from picking up their students on time. Ms. Giddens-Green also observed that the respondent's students did not respect him. The respondent did not timely submit his quarterly information, potentially delaying progress reports about students. Ms. Giddens-Green was very concerned and she wrote to the respondent, expressing concerns about his performance of his teaching duties. She testified that the respondent's basic deficiencies were lack of preparation, ineffective classroom management, and lack of consistency with his students, resulting in part from his poor attendance. She collected numerous examples of students' papers on which the respondent had not corrected spelling and mathematical errors.

Parker Annex II did present a distracting environment in which the respondent had to teach his fifth graders. The respondent testified that he empathized with his students, some of whom came from dysfunctional families or otherwise deprived backgrounds, and he encouraged them to be "the best person they can be" and to believe that "there is nothing they can't do." This probably helped the students' self-esteem, an important part of a teacher's job, especially for children from deprived backgrounds. However, given the respondent's deficient teaching, he failed to help his students develop and progress in prescribed basic academic skills and he thereby compounded their problems.

Ms. Giddens-Green suggested methods of improvement to the respondent. However, as she noted in the Teacher's Final Evaluation Form, the respondent's deficiencies included the following: he failed to plan for his lessons to gain and maintain his students' focus on the lesson; he had lesson plans directly from the textbook, which did not consider different learning styles in his classroom; he failed to conduct lessons that met objectives of NJ CCCS; he failed to use posters and charts in his lessons; he failed to use science kits; he did not use TECHPATHS; and he failed to develop learning centers.

Mr. Solomon and Ms. Giddens-Green recommended that the BOE not grant a salary increment to the respondent for the next school year.

During the 2006-07 school year, RaShawn Adams served as building principal in the Parker Annex II, where the respondent taught fifth grade. Mr. Adams, who has had many years of experience in education and who is a diligent and dedicated educator, was a credible witness. Mr. Adams candidly testified that the Parker Annex II building was not a good environment for teachers or students.

At the start of the school year, the respondent failed to report to school on time and his lesson plans were deficient. For example, the respondent did not make reference to the CCCS and he omitted goals for his students. Mr. Adams talked with him and provided him with advice and suggestions and materials to improve his performance. Between the start of the school year and January 2007, the respondent was absent 11 days. He testified that, thereafter, he was absent about four months. When the respondent was in school Mr. Adams monitored him and saw that the respondent did not initiate or was incomplete in a number of the above-described categories. For example, the respondent did not post the objectives and essential questions relative to the CCCS. Mr. Adams also collected examples of the respondent's students' writing with numerous errors uncorrected by the respondent. Mr. Adams found that the respondent did not have high expectations for his students, he did not differentiate his students' abilities, he did not tailor his level of education to them accordingly, and there was insufficient academic rigor in his class. The respondent was not following the prescribed checklist and, on October 5, 2006, Mr. Adams e-mailed to the respondent suggestions for improvement.

In mid-October 2006, the school system brought the above-described eight charges against the respondent. The school system allowed the respondent the 90-day period, between October 2006 and December 2006, to correct and overcome his deficiencies and inefficiencies consistent with a Corrective Action Plan (CAP.) Mr. Adams regularly met with the respondent and his TEA representative, discussed the CAP, observed the respondent in classes, and prepared detailed memoranda to the respondent.

During the period of the CAP, the respondent did not comply with many of Mr. Adams' suggestions and the respondent's deficiencies continued. He was tardy to work on numerous days. He called in that he would be absent (on a Monday) without leaving lesson plans for the substitute. He taught below grade level. He failed to implement prescribed instructional plans and he did not present lessons properly, e.g., summarizing lessons and building in time for reflection. Mr. Adams collected numerous examples of the respondent's students' papers on which he had written "C's," but on which he had failed to correct numerous striking errors. The respondent attempted to justify this by explaining that he did not always have time to correct his students' work and/or that he needed to encourage his students (even though their work was incorrect.) However, developing students' self-esteem while failing to give them basic literacy or mathematics skills sets the students up for failure and disappointment in the real world. Mr. Adams, a former teacher, who was familiar with the standard of work the students should have been producing, saw that the respondent's students were not thinking and/or writing appropriately.

Mr. Adams above-described memorandum described the respondent's performance with reference to the CAP. While the respondent improved, e.g., in attendance, his performance remained deficient, he was not well prepared for classes, he did not instruct as prescribed, and he did not hold his students to standards for the fifth grade consistent with the CCCS.

To summarize, the BOE's witnesses, all dedicated educators, uniformly and credibly testified and I find that the respondent's performance, even after notice of the charges, assistance, and opportunities to improve, was deficient and inefficient as charged. The respondent continued to refuse and/or failed to prepare for instruction of his students. He continued to refuse to provide and/or failed to provide efficient instruction. He continued to refuse and/or failed to efficiently comply with schedules, methods, and pacing, and failed to provide content and documentation prescribed for instruction and for evaluation of student performance pursuant to the New Jersey Professional Standards for Teachers and the Core Curriculum Content Standards and the BOE's ENDS Policies.

CONCLUSIONS OF LAW

The Legislature established tenure for public school teachers in order to aid in establishment of a "thorough and efficient free public school system." N.J. Const. art. VIII, § IV, ¶ 1; N.J.S.A. 18A:10-1; N.J.S.A. 18A:28-5.

Tenure for teachers is intended to ensure the presence of a competent and efficient teaching staff. Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63 (1982); Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215 (App. Div. 1949); Redcay v. State Bd. of Educ., 130 N.J.L. 369 (Sup. Ct. 1943), aff'd, 131 N.J.L. 326 (E. & A. 1944). Such tenure is intended to prevent boards of education from abusing their superior bargaining powers in contract negotiations and to prevent dismissal for unfounded, flimsy or political reasons. Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63 (1982); Greenway v. Camden Bd. of Educ., 129 N.J.L. 46, 49 (Sup. Ct. 1942), aff'd, 129 N.J.L. 461 (E. & A. 1943); Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215 (App. Div. 1949); Redcay v. State Bd. of Educ., 130 N.J.L. 369 (Sup. Ct. 1943), aff'd, 131 N.J.L. 326 (E. & A. 1944).

However, while a tenured teacher shall not be dismissed from employment or reduced in compensation, "during good behavior and efficiency in the public school system of the state," a tenured teacher may be dismissed "for inefficiency, incapacity, unbecoming conduct, or other just cause." N.J.S.A. 18A:6-10 (Emphasis added.)

> The plain meaning of "inefficiency" is "the quality or condition of being inefficient; lack of efficiency," and "inefficient" means "not efficient; unable to effect or achieve the desired result with reasonable economy." The Random House College Dictionary 680 (Revised Edition 1982). Therefore, the essence of inefficiency as a charge against an employee is that he or she has failed to reasonably effectively perform duties required of his or her title.
>
> [Board of Educ. of Asbury Park v. Antonio Lewis, EDU 921-04, Initial Decision (April 6, 2004), adopted, Commr, (June 7, 2004)]

The school laws provide that, where a tenured public school teacher is charged with "inefficiency," after the charge and statement of evidence are filed with the local board of

education, the school system must "allow at least 90 days in which to correct and overcome the inefficiency." N.J.S.A. 18A:6-11. During the improvement period, the school administration is required to render "positive assistance to the teacher in an effort to overcome his inefficiencies." Rowley v. Bd. of Educ. of Manalapan-Englishtown Reg'l School Dist., 205 N.J. Super. 65, 72 (App. Div. 1985), quoting the Commissioner. Also citing, In the Matter of the Tenure Hearing of Ethel P. Hogue v. Teaneck School Dist., Bergen Cty., 12-83 S.L.D. (January 13, 1983); In the Matter of the Tenure Hearing of Franklin Johnson, Sch. Dist. of the Tp. Of Cherry Hill, Camden Cty., 239-81 S.L.D. (July 2, 1981). There should be a "cohesiveness of effort before and after the filing of the charges that enables the Board ultimately to measure the teacher's improvement by a synthesis of observations." Rowley, supra, 205 N.J. Super., at 73, quoting the State Board of Education. The school system must provide meaningful assistance in the form of a standard or "yardstick against which he/she is measured . . . In effect, the teacher must be told precisely about the alleged inefficiencies, so that he/she has a reasonable opportunity to correct them by the end of the improvement period." Id., at 74. Further, observations of the teacher during the improvement period should be related to the charges and evaluations should relate to the task required by regulation and decision law. Ibid. If, after such assistance, the teacher remains inefficient, the charges may be prosecuted.

Consistent with the findings of fact, I **CONCLUDE** that the respondent's performance, even after notice of the charges and assistance and opportunities to improve, was deficient and inefficient as charged so that the respondent should be dismissed and removed from BOE employment.

ORDER

I **ORDER** the respondent **DISMISSED** and **REMOVED** from his employment with the Trenton Public School System.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 14, 2008
DATE

John R. Tassini
JOHN R. TASSINI, ALJ

Date Received at Agency: 8-14-08

Mailed to Parties:

AUG 15 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

mph

EXHIBITS

(Exhibits are evidence unless marked ID, for identification only)

Joint:

J-1 Stipulation of Facts

For Petitioner:

P-1 N.J.A.C. 6A:9-3.1, -3.2, -3.3

P-2 State of New Jersey Department of Education, "Academic & Professional Standards," for Teachers and School Leaders

P-3 Trenton Public Schools "New Board Governance Policies," adopted April 14, 2003, Policy Type ENDS Policy Numbers E-1 through E-6

P-4 Letter (notice of BOE approval of appointment to the position of teacher) from BOE to respondent, December 23, 1998

P-5 Trenton Public Schools Annual Teacher Evaluation Packet, April 26, 1999; Teacher Final Evaluation Form, April 26, 1999

P-6 Letter from BOE (notice of contract for 1999-2000, etc.) to respondent, April 30, 1999

P-7 Letter (notice of BOE's approval of reappointment, etc.), November 3, 1999

P-8 BOE Instructional Staff Contract, April 28, 2000

P-9 Annual Teacher Evaluation Packet, May 24, 2000; Teacher Final Evaluation Form, May 24, 2000

P-10 BOE Instructional Staff Contract, dated May 9, 2001

P-11 Annual Teacher Evaluation Packet, June 18, 2001; Teacher Final Evaluation Form, June18, 2001

P-12 BOE Instructional Staff Contract, April 30, 2002

P-13 Annual Teacher Evaluation Packet, May 6, 2003; Teacher Final Evaluation Form, May 6, 2003; Professional Improvement Plan (PIP), for 2003-04; Record of Professional Development Hours, May 13, 2003; 2003 Grant STAR-W (statement by respondent); Teacher Observance/Conference, May 1, 2003; Memorandum from Solomon to respondent, May 1, 2003

P-14 BOE Employment Contract, May 9, 2003

P-15 Memorandum from Fland to respondent, September 9, 2003

P-16 Memorandum from Solomon to respondent, October 16, 2003

P-17 Memorandum from Fland to respondent, dated November 3, 2003

P-18 Teacher Observation/Conference Form, November 20, 2003

P-19 Teacher Observation/Conference Form, December 5, 2003

P-20 Memorandum from Fland to respondent, December 9, 2003

P-21 Memoranda from Gibson to respondent, December 16, 2003 & October 2, 2003; Memoranda from Fland to respondent, September 25, 2003, September 26, 2003, October 1, 2003, October 2, 2003

P-22 Letter from Gibson to respondent, March 26, 2004

P-23 Memorandum (notice of reprimand/discipline) from Gibson to respondent, March 31, 2004; memorandum from Solomon to respondent, January 12, 2004; memorandum from Fland to respondent, January 16, 2004; memorandum from Solomon to respondent, February 3, 2004

P-24 Letter from Gibson to respondent, April 20, 2004

P-25 Letter (notice of BOE consideration of withholding increment) from Gibson to respondent, April 26, 2004; Labor Relations Summary Sheet; Memoranda from Fland to respondent, September 10, 25, 2003, October 1, 2, 2003; November 3, 2002; December 9, 2003; Teacher Observation/Conference Forms, November 20, 2003 & December 5, 2003; Observation Notes, November 19& December 5, 2003; Memoranda from Solomon to respondent, October 14, 2001; January 29, February 11& October 16, 2003

P-26 Memorandum from respondent, May 4, 2004; Teacher Observation/Conference Form, April 27, 2004; Staff Observation memorandum by Trapp, April 27, 2004; Skills Plan for ASK 2003-2004, Starting Date of Cycle: April 26, 2004

P-27 BOE Employment Contract with notice of recommendation of withholding of Increment for the 2004-2005 school year, April 27, 2004

P-28 Annual Teacher Evaluation Packet Transmittal Checklist, April 28, 2004; Teacher Final Evaluation Form, April 28, 2004; PIP 2004-05; Record of Professional Development Hours; Memorandum from respondent, May 4, 2004; Teacher Observation/Conference Form, April 27, 2004; Staff Observation by Fland, April 27, 2004; Skills Plan for ASK 2003-2004, Starting Date of Cycle: April 26, 2004; Memorandum from Trapp, March 29, 2004; Teacher Observation/Conference Form, October 9, 2003; Observation Notes by Fland, October 3, 2002; Parker Elementary School Mr. Jones' Lesson Plans, October 3

thru October 10th; Memorandum from Fland, October 3, 2004; Memorandum from Fland, September 25, 2003

P-29 Memorandum from Trapp, May 28, 2004

P-30 Memorandum (notice of reprimand) from Gibson, August 18, 2004; Memorandum from Trapp, May 25, 2004; Memorandum from Trapp, June 16, 2004; Memorandum from Trapp, June 16, 2004; Memorandum from Trapp, June 21, 2004

P-31 Letter from Gibson, October 20, 2004

P-32 Memorandum (notice of discipline) from Gibson, December 6, 2004; Acknowledgement for Receipt of Documents forms; Memorandum from Trapp, April 28, 2004; Revision BOE Policy, May 24, 2004; Memorandum from Trapp, October 4, 2004

P-33 Memorandum from Gibson, February 10, 2005; Acknowledgement for Receipt of Documents forms; Memorandum from Solomon, October 19, 2004; Memorandum from Trapp, December 12, 2004; Memorandum from Trapp, January 25, 2005; Memorandum from Trapp, January 28, 2005

P-34 Memorandum (Re: Explanation of 2/23/05 events) from Trapp, March 1, 2005; Memorandum (Re: Preparation Times) from Trapp, March 1, 2005

P-35 BOE Evaluation Booklet for Teacher; Annual Teacher Evaluation Packet, Transmittal Checklist; Teacher Final Evaluation Form, April 8, 2005; Teacher Observation/Conference, December 1, 2004; Staff Observation memorandum, December 17, 2004; Teacher Observation/Conference, December 9, 2004; Staff Observation by ____, December 9, 2004; Memorandum (Re: Observation of Jones teaching TERC Investigations), February 15, 2005; Memorandum by Trapp, October 18, 2004; Staff Observation by _____, September 23, 2004; PIP, 05/06; Record of Professional Development Hours

P-36 Letter (notice of BOE closed session relative to increment) from Gibson, May 3, 2005; Labor Relations Summary Sheet; Memoranda from Solomon and/or Trapp; Documentation for Withholding of Increment; Memorandum from Solomon & Trapp, March 24, 2005; Memorandum from Trapp, April 15, 2005; E-mail from Solomon, December 22, 2004; Memorandum from Trapp, May 28, 2004; Letter from Solomon, December 22, 2004; Letters from J.B., November 10 and December 15, 2004; Memorandum from Solomon, November 16, 2004; Memoranda "Work Smart – Not Hard," "Reading – E-2.11," etc., from Solomon & Trapp, September 6, 2004;

Memorandum from Trapp, September 28, 2004; Memorandum from Trapp, October 4, 2004; Memorandum from Trapp, October 18, 2004; Memorandum from Trapp, November 30, 2004; Memorandum from Solomon & Trapp, relative to December 9, 2004 meeting; Teacher Observation/Conference form, December 9, 2004; Staff Observation from Trapp, December 9, 2004; Memorandum from Solomon, December 13, 2004; Notice of absences, December 1, 2004; Teacher Observation/Conference, December 17, 2004; Staff Observation from Trapp, December 17, 2004; Memorandum from Trapp, January 25, 2005; Memorandum from Trapp, January 26, 2005; Observation notes by Heather Jackson(?), February 15, 2005; Memoranda (Insubordination and Lesson Plans) from Trapp, March 7, 2005; Memorandum III from Solomon, March 8, 2005; July 2004-June 2005 Calendar of respondent's absences, etc.; Memorandum from Trapp, December 23, 2004; Memorandum from Trapp, March 1, 2005

P-37 BOE Employment Contract, May 10, 2005, with notice of recommendation of withholding of Increment

P-38 Letter (notice of BOE's approval of withholding of increment) from Gibson, June 2, 2005; BOE Employment Contract, June 3, 2005

P-39 Memorandum from Trapp, June 10, 2005

P-40 Notice of recommendation of Withholding of Increment/Tenure Charges by Solomon, March 17, 2006; Memorandum from Solomon and Giddens-Green, December 5, 2005; Memorandum from Giddens-Green, March 9, 2006; Letter from Giddens-Green, March 10, 2006; Letter from Giddens-Green, September 29, 2005; E-mails from Bethea, Solomon, September 27, 2005; Memorandum from Jones, October 5, 2005; Letter from Giddens-Green, October 10, 2005; BOE Policy "Attendance Patterns"; Letter from Trenton Orthopedic Group, September 21, 2005; Excusal Slip from Eastern Dental, November 17, 2005; Prescription Blank, October 7, 2005 with note from respondent; Parker Elementary School, Staff Temporary Sign Out, September 16, 19, 20, 21, 22, 2005; Letter from Giddens-Green, December 9, 2005; Notice from Solomon, Giddens-Green and Bethea to All Staff, September 1, 2005; Memorandum from Giddens-Green, December 12, 2005, and respondent's handwritten reply; Letter from Giddens-Green, February 24, 2006; Acknowledgement of Receipt by respondent, February 24, 2006; Memorandum relative to Utilizing Preparation Time from Giddens-Green, December 5,

2005; Memorandum relative to Data Conference from Giddens-Green, December 5, 2005;

P-41 Letter (notice of appointment for determination of fitness to return to work) from Gibson, April 25, 2006, with mail receipt records, etc.

P-42 Teacher Final Evaluation Form, April 28, 2006

P-43 Human Resources Personnel Action Request (for return to duty), May 1, 2006

P-44 Letter (notice of BOE meeting relative to recommendation to withhold increment), May 4, 2006

P-45 Teacher Final Evaluation Form, April 28, 2006; Teacher Observation/Evaluation, Pre-Observation Form, March 10, 2006; Formative Teacher Evaluation, March 17, 2006; Post-Observation Form, March 17, 2006

P-46 Employment Contract and notice of recommendation of withholding of Increment for the 2006-2007 school year, May 12, 2006

P-47 Memorandum from Giddens-Green, May 30, 2006; e-mail (response) from respondent, May 12, 2006

P-48 Letter (notice of BOE hearing relative to withholding of increment), June 8, 2006

P-49 Memorandum (relative to return of equipment) from Giddens-Green, June 26, 2006

P-50 Letter (notice relative to return from a medical leave of absence) from Gibson, June 27, 2006

P-51 Letter (notice of rescheduled BOE hearing relative to withholding of increment), June 28, 2006

P-52 Memorandum, February 27, 2006 [July 27, 2006]; transmitting memorandum of reprimand, July 11, 2006; memorandum relative to conference, June 14, 2006; e-mail from respondent, June 17, 2006

P-53 Memorandum "Areas Needing Attention/Improvement," from Adams, September 14, 2006

P-54 Lesson Plans Monitoring Checklist[s] (weeks of September 25, 2006 – October 2, 2006; October 10 -16, 2006), September 25, 2006; School schedule; Parker Annex II Elementary School Classroom Checklist; Parker Annex II, respondent's Lesson Plans, 2006-07: Oct 9th -13th, Oct 16th – 20th; List: Word Work, etc.

P-55 Examples of writing by student in respondent's class, October, 2006

P-56 E-mails from Adams to respondent, October 5, 2006

P-57 Memoranda (relative to Tenure Charges and Action Plan, Instructional Expectations) from Adams, October 10, 2006; e-mail (relative to Posted Objectives) from Adams, October 5, 2006; Lesson Plans Monitoring Checklist (October 10 -16, 2006), October 10, 2006; School schedule; Parker Annex II Elementary School Classroom Checklist; Memorandum (relative to Classroom Checklist) from Adams, September 19, 2006; Parker Annex II, respondent's Lesson Plans, 2006-07: Oct 9th -13th, Oct 16th – 20th

P-58 Memorandum or E-mail (relative to Attendance for 2006-2007 school year through October 1, 2006), October 12, 2006

P-59 Memorandum (relative to Ninety (90) Day Corrective Action Plan) from Adams, October 13, 2006; "Inquiring into Teaching and Learning in Classrooms" (article relative to evaluations, etc.); e-mails from Bethea, Solomon and Giddens-Green, September 27 to October 13, 2006; e-mails from Giddens-Green and Adams, October 11, 2006

P-60 Memorandum (relative to use of cellular phone) from Adams, October 17, 2006; BOE policy relative to Cell Phones and Pagers

P-61 Nature's Fury Theme Skills Test Record for students, October 12, 2006

P-62 Clara Parker Annex II, Staff Handbook Distribution, received by respondent, October 17, 200[6]

P-63 Memorandum (relative to Ninety (90) Day Corrective Action Plan Meeting) from Adams, October 20, 2006; examples of students' work; Parker Annex II Elementary School Classroom Checklist, October 16, 2006

P-64 Memorandum (relative to Substitute Plans) from Adams, October 25, 2006; to Warren Jones from RaShawn M. Adams, Principal, regarding Substitute Plans; Clara Parker Annex II, Staff Handbook Distribution, received by respondent, October 17, 200[6]; Parker Annex II, respondent's Lesson Plans, 2006-07: Oct 9th -13th, Oct16th – 20th; "October 23, 2006, From the desk of Ms. Blackwell, School Counselor . . . , Write a letter to yourself . . ." (form); "Geography Crossword Puzzle"; map of the United States; "Money Matters" (problems to be solved); memorandum (relative to substitute preparation) from Fland, October 2, 2003

P-65 Memorandum from Adams (relative to Ninety (90) Day Corrective Action Plan Meeting) from Adams, October 27, 2006; Lesson Plans Monitoring Checklist (October 23 – November 3, 2006), October 25, 2006; written materials relative to journals, etc.; e-mails

from Adams and respondent, October 5, 26, 27, 2006; Week[s] of October 27, 30, 2006, respondent's 5th Grade school schedules; students work, October 2006

P-66 Memorandum (relative to Ninety (90) Day Corrective Action Plan Meeting) from Adams, November 3, 2006; form with circles; respondent's(?) notes relative to "Prep", November 3, 2006

P-67 Week[s] of November 6th – 10th, November 8th -17th, 2006, Mr. Jones' 5th Grade Revised Lesson Plans; respondent's notes: "Sub-Teacher," undated; "Running Log," October 29 – November 7, 2006(?), "During Prep"

P-68 Parker Annex II Elementary School Classroom Checklist for respondent

P-69 Lesson Plans Monitoring Checklist (November 16, 2006), November 6, 2006; Week[s] of November 6th – 10th, 13th – 17th schedule

P-70 Memorandum (relative to Ninety (90) Day Corrective Action Plan Meeting) from Adams, November 17, 2006; "The Minilesson and Beyond," etc., articles

P-71 Memorandum (relative to Ninety (90) Day Corrective Action Plan Meeting) from Adams, December 8, 2006

P-72 Memorandum (relative to Ninety (90) Day Corrective Action Plan Meeting) from Adams, December 8, 2006

P-73 Memorandum (Summary and Recommendation 90 Day Plan for respondent) from Adams, January 5, 2007; "Identifying the 'Distinguished/Very Good' Teaching and Learning Experience"; "Inquiring into Teaching and Learning in Classrooms"

P-74 Agreement between the Trenton Board of Education and the Trenton Education Association, covering the period September 1, 2004 to August 31, 2007 and September 1, 2007 to August 31, 2009

P-75 Unsatisfactory Evaluation Report 2005-2006, submitted by Giddens-Green, organized documents including memoranda, assessments, informal/formal observations, parent complaints, student work samples, separated into parts identified as Evaluation History, Concerns, Current Evaluation, Informal Observations, Assessments, Parental Complaints, Student Work Samples, Attendance, Other Communications, Front Pocket, Back Pocket

P-76 State of New Jersey, Department of Education, Academic & Professional Standards, Core Curriculum Content Standards

P-76A "NJCCCS CD-ROM Project in Cooperation with Newark Teachers' Union, Seton Hall University, and the Newark Public Schools"

P-77 Tenure Certification Form (recommending RaShawn Adams for tenure) by Rodney Lofton, March 26, 2007

P-78 Letters (of recommendation for RaShawn Adams) from Gibson, Lofton, Weatherington, May 23, 31, 2007

P-79 Drawing by Blackwell

P-80 Sentence written by respondent with subject and predicate underlined, etc. ID

P-80A Sentence diagramed by BOE's attorney ID

For Respondent:

R-1 Message (relative to 2nd and 5th Students) from Giddens-Green, October 24, 2005

R-2 Article: Education Week, "Rigor on Trial," by Tony Wagner, January 11, 2006

R-3 Provisional Certificate, October 1997 to July 1998 ID

R-4 Article: The Times, "Trenton students' test scores slip," by Lisa Coryell, September 30, 1998 ID

R-5 Letters from Superior Court of New Jersey, "Jury Manager," October 1, 2003, and Superior Court of New Jersey, John Saunders, Manager with note from "___ Swain, Team Leader," December 8, 2003; Memoranda from P. Fland, December 12, 2003, and P. Fland and W. Solomon, December 22, 2003

R-6 Memorandum from Jones, January 14, 2004

R-7 E-mail printout relative to messages, November 23, 2003

R-8 Memorandum (referring to "Account of February 23, 2005 Events") from Jones, undated

R-9 Memorandum (referring to "Failure to Cooperate/E-Grade Books") from Jones, undated

R-10 Memorandum from Solomon, November 16, 2004

R-11 Memorandum from Jones, March 12, 2005, with attachments related to FMLA request, etc.

R-12 Memorandum from Jones, December 16, 2004

R-13 TerraNova, Multiple Assessments (of Parker School students), test date April 18, 2005

R-14 2006 (2006-07 School Year) Class List Spring 2005 Test Scores (rosters of 5th Graders in Butler's, Cook's, and Alvarado's classes)

R-15 2006-07 School Year Roster of 5th Grade Students in Jones' class with NJASK Scores

R-16 5th Grade 2006-07 School Year Roster of Students in Jones' class with attachments: students TerraNova Performances by Content Areas

R-17 Memorandum from respondent to Giddens-Green, January 26, 2006

R-18 Handwritten note from Giddens-Green to respondent, October 10, 2005

R-19 Teacher Edition, Zaner-Bloser Handwriting, 5, cover and page

R-20 Reading Support and Test Preparation Answer Key, Harcourt Horizons United States History Beginnings, cover and page

R-21 Level E, Modern Curriculum Pres Word Study, cover and page

R-22 Page from Trenton school system student newsletter with articles, "My African-American Heros" (sic)

R-23 Handwritten note from A.S., March 31, 2006

R-24 Respondent's log October to December, 2006

R-25 E-mail from Shank to Parker School, Parker Annex II, February 6, 2007, 10:05 am

R-26 E-mail from Shank to respondent, Parker Annex II, February 6, 2007, 2:12 pm

R-27 Memorandum from Novis, February 10, 2007

R-28 Standard Certificate, Elementary School Teacher, Issued 12/99

R-29 E-mail from Juanita Jenkins, Law & Public Safety, to Cynthia Price, May 23, 2005 ID

WITNESSES

For Petitioner:

RaShawn Adams

Peter E. Fland

Deborah Giddens-Green

Willie Solomon

Bernadette Trapp

For Respondent:

Betty Blackwell

Warren Jones

Lori Novis

405-08

OAL DKT. NO. EDU 3840-08
AGENCY DKT. NO. 22-1/08

IN THE MATTER OF THE TENURE HEARING OF ANTHONY PARASKEVOPOLOUS, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter – as supplemented by pages 48-49 of the Teacher-Clerk Agreement Between the Newark Teachers Union and the Newark Public Schools for the period of July 1, 2006 through June 30, 2009[1] – the parties' proposed Stipulation of Settlement, and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon such review, the Commissioner concurs with the ALJ that the proposed settlement is consistent with established standards governing settlement of tenure matters. *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846. In so holding, however, the Commissioner observes that the proposed agreement provides for effectuation of central terms – most particularly respondent's resignation on June 30, 2008 – prior to final agency approval, contrary to *N.J.A.C.* 1:1-19.1. The parties herein – and all litigants in controverted matters – are accordingly reminded that parties to proposed settlements act at their peril when including terms requiring effectuation prior to the

[1] On September 12, 2008, in accordance with *N.J.A.C.* 1:1-15.2(c), the Director of the Bureau of Controversies and Disputes advised the parties that the Commissioner intended to take notice of this document – which is a public record pursuant to the Open Public Records Act, *N.J.S.A.* 47:1A-1 et seq. – since it was necessary for the record of this matter to include the contract provision referenced in Term No. 3 of the proposed settlement agreement, without which the meaning and effect of the term could not be ascertained. The parties were afforded an opportunity to object, but did not do so.

Commissioner's approval, since the Commissioner may ultimately disapprove the term(s) in question or, indeed, the agreement in its entirety.

Accordingly, the settlement is hereby approved and the tenure matter dismissed, subject to compliance with the terms of the settlement. A copy of this decision shall be forwarded to the State Board of Examiners for action as it deems appropriate.

IT IS SO ORDERED.[2]

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 10/01/08

Date of Mailing: 10/02/08

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INIITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 03840-08
AGENCY DKT. NO. 22-1/08

IN THE MATTER OF THE TENURE HEARING OF ANTHONY PARASKEVOPOULOS, STATE-OPERATED DISTRICT OF NEWARK, ESSEX COUNTY

Adam S. Herman, Esq., for petitioner, State-Operated School District

Charles I. Auffant, Esq., for respondent Anthony Paraskevopoulos (Ball Livingston, attorneys)

Record Closed: August 21, 2008 Decided: August 21, 2008

BEFORE **JESSE H. STRAUSS**, ALJ:

On November 27, 2007, the State-Operated District of Newark (District) charged tenured teacher Anthony Paraskevopoulos with unbecoming conduct and other just cause and sought his removal or reduction in salary under N.J.S.A. 18A:6-10 et seq. The Bureau of Controversies and Disputes of the New Jersey Department of Education referred the matter to the Office of Administrative Law (OAL) on March 26, 2008, as a contested case after having reviewed the Tenure charges and having deemed them

sufficient, if true, to warrant dismissal or reduction in salary.[1] N.J.S.A. 52:14F-1 to F-13. At the commencement of the hearing on June 24, 2008, the parties participated in a settlement conference which successfully concluded with the execution of the attached Voluntary Settlement Agreement, which the Superintendent of the Sate-Operated District of Newark approved.

The allegations which gave rise to the Tenure charges were that, on May 7, 2007, Paraskevopoulos verbally and deliberately made a false statement to his principal that he had observed a fellow teacher inappropriately touch students on multiple occasions. This allegation caused a report to be filed with the Division of Youth and Family Services. The charges further allege that, three days later, Paraskevopoulos admitted to the principal that he had fabricated the allegations.

Based upon a review of the record as well as the proposed Settlement Agreement, and the representations of the parties on the record of this matter, I make the following **FINDINGS:**

1. The nature of the charges has been documented by the submission of a Statement of Charges and Certificate of Determination.

2. The Settlement is in the public interest as it conserves the Board's resources and delivers a final result, whereby Paraskevopoulos will no longer be associated with the District, rather than the unpredictable outcome of a hearing. Litigation costs associated with a scheduled multiple day hearing have been considered against the monetary terms of the Settlement. The nature of the charges, although of serious concern, are not such as to suggest criminal conduct or the unreasonable infliction of harm by Paraskevopoulos in the form of physical, mental or sexual

[1] On February 28, 2008, the Commissioner issued a decision in this matter ordering Paraskevopoulos dismissed from his tenured position as a teacher. She deemed each count of the tenure charges to have been admitted since Paraskevopoulos failed to submit a timely Answer to the tenure charges. On March 26, 2008, the Commissioner vacated her order of February 28, 2008, and accepted Paraskevopoulos' untimely Answer submitted with his motion for reconsideration.

abuse of children. Additionally, Paraskevopoulos has represented that there was a reasonable basis for his actions, which he contends were taken in good faith. The proposed settlement agreement is with the consent of all parties.

3. By the terms of the proposed settlement agreement and the representations of Paraskevopoulos at the hearing, the charged party has entered into this agreement with a full understanding of his rights.

4. Paraskevopoulos has been advised of the Commissioner's role in referring Tenure resolutions to the State Board of Examiners for possible suspension or revocation of certificates.

I therefore **CONCLUDE** that this Settlement Agreement meets the requirements of N.J.A.C. 6A:3-5.6 and that approval of it is in the public interest. Although making false allegations against a fellow employee, particularly where the claim could affect his career, is extremely serious, the nature of these charges are not such as to constitute per se grounds for the forfeiture of teaching certificates as a condition of this proposed settlement, as opposed to having the issues reviewed by the Board of Examiners.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

August 21, 2008
DATE

Jesse H. Strauss
JESSE H. STRAUSS, ALJ

Date Received at Agency: 8-25-08

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AUG 25 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

id

NEWARK PUBLIC SCHOOLS
Office of the General Counsel
2 Cedar Street
Newark, New Jersey 07102
(973) 733-8358
Attorney for Newark Public Schools

2008 AUG 21 A 11:02
OFFICE OF ADMINISTRATIVE LAW

IN THE MATTER OF TENURE CHARGES AGAINST ANTHONY PARASKEVOPOULOS; STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, IN THE COUNTY OF ESSEX	OAL DKT. NO. EDU 03840-08 AGENCY REF. NO. 22-1/08 **STIPULATION OF SETTLEMENT**

The above parties in this appeal have voluntarily resolved all disputed matters and enter into the following stipulation of settlement, which fully disposes of all issues in controversy between them.

WHEREAS, Anthony Paraskevopoulos ("Dr. Paraskevopoulos"), is a tenured teaching staff member employed by the State-Operated School District of the City of Newark ("District") as a school teacher;

WHEREAS, on or about November 27, 2007, tenure charges were filed against Dr. Paraskevopoulos;

WHEREAS, on or about January 2, 2008, the tenure charges were certified to the Commissioner of Education ("Commissioner");

WHEREAS, in connection with the certification of the tenure charges to the Commissioner, Dr. Paraskevopoulos was suspended without pay effective January 7, 2008, pursuant to N.J.S.A. 18A:6-14;

WHEREAS, on or about January 25, 2008, Dr. Paraskevopoulos, through his counsel, Charles I. Auffant, Esq. , filed an Answer with the Commissioner denying all charges;

WHEREAS, on or about March 26, 2008, the Commissioner transmitted the file to the Office of Administrative Law as a contested case for hearing, bearing Docket No. EDUTH-03840-08;

WHEREAS, the parties engaged in settlement discussions regarding this matter;

WHEREAS, due to the uncertainties of the outcome of litigation, expenditure of resources due to multiple days of hearing with numerous witnesses, the concern that school personnel will be removed from educational duties and responsibilities during that time, and Dr. Paraskevopoulos' representation that there was a reasonable basis for his actions which he contends were taken in good faith, the parties seek to amicably resolve this matter and hereby stipulate and agree as follows:

1. Dr. Paraskevopoulos hereby agrees to resign from his tenured position effective June 30, 2008. Attached is a copy of the signed Letter of Resignation (Exhibit A). Upon approval of the signed Stipulation by the Commissioner of Education, the District shall and hereby does withdraw the instant tenure charges and will process Dr. Paraskevopoulos' separation from the District in accordance with this paragraph.
2. Dr. Paraskevopoulos will receive 120 calendar days' salary for the period he served his 120-day unpaid suspension subsequent to the charges being certified to the Commissioner. Dr. Paraskevopoulos will receive said compensation in four (4) equal monthly installments. The District will take all mandatory deductions.
3. Dr. Paraskevopoulos will be permitted to buy back his sixty-two (62) accumulated sick days under the formula set forth in Article 10 Section 7 C (1) in the collective Bargaining Agreement between the District and the Newark Teachers Union dated July 1, 2006 though July 30, 2007. Dr. Paraskevopoulos shall receive this amount in two (2) equal installments. The District will take all mandatory deductions.
4. Dr. Paraskevopoulos' separation from employment will be deemed a voluntary resignation. Upon inquiry from any third parties, the District will only confirm Dr. Paraskevopoulos' title and dates of employment.

5. As of June 30, 2008, all of Dr. Paraskevopoulos' employment rights, including, but not limited to salary, insurance coverage, tenure and seniority, will permanently end.

6. The District will not pursue tenure charges against Dr. Paraskevopoulos as long as this Stipulation remains in effect and is not voided by any court or administrative agency of competent jurisdiction. However, if the Stipulation is voided, the District retains the right to file and consider for certification tenure charges against Dr. Paraskevopoulos, including such charges that previously have been filed by the District against Dr. Paraskevopoulos and Dr. Paraskevopoulos may rescind his resignation.

7. In accordance with N.J.A.C. 6A:3-5.6, Dr. Paraskevopoulos has been advised that this matter must be forwarded to the Commissioner for approval.

8. In accordance with N.J.A.C. 6A:3-5.6, Dr. Paraskevopoulos has been advised that this matter may be referred by the Commissioner to the State Board of Examiners.

9. The parties respectively acknowledge that counsel has advised them and that each is signing this Stipulation freely and voluntarily, without duress, coercion or pressure from the other party.

10. This Stipulation constitutes the full agreement between the parties, and shall be construed and enforced in accordance with New Jersey law.

11. Dr. Paraskevopoulos agrees that he will not apply for reemployment with the District at any time. If Dr. Paraskevopoulos does apply for reemployment with the District and is approved for employment, the terms of this settlement agreement shall be grounds for immediate termination of Dr. Paraskevopoulos' employment.

12. The undersigned representatives of the parties hereby acknowledge that they have been duly authorized by the respective parties to sign this Stipulation and bind their principals to its terms.

13. By entering this Stipulation, each party releases and discharges the other with respect to all claims or rights that either party may have against the other. This includes without limitation, any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Dr. Paraskevopoulos'

employment with the District. It specifically includes, without limitation, all claims which Dr. Paraskevopoulos may have regarding tenure, withholding of increment, discrimination on any basis, any federal or state civil rights law, claims under the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, and any other federal or state civil rights claims, including claims of age discrimination and other rights and claims arising under the Age Discrimination in Employment Act and the Older Workers' Benefits Protection Act, rights under any collective bargaining agreement, disability payments, sick leave, salary or any other matter pertaining to his employment.

14. This Stipulation of Settlement is subject to the approval of the State District Superintendent of the State-operated School District of the City of Newark.

FOR RESPONDENT:

Dated: 6/28/08

Dr. Paraskevopoulos

Dated: 6/28/08

Charles I. Auffant, Esq.
Attorney for Anthony Paraskevopoulos

FOR PETITIONER:

Dated: _____

Dr. Clifford B. Janey
Superintendent

Dated: 8/11/08

Adam S. Herman, Esq.
Senior Associate Counsel
Newark Public Schools

CERTIFICATION

I, Dr. Paraskevopoulos, being the Appellant in this matter, hereby certify that I have reviewed this Stipulation of Settlement and fully understand its meaning and terms. I acknowledge that my representative questioned my understanding and verified my acceptance of the terms of this Stipulation of Settlement. I am satisfied with my representation and I enter into this Settlement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dr. Paraskevopoulos
DR. PARASKEVOPOULOS

DATED: 6/28/08

#406-08

406-08

A.S. on behalf of minor children T.S. and O.H.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner appealed a determination by the Board that his children, T.S. and O.H., are not entitled to a free education in the Bloomfield School District because petitioner is not domiciled in the district. The respondent Board filed a counterclaim for tuition for T.S. O.H. has been attending a special education program outside the district and tuition was not sought by the Board for his placement. Petitioner failed to appear for a scheduled hearing on August 14, 2008; ex parte proofs were presented by the respondent at the hearing.

The ALJ found that: petitioner failed to prosecute his appeal, leaving no basis to consider overturning the residency determination of the respondent Board; respondent's proofs as to ineligibility and tuition rate were convincing and satisfy its burden of proof for the counterclaim. The ALJ concluded that: the Board is entitled to a decision on the merits based on the unrefuted proofs presented at hearing; petitioner must pay the respondent tuition in the amount of $ 7,550.40, representing the cost of T.S.'s tuition for 143 days of ineligible attendance; and at all relevant times, T.S. and O.H. were residents of and domiciled in West Orange. The ALJ dismissed the petition and granted the Board's counterclaim for tuition.

The Commissioner concurred with the ALJ, and adopted the Initial Decision as the final decision in this matter, with one modification. The Commissioner rejected the ALJ's finding that the children are domiciled in West Orange, as there is nothing in the record that establishes their domicile. The Commissioner dismissed the petition and ordered petitioner to pay tuition as set forth above.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

October 3, 2008

OAL DKT. NO. EDU 7136-08
AGENCY DKT. 130-5/08

A.S. on behalf of minor children T.S. and O.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Because the respondent presented evidence that suggested that T.S. and O.H. did not live at the Bloomfield address listed in their student files, and that evidence was not rebutted by petitioner,[1] the Commissioner concurs with the Administrative Law Judge that petitioner is liable for the tuition amount that was assessed by respondent and supported by way of the affidavit of respondent's business manager, along with copies of respondent's school calendar and a business record identifying tuition figures for the 2007-2008 school year. Since, however, there is nothing in the record that actually establishes where T.S. and O.H. are domiciled, the Commissioner rejects the ALJ's express finding that they are domiciled in West Orange.

[1] Petitioner did not appear for the OAL hearing, notwithstanding that a hearing notice dated July 7, 2008 was sent to the address which petitioner identified as his residence in Bloomfield. Nor did petitioner respond to a letter dated August 18, 2008 – sent by the ALJ to the same address – requesting an explanation for petitioner's absence at the hearing.

The petition is dismissed, respondent's counter claim for tuition in the amount of $7550.40 is granted, and the findings of the Initial Decision are modified as set forth above.

IT IS SO ORDERED.[2]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 10/03/08

Date of Mailing: 10/03/08

[2] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7136-08
AGENCY DKT. NO. 130-5/08

A.S., ON BEHALF OF MINOR CHILDREN,
T.S. AND O.H.,
Petitioner,
v.

TOWNSHIP OF BLOOMFIELD BOARD
OF EDUCATION, ESSEX COUNTY,
Respondent.

No appearance by or for petitioner

Joseph L. Roselle, Esq., for respondent (Schwartz, Simon, Edelstein Celso & Kessler, attorneys)

Record Closed: August 26, 2008 Decided: September 4, 2008

BEFORE **GAIL M. COOKSON**, ALJ:

STATEMENT OF THE CASE

A.S. appeals the Township of Bloomfield Board of Education's (Board) determination that his daughter, T.S., and his son, O.H., are not entitled to a free public education in the Bloomfield School District because he is not domiciled in the district.

The Board has filed a counterclaim seeking A.S.'s payment of tuition for the number of days T.S. attended elementary school in the district during the 2007-2008 school year. O.H. is attending a special education program outside the district and tuition is not sought by the Board on his placement.

The Board notified A.S. of its determination on March 26, 2008, including his liability for out-of-district tuition, and T.S. was disenrolled from the district on April 15, 2008. A.S. filed his petition of appeal directly with the Commissioner of Education on May 15, 2008. The Board filed its answer and counterclaim on May 28, 2008, and the matter was then transmitted to the Office of Administrative Law for determination as a contested case on May 30, 2008.

The hearing was scheduled for August 14, 2008. Although notice of the hearing was sent to the Bloomfield address, A.S. failed to appear. Prior to the hearing, the Board had sought a telephonic pre-hearing conference but was unable to reach A.S. at the telephone on record. When the OAL requested that the Board contact A.S. by mail in order to set up the telephonic conference, its multiple attempts to deliver its request by overnight delivery failed. Given the fact that the Board had, with its answer to A.S.'s petition, filed a counterclaim seeking A.S.'s payment of tuition for the number of days T.S. had attended school in the district, an ex parte hearing was held and concluded. The record was not closed on that date in order to allow the Board time to submit a final certification on the tuition rates for the school year. In addition, subsequent to the hearing, the OAL provided written notice to A.S., with delivery confirmed, requesting an explanation of his failure to appear. No communication has ever been received.

FINDINGS OF FACT

Based upon due consideration of the pleadings and the testimonial and documentary evidence presented ex parte at the hearing and having had the opportunity to observe the demeanor of the witness and assess his credibility, I **FIND** the following to be the undisputed facts:

Testifying on behalf of the school district was Jeffrey Allyn, who has been a compliance and truancy officer and investigator for the Board for the past fifteen years. In November, 2007, Allyn was assigned to investigate why O.H. had missed his bus transportation to the special education program he attended out-of-district. At that time, he observed an adult female drive up to the Bloomfield address listed on the school registration forms with two children in the vehicle. The female stated that she was A.S.'s girlfriend, that A.S. was at work already and that she was dropping the children off for him. Allyn advised her to make sure that O.H. was ready promptly for the bus in the future.

Two months later, a follow-up referral was made to Allyn from the Carteret Elementary School where T.S. attended school. The referral was made because the school had not been receiving calls when T.S. was absent and the home phone was disconnected when the school attempted to contact A.S. In addition, the school's emergency card had been sent home five times to be completed without success. Allyn began his investigation on January 16, 2008, conducting surveillance of the residence at 206 North 15th Street, Bloomfield, between 7:45 a.m. and 8:45 a.m. On that day, he did not see either child leave the residence. On January 22, 2008, the investigator conducted his surveillance beginning at 6:45 a.m. and stayed until 8:40 a.m. He observed the special education van pull up to the Bloomfield address at 7:39 a.m. and wait. At 8:00, a vehicle pulled up and dropped off O.H. while T.S. remained in the car. The car was driven by a female. Allyn confirmed with the van driver and special education aide that O.H. is driven to the bus every morning and that the van is always kept waiting for him to arrive.

Allyn also conducted research on the vehicle he had observed and traced it to a West Orange address and a name that appeared unrelated to information on file with the school. The next day, he proceeded to the West Orange address at 7:15 a.m. and observed the same vehicle. The vehicle left the area at 7:28 a.m. with both children in it, the female driver from the day before and another adult female. The female driver was identified as a person who is known to attend special education meetings on behalf of O.H. but who has never produced legal guardianship papers in spite of several requests from the district.

The investigator's early morning surveillance of the West Orange address continued on January 24, 28, 29, 30, 31 and February 4, 5, 6, 7, 11 and 12. On most days, he commenced his investigation at approximately 6:30 a.m. but was there as early as 4:30 a.m. on February 5. On each occasion, he observed the same vehicle parked in an off-street lot, noting that parking is prohibited on the street between 2 and 6 a.m. He also observed the adult female and two children leaving the West Orange address each morning and being driven toward Bloomfield. He never observed A.S. coming or going from that address on any of these days.

Based on the above uncontroverted facts, I **FIND** that T.S. and O.H. were not domiciled in Bloomfield during the 2007-2008 school year.

With respect to the Board's counterclaim for tuition, the Board presented the Certification of Michael Derderian, the Business Administrator. He presented a statement that A.S. was being assessed residence tuition for T.S.'s attendance at the school district's Carteret Elementary School for 143 days from the beginning of the school year through April 15, 2008. Since tuition is calculated on the basis of 1/180 of the school district's total annual per pupil cost of $9,504, or $52.80 per day, Mr. Derderian concluded that A.S. owes the district the total amount of $7,550.40. I **FIND** that the Board's tuition costs of T.S. attending Carteret Elementary School for 143 days while not residing in Bloomfield totals $7,550.40.

ANALYSIS AND CONCLUSIONS OF LAW

When a party fails to appear for a hearing despite having received adequate notice of the proceedings, the appearing party may ask the Administrative Law Judge to proceed through the presentation of ex parte proofs. If, after holding the matter for one day, the judge does not receive from the absent party an explanation for the failure to appear, and the circumstances require a decision on the merits, the judge may then issue an initial decision on the merits based on the ex parte proofs presented. N.J.A.C. 1:1-14.4(c). New Jersey Real Estate Commission v. Grennor, 92 N.J.A.R. 2d (REC) 29. Since A.S. failed to submit an explanation for his absence at the scheduled hearing, I

CONCLUDE that the Board is entitled to an initial decision on the merits based on the proofs presented at hearing.

The issue in this matter is whether T.S. was entitled to a free education under N.J.S.A. 18A:38-1, which provides that public schools shall be free to persons over five and under twenty years of age who are "domiciled within the school district." See V.R. o/b/o A.R. v. Hamburg Bd. of Educ., 2 N.J.A.R. 283, 287 (Educ. 1980), aff'd, State Bd., 1981 S.L.D. 1533, rev'd on other grounds, sub nom Rabinowitz v. New Jersey State Bd. of Educ., 550 F. Supp. 481 (D.N.J. 1982) (New Jersey requires local domicile, as opposed to mere residence, in order for a student to receive a free education).

Generally speaking, domicile is the place of a person's abode where he or she has the present intention of remaining and to which, if absent, he or she intends to return. Mercadante v. City of Paterson, 111 N.J. Super. 35, 39 (Ch. Div. 1970), aff'd, 58 N.J. 112 (1971). A person may have multiple residences, but only one domicile at a time; as such, the residence may coincide with domicile, but does not alone determine domicile. State v. Benny, 20 N.J. 238, 251 (1955).

"In a strict legal sense, the domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving." In re Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991) (quoting Kurilla v. Roth, 132 N.J.L. 213, 215 (Sup. Ct. 1944)); see also Mercadante, supra, 111 N.J. Super. at 39. Thus, domicile is what is regarded as an individual's true and permanent home. In re Jaffe, 74 N.J. 86, 90-91 (1977).

The question of domicile is one of fact and must be determined on a case-by-case basis. Lea v. Lea, 18 N.J. 1, 7 (1955). And in the present matter, there is absolutely no evidence that A.S. established even so much as a residence, much less a domicile, in Bloomfield. Stated another way, the undisputed evidence establishes that T.S. and O.H. were domiciled in the City of West Orange throughout the period of time T.S. attended school in the Bloomfield school district.

Mr. Allyn credibly testified that he conducted multiple random surveillances of 206 North 15th St. in Bloomfield without ever seeing A.S., O.H. or T.S. leave the residence in the morning to go to school. On the other hand, his surveillance revealed that an adult female appeared to have custody of the children and that those three persons, and maybe others, lived at 125 Main St., West Orange from which they were driven each morning back to Bloomfield to attend school or to embark onto the special education van.

After careful consideration of the record before me, I **CONCLUDE** that T.S. and O.H. were at all relevant times residents of and domiciled in West Orange, and therefore **CONCLUDE** that T.S. was not entitled to a free public education in the Township of Bloomfield school district during the 2007-2008 school year.

Under N.J.S.A. 18A:38-1(b)(2), a board of education is entitled to recover tuition from the parent of a child found ineligible to attend a school in its district. In such cases, "[t]uition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance... ." Ibid. Here, it is undisputed and I therefore **CONCLUDE** that the school district is entitled to $7,550.40 for the 143 days that T.S. attended elementary school during the 2007-2008 school year. Accordingly, I **CONCLUDE** that A.S. should be assessed tuition costs in that amount.

ORDER

Based upon the foregoing, it is **ORDERED** that A.S.'s petition of appeal should be and is hereby **DISMISSED WITH PREJUDICE**. And it is further **ORDERED** that the Board's counterclaim for recovery of tuition costs associated with T.S.'s attendance at the Carteret School in the Township of Bloomfield school district during the 2007-2008 school year in the amount of $7,550.40 be and is hereby **GRANTED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 4, 2008
DATE

Gail M. Cookson
GAIL M. COOKSON, ALJ

Date Received at Agency:

9/5/08

Mailed to Parties:

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SEP 8 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

pb

APPENDIX

WITNESSES

For Petitioner:

None

For Respondent:

Jeffrey Allyn

EXHIBITS

For Petitioner:

None

For Respondent:

R-1 Investigative Report

R-2 Certification of Michael Derderian

407-08

IN THE MATTER OF THE TENURE :
HEARING OF CURTIS ROBINSON, :
STATE-OPERATED SCHOOL DISTRICT :
OF THE CITY OF PATERSON, :
PASSAIC COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

The petitioning Board certified tenure charges of conduct unbecoming and other just cause against respondent Curtis Robinson – a tenured teacher – for alleged inappropriate, unprofessional and offensive behavior toward students and staff, including physical abuse against classified students with disabilities; the Board sought dismissal of respondent from his tenured employment.

The ALJ found that: the Board carried its burden of proving eight of the original charges of unbecoming conduct against respondent; respondent's actions were violative of the public trust and his behavior constituted conduct unbecoming a teacher; and the Board's determination to remove respondent was reasonable and necessary in order to insure the safety and well being of students and staff. The ALJ ordered that the tenure charges were sustained, and recommended that his teaching certificate be revoked.

Upon independent review of the record, the Commissioner concurred with the ALJ's findings as to the seriousness and unacceptability of respondent's conduct, and found that the Board had sustained its burden of proving eight of the tenure charges by a preponderance of credible evidence. Accordingly, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter, noting, however, that certificate revocation is solely within the jurisdictional purview of the State Board of Examiners – to whom this decision will be transmitted for action against respondent's certificate(s) as that body deems appropriate.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

October 3, 2008

OAL DKT. NO. EDU 7481-04
AGENCY DKT NO. 230-6/04

IN THE MATTER OF THE TENURE :
HEARING OF CURTIS ROBINSON, :
STATE-OPERATED SCHOOL DISTRICT :
OF THE CITY OF PATERSON, :
PASSAIC COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. Both petitioner and respondent filed timely primary and reply exceptions which were fully considered by the Commissioner in reaching her determination herein.

Respondent's exceptions charge that the decision of the Administrative Law Judge (ALJ) "perpetrates a gross miscarriage of justice, is arbitrary and capricious, and is not based on substantial evidence in the record." (Respondent's Exceptions at 1) Essentially recasting and reiterating his presentations made below, respondent maintains that the ALJ erroneously concluded that the District had carried its burden of proving Charge 1, Charge 2, Charge 3, Charge 4 – Count 3, Charge 5, Charge 7 and Charge 8. In reaching her determinations on these charges, respondent contends that the ALJ credited the testimony of the District's witnesses which he alleges was inconsistent and incredible while ignoring his competent testimony and that of his witnesses which respondent avers directly contradicted the proffers of the District's witnesses. Respondent presents extensive discussion of certain hearing testimony on each of these charges which he alleges supports his position. Respondent maintains that had

the ALJ adequately weighed the credibility of respondent's witnesses against that of the District's witnesses, the charges would have been dismissed. Finally, in finding him guilty of Charge 16 –which incorporates all of the prior charges to reach the conclusion that respondent, as a whole, conducted himself in a manner unbecoming a teacher – he advances that the ALJ improperly used evidence of alleged prior bad acts to support the District's charges against him. Specifically, he argues:

> The Initial Decision cited to three documents stating that they support the testimonial evidence. (Initial Decision, p. 56) However, all three documents pre-date the charges which allege conduct during the 2000-01 school year through the 2003-04 school year. Letters and memos from Mr. Jenkins regarding alleged conduct by the Respondent in the years prior to the charges do not prove the charges actually brought by the District and clearly demonstrate the prejudice that is inherent when allowing into evidence documents relating to "prior bad acts."
> (Respondent's Exceptions at 31)

In reply, the District asserts that the ALJ's credibility determinations are fully appropriate and supportable. It maintains that respondent's reliance on isolated excerpts of testimony in an attempt to disparage the credibility of the District's witnesses is fruitless. "Without exception, Petitioner's witnesses stood to gain nothing by their testimony. No one was still in a close working relationship with Respondent such that his departure, or his humiliation, would benefit the witness. Virtually every witness specifically testifying to events which took place at School 4 was no longer on site at that school." (District's Reply Exceptions at 3) Furthermore, the District alleges, the ALJ clearly considered the testimony of respondent's witnesses and found their testimony to be irrelevant. Each of these witnesses (except Campbell and V.H.) admitted that he or she was not present in respondent's classroom on a regular basis during the time period covered by the charges. With respect to V.H. and Campbell, the ALJ

specifically found V.H. to lack credibility and Campbell was removed from her position, seriously calling her credibility into question. (*Id.* at 10)

As to respondent's challenge that the ALJ used "prior bad acts" to support the charges, the District advances "Judge Rigo's consideration of certain proofs which predated the charges was wholly appropriate. The documents at issue are part of Respondent's personnal file and, more importantly, directly refuted the testimony of Respondent's witness Julian Jenkins, who attempted to characterize Respondent in a positive light." (transcript citations omitted) (*Id.* at 16)

Exceptions of the District take issue with certain summaries of witness testimony set forth by the ALJ in her decision claiming that these do not necessarily reflect "complete summaries of each and every witness's relevant direct and cross-examination testimony," and it proceeds to supply what it avers was mistakenly omitted. (District's Exceptions at 2-5) The District next cites to specific hearing testimony which it purports demonstrates that certain charges which the ALJ found were not sustained, in actuality, were aptly supported. (*Id.* 5-11) In conclusion, in light of the fact that the majority of the tenure charges were deemed proven, the District seeks a declaration that the testimony of respondent specifically denying such charges and the testimony of his witnesses attempting to refute them was incredible. (*Id.* at 11)

Respondent's reply exceptions state (1) that the ALJ was under no obligation whatsoever to include the specific testimony cited by the District in her summaries and 2) credibility doubts, conflicting testimony and lack of corroboration amply explain the ALJ's refusal to sustain the charges identified by the District. (Respondent's Reply Exceptions at 1-3)

Respondent further observes that the Initial Decision made very few findings with respect to witness credibility. "Finding that a charge was proven does not automatically mean

that the testimony of witnesses offered to rebut those charges was not credible." Respondent proposes that the ALJ should have made specific credibility findings with respect to each and every key witness of both the District and the respondent. (*Id.* at 4)

Upon a comprehensive review of the complete record of this matter – which included transcripts of the proceedings at the OAL,[1] together with exhibits, pre- and post-hearing briefs, exceptions and reply arguments – the Commissioner agrees with the conclusion of the ALJ that the District has established that respondent is guilty of unbecoming conduct warranting removal from his tenured position.

In reaching her determination herein, the Commissioner fully recognized that the outcome of this matter with regard to the proving of the charges turns almost exclusively on the credibility of witnesses and the weighing of evidence. This being the case – and the ALJ having had the opportunity to assess the credibility of the various witnesses who appeared before her, and having made findings of fact based on their testimony – the standard governing the Commissioner's review is clear and unequivocal:

> The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record.
> (*N.J.S.A.* 52:14B-10(c))

Upon a reasoned review of the record with this governing standard in mind, contrary to the parties' exception assertions, the Commissioner is satisfied that the ALJ's recitation of testimony is both accurate and thorough, and that she carefully measured its relevance to the charges,

[1] The record contains transcripts of proceedings conducted on April 6, April 7, April 12, April 18, and April 27, 2006, May 4, May 8, and May 30, 2006, June 6, June 12 and June 14, 2006, August 8 and November 13, 2006, December 7, December 21 and December 22, 2006, May 1, May 17 and June 1, 2007 and out-of-state deposition transcript dated April 16, 2007.

conflicts, inconsistencies, potential biases, and the plausibility of its content in deciding which testimony to credit in reaching her findings of fact.[2] As such, the Commissioner accepts the ALJ's factual findings (Initial Decision at pp. 48-56), determining that they are amply supported by the record before her.

In summary, the Commissioner therefore finds – as did the ALJ – that the District has sustained its burden of proving the following charges of unbecoming conduct against respondent by a preponderance of the competent, relevant and credible evidence:

> **Charge 1** – During the course of the 2000-2001, 2001-2002 and 2002-2003 school years respondent used inappropriate language towards students;
>
> **Charge 2** – On or about February 4, 2004, respondent hit and/or punched V.H. [one of his students] in the face several times and pushed her out of her chair, causing V.H. to fall to the floor;
>
> **Charge 3** – Respondent exhibited inappropriate physical conduct towards [student] A.T.;
>
> **Charge 4** – On or about November 21, 2001, respondent used inappropriate language and physical conduct towards instructional aide Michelle Coleman;
>
> **Charge 5** – On or about November 26, 2001, respondent made unwarranted, unprofessional, offensive and/or sexist remarks to staff member Teresa Granata.
>
> **Charge 7** – During the 2002-03 school year, respondent would hit, punch and/or beat N.H., a classified handicapped male student, with his hands and/or a yardstick.
>
> On or about May or June 2003, respondent picked up N.H. by his upper body and shoved him against the blackboard telling him to sit down, causing N.H. to cry.

[2] The parties' exception arguments charging that the ALJ erred in failing to reach specific credibility determinations on each of the witnesses who appeared before her – thereby calling into question the validity of her Initial Decision – are found to be meritless. To the extent that the ALJ neglected to make "specific" declarations as to the credibility of each of the 31 testifying witnesses, the Commissioner finds and concludes that these assessments are clearly inferentially evident from her recitation of the witnesses' proferred testimony in light of the aforementioned review.

> **Charge 8** – During the 2003-04 school year, respondent routinely hit, punched and/or beat J.T., a classified, handicapped male student in his class.
>
> On or about February 4, 2004, respondent punched J.T. in his chest as a method of disciplining him for failure to do his class work.
>
> **Charge 16** – All of the above charges are incorporated to find that, by virtue of his repeated unbecoming behavior towards his students and colleagues and his use of profanity directed at the students in his class, respondent, as a whole, conducted himself in a manner unbecoming a teacher. (Initial Decision at pp. 48-56)

Turning to the appropriate penalty to be imposed in this matter, the Commissioner is mindful that she is required to consider respondent's prior record in the District, the nature and gravity of his offenses under all the circumstances involved, any evidence as to provocation, extenuation or aggravation and must consider any harm or injurious effect which his conduct may have had in the maintenance of discipline and the proper administration of the school system. *In re Fulcomer*, 93 *N.J. Super.* 404, 421-22 (App. Div. 1967). Initially, in this regard, the Commissioner is particularly cognizant that it has long been recognized that – by virtue of the unique position they occupy – educators must be held to an enhanced standard of behavior. As was succinctly stated in *In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional*, 1972 *S.L.D.* 302, 321:

> [Teachers] are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. *This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment.* (emphasis added)

Moreover, as a special education teacher entrusted with the care and instruction of classified students with disabilities, recognition of and strict adherence to this requisite standard of

behavior is, of necessity, even more crucial. Next, the established charges are, indeed, very serious in nature. Clearly, respondent's physical abuse of his students in an attempt to control children who refused to listen to his instructions went beyond professional boundaries. It is of no import that V.H., A.T., N.H. and J.T. may have been prone to misbehavior and at times difficult to control, as there is no excuse, under circumstances of the type herein, for offensive touching of a pupil by a teacher. As noted in *In the matter of the Tenure Hearing of Thomas Appleby, School District of Vineland, Cumberland County*, 1969 *S.L.D.* 159, 172-173, *aff'd* State Board, 1970 *S.L.D.* 448, *aff'd* N.J. Superior Court 1972 *S.L.D.* 662 (App. Div. 1972):

> [w]hile 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 to freedom from offensive bodily touching even though there be no actual physical harm...* (emphasis added) (citations omitted)

Similarly, the Commissioner finds that the respondent's use of profanity and deprecating remarks to his students could have a serious deleterious effect on the self-esteem and psyche of impressionable young children – particularly where, as here, these children are already suffering from varying degrees of social or emotional or mental impairment. Additionally, the lack of professional respect accorded to his co-workers compromises the ability of the District to provide educational services to its students in a stable, stress free environment.

While considering respondent's length of employment with the District and other positive attributes attested to by his character witnesses, the Commissioner is nonetheless satisfied that the charges proven herein are not "trivial," but rather reflect a pattern of verbal and physical

abuse of students, and demeaning and threatening behavior toward fellow staff members – professionally unacceptable conduct which cannot be tolerated in a school setting.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons expressed therein. Respondent is hereby dismissed from his tenured teaching position with the State-operated School District of Paterson. This matter will be transmitted to the State Board of Examiners for action against respondent's certificate(s) as that body deems appropriate.[3]

IT IS SO ORDERED.[4]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 10/03/08

Date of Mailing: 10/03/08

[3] As part of her decision forwarded to the Commissioner for review and consideration, the ALJ recommends that respondent's teaching certificate be revoked. It is noted that certificate revocation is solely within the jurisdictional purview of the State Board of Examiners.

[4] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 07481-04
AGENCY DKT NO. 230-6/04

IN THE MATTER OF THE TENURE HEARING OF CURTIS ROBINSON, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY.

Joanne L. Butler, Esq., for petitioner State-Operated School District of the City of Paterson, Passaic County (Schenck, Price, Smith & King, attorneys)

Mary J. Hammer, Esq., for respondent Curtis Robinson (Bucceri & Pincus, attorneys)

Record Closed: March 24, 2008 Decided: July 24, 2008

BEFORE **CARIDAD F. RIGO, ALJ**:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On June 9, 2004, the petitioner, State-Operated School District of the City of Paterson, Passaic County, certified charges against the respondent, Curtis Robinson. Respondent is a tenured teacher in the school district. Petitioner alleges that respondent made defamatory statements to/about students, physically abused students, exhibited poor classroom behavior and unprofessional and offensive conduct towards

students and other teaching staff members, and/or generally conducted himself in a manner unbecoming a teacher.

The contested case was transmitted to the Office of Administrative Law (OAL), where it was filed on July 29, 2004. Several conferences and hearings were scheduled and conducted. The parties submitted simultaneous posthearing briefs on February 29, 2008, at which time the record closed. Due to the undersigned's voluminous caseload two order of extensions were filed.

ISSUES PRESENTED

The issues are whether respondent is guilty of the following charges, and, if so, what the penalty should be.

1. Charge One: Use of inappropriate language towards students constituting conduct unbecoming a teacher.

2. Charge Two: Inappropriate physical contact with student V.H. constituting conduct unbecoming a teacher.

3. Charge Three: Inappropriate physical contact with student A.T. constituting conduct unbecoming a teacher.

4. Charge Four: Inappropriate physical contact with instructional aide Michelle Coleman constituting conduct unbecoming a teacher.

5. Charge Five: Use of inappropriate language towards teacher Teresa Granata constituting conduct unbecoming a teacher.

6. Charge Seven: Inappropriate physical contact with student N.H. constituting conduct unbecoming a teacher.

7. Charge Eight: Inappropriate physical contact with student J.T. constituting conduct unbecoming a teacher.

8. Charge Ten: Inappropriate physical contact with student M.J. constituting conduct unbecoming a teacher.

9. Charge Twelve: Use of inappropriate language towards teacher Jacqueline Ebanks constituting conduct unbecoming a teacher.

10. Charge Fourteen: Inappropriate physical contact with student A.W. constituting conduct unbecoming a teacher.

11. Charge Fifteen: Inappropriate physical contact with student T.C. constituting conduct unbecoming a teacher.

12. Charge Sixteen: Conduct which, taken in its entirety, can be deemed conduct unbecoming a teacher.

TESTIMONY OF WITNESSES

The following is a summary of the pertinent portions of the witnesses' testimony.

Capt. James Smith

Captain Smith is the executive director of school security for the Paterson school district. He has been employed by the district for four years. Prior to this post he was police captain for the City of Paterson. He worked for the Paterson Police Department for twenty-seven years. As the director of school security he is responsible for all school security matters, internal investigations and evacuation plans. In academic year 2002-2003 he was responsible for the investigations pertaining to the series of charges and allegations against Curtis Robinson.

Captain Smith said that he personally investigated the incident alleging that Robinson struck student J.T. Captain Smith said he interviewed Jacqueline Eubanks, Theresa Granata, Sophia Chain, Doris Butler and a Division of Youth and Family Services (DYFS) investigator. He said that he did not interview or speak with everyone that witnessed or may have witnessed the events involving Curtis Robinson. Under cross-examination he acknowledged that he did not speak to all of the aides that were in Robinson's classroom. Captain Smith stated that after he conducted his investigation he recommended to the superintendent that the district file tenure charges against Curtis Robinson.

Jacqueline Ebanks

Jacqueline Ebanks was an academic support teacher assistant at the time in question. She had been employed with the district since 1998. She has a bachelor of arts degree from Rutgers University in business management. She holds a certificate for teacher of the handicapped in elementary education. During the 2002-2003 school year she taught at School 4, in room 304, and her classroom was next to Mr. Robinson's. She said she met Curtis Robinson when she arrived at School 4.

Ms. Ebanks stated that initially Mr. Robinson was friendly and nice. He took her around and showed her the ropes; he showed her where to go and what to do. However, shortly after those initial days Mr. Robinson began referring to her in a derogatory and threatening manner. She said Robinson called her a "demented Jamaican bitch," and in a demeaning manner referred to her as "special." She testified that many times Robinson cursed her out in front of their peers at meetings. Ebanks said that during those teachers' meetings Robinson would refer to the group as "y'all bitches." According to Ebanks that was a common characterization used by Robinson when referring to the female teachers.

Ebanks testified that sometime in late May or early June 2003 she was walking down the hallway, passing Robinson's classroom, with a parent of one of her students when she heard loud noises and disturbances coming from Mr. Robinson's room. As she walked pass the classroom she saw Robinson push and shove a student up against

the blackboard. She saw the student being banged up against the wall as Robinson was holding him by the collar. She testified that Robinson banged the student against the wall three or four times. She said the student was trying to get away from Robinson and Robinson was trying to detain the student. She heard the student say "let me go." Ms. Ebanks testified that she stood outside the classroom looking at the scene inside the classroom about five seconds. She said she did not go inside the classroom, but proceeded down the hallway and stopped at another teacher's room and advised that teacher of what was going on. Ebanks said that she had never seen Robinson so angry before. According to Ebanks she reported the incident to Ms. Butler, the principal. She said she was reluctant to tell Ms. Butler because in the past she had reported things to Ms. Butler about Mr. Robinson but Ms. Butler never did anything about her reports. She said she also complained about Robinson to Mary Crooms, Jim Joyner and Julia Jenkins.

Ms. Ebanks said she felt threatened by and was scared of Mr. Robinson. Ms. Ebanks further stated that many times she would hear Mr. Robinson curse at his students. She overheard Robinson call his students "retarded" and "retarded ass."

Under cross-examination Ebanks admitted that it was common knowledge throughout School 4 that she and Mr. Robinson did not get along; she did not like Mr. Robinson. She admitted that she is one of the people that complained about Robinson's attitude and behaviors. She further admitted that she has had problems since leaving School 4. According to Ebanks she has been overlooked for advancement, she has received no support in her attending graduate school, and she has been moved from one school to another. Ebanks attributes everything negative that has happened to her at the district to her relationship or lack of relationship with Ms. Butler (principal) and Mr. Robinson. She left School 4 in September 2003.

Under cross-examination it was revealed that although the incident she witnessed while walking down the hall occurred in late May or early June 2003, she did not commit the incident to writing until February 13, 2004. See P-14. She also admitted that perhaps she did not stop and witness the incident for five seconds; she said she

looked into the classroom as she was walking by while talking to the parent; she did not stop.

G.M.

G.M. is the stepfather of J.T. J.T. was a student in Mr. Robinson's class during the 2003-2004 academic year. G.M. testified that he first learned of the incident of Mr. Robinson striking his stepson when he and his wife, T.M., confronted J.T. about not doing his school work. G.M. said that J.T. admitted that he did not do his work at school and that as a result of not doing his school work Mr. Robinson hit him. G.M. said J.T. told him and showed him how Mr. Robinson hit him.

G.M. said that he and his wife met with the principal Ms. Butler, and the hitting incident was discussed. Mr. Robinson also attended the meeting. G.M. said initially Mr. Robinson denied ever hitting J.T. However, Ms. Butler then called J.T. into the meeting, and J.T. explained to them all how Mr. Robinson had hit him. G.M. said that at that point Mr. Robinson admitted to touching J.T.

T.M.

T.M. is the mother of J.T. T.M. testified that on the afternoon in question Sophia Chain called her at work. Mrs. Chain told her that J.T. had his head down on his desk and would not do his school work. T.M. further testified that while she was talking to Ms. Chain she heard a child in the background saying "get off of me" and she also heard a loud crash. When she got home she questioned J.T. about what Ms. Chain had said and what she had overheard during their conversation. T.M. testified that J.T. told her that what she heard in the background was V.H., another student, who was being hit by Mr. Robinson.

T.M. testified that J.T. told her that Mr. Robinson always hits and curses at the kids in his class. T.M. further testified that the next day she and her husband met with Ms. Butler, and that Mr. Robinson's hitting of their son was discussed. J.T. was called into the meeting and he demonstrated to all what Mr. Robinson did to him. T.M. stated

that at the end of the meeting Butler and Robinson assured her that Mr. Robinson would never touch her child again. She testified that she was satisfied with that conclusion.

Under cross-examination T.M. stated that on the afternoon when Ms. Chain called her she did not speak to her son; she only spoke to him when she got home that evening. T.M. said that that was the first time J.T. had been hit by Mr. Robinson. T.M. reiterated that J.T. told her that Mr. Robinson always curses at and hits all of the students. T.M. could not remember what curses or what names J.T. said Mr. Robinson used on the students.

J.T.

J.T. at the time of his testimony was fourteen years old. He was a student at John F. Kennedy High School in Paterson, N.J. J.T. confirmed that he was a student at School 4 in Mr. Robinson's classroom. He recalled the incident wherein Mr. Robinson punched him. J.T. demonstrated on his stepfather how Mr. Robinson struck him.

He said he was sitting down at his desk when Mr. Robinson came up to him, grabbed him by his clothing at the shoulders, pulled him up, balled his hand in a fist and struck him in the middle of his chest. He said he immediately began to cry because it hurt him; he sat down and Mr. Robinson walked away.

He further testified that this was the first time Mr. Robinson hit him like that. He testified and demonstrated that Mr. Robinson at other times would slap him or wave an open hand about his shoulders. J.T. said that he knew that that kind of action was not a direct hit, but a gesture by Mr. Robinson meaning, "what's up?" J.T. testified that he did not take offense at this kind of slapping. J.T. realized and acknowledged that this was a nonoffensive touching my Mr. Robinson. J.T. said he did not mind that kind of touching. However, he clearly made the distinction between an open-hand, non-offensive slap or wave and the direct offensive punch that he received from Mr. Robinson. J.T. said that it was Mr. Robinson's words and demeanor when he punched him that he found offensive.

J.T. also testified that he had heard Mr. Robinson call students derogatory names. He said he heard Robinson one time call a student a "dumb ass." Under further questioning on the use of inappropriate language, J.T. stated that he did not remember Mr. Robinson using the "F" word. He did state, however, that he once heard Mr. Robinson call a student "retarded."

Under cross-examination, J.T. said that V.H. was the young lady who was yelling in the background when Ms. Chain was speaking with his mother on the telephone. He said V.H. had fallen out of her desk. J.T. also said that he did hear Mr. Robinson use the "F" word once, but he could not remember in what context. He again reiterated that in prior times when Mr. Robinson had touched him he knew that it was a play touch and did not take offense at it. However, on the afternoon in question, when Mr. Robinson punched him, he knew that it was not a playful touch because Mr. Robinson was yelling at him.

Theresa Granata

Mrs. Granata is a special education teacher at School 4. She started at School 4 in 2001.

Mrs. Granata testified that Mr. Robinson insulted her when at a staff meeting Robinson told her she should do a cat walk, get up on the table and do some go-go dancing. She said Robinson told her this in an open meeting room in front of school staff. Mrs. Granata stated that Mr. Robinson told her she should pose for *Playboy*. She said that at the same meeting Robinson told her he saw her at a strip club and that she should do a strip dance at a staff party. Mrs. Granata stated that she was very offended by the insinuations and the language used by Mr. Robinson; she reported the language and the incident to Mrs. Butler, the principal. She said that she approached Mr. Robinson and told him to stop saying untruths to her or about her. After this incident she brushed Mr. Robinson off and really did not pay much attention to him.

Mrs. Granata also testified that Mr. Robinson apologized to her after she and Robinson met with Mrs. Butler. She said Mrs. Butler made him apologize.

Mrs. Granata testified that she had heard Mr. Robinson make inappropriate comments about Sophia Chain, but that she also heard Mrs. Chain make inappropriate comments about Mr. Robinson. She heard and knew about Robinson and Ebanks. Granata said Ebanks and Robinson got loud with each other all of the time. She said that once Ebanks told her how threatened she felt by Robinson. Granata said that Robinson had a threatening demeanor and that she initially was afraid of him. However, over time she was able to dispel that fear and he no longer bothers her. She said she kept her distance from Robinson.

Granata said she never taught in the same classroom with Robinson, and her classroom was not near Robinson's. She never observed Robinson while he was teaching. She only observed Robinson interact with his students when they were on field trips, at class parties, or in the common hallways or areas.

Under cross-examination she reiterated that she was no longer afraid of Robinson. She was afraid of him her first year at the school, in 2001.

She testified that she never heard Robinson refer to other female teachers as "bitches." She never heard Robinson say the word "bitch." She vividly recalls Robinson and Ebanks always getting loud with each other. She did hear Robinson refer to Ebanks as a "Jamaican" something. She reiterated that she never heard Robinson use the word "bitch" in a meeting.

Mrs. Granata testified that she heard Sophia Chain call the students "retards" and "stupid." She testified that Mrs. Chain was very cold towards the students.

Granata also stated that she found Robinson to be a caring teacher. She opined that he cared for his students. She said that when she and Robinson had to work together they worked very nicely. She said she had no issues with him.

Respondent produced R-2, also known as Exhibit 1, which is a certification signed by Ms. Granata wherein she states that she saw Robinson with his students on a

daily basis. In this certification Ms. Granata states that Robinson clearly cared for his students and that he always went that extra mile for them. She states in her certification that she never saw Robinson hit a student. She states that it was Sophia Chain who told her Robinson had AIDS.

Michelle Coleman

Michelle Coleman is employed by the Paterson State-Operated School District as a teacher's assistant. She has been employed by the district for five years. As a teacher's assistant she helps teachers and students, working under the direction of the classroom teacher. Ms. Coleman testified that she began teaching at the district in January 2001. She started in School 4 as a classroom aide to Curtis Robinson. She said she worked for Mr. Robinson for approximately one year. This class was a special education class containing students from the fifth to the eighth grades.

Ms. Coleman testified that initially she had no problems or disagreements with Mr. Robinson. However, it was not too long before she began having problems; she said they would disagree about her job responsibilities. They would have discussions as to what she was supposed to do with the students.

Ms. Coleman testified that Mr. Robinson was abusive and nasty to her. She stated that on or about November 21, 2001, Robinson told her not to give V.H. and some other students a snack while they were watching a movie. She disagreed with him and attempted to give V.H. some potato chips anyway. She said that when Mr. Robinson saw her do it he jumped in her face. Robinson threw her and V.H. out of the classroom, and as she walked out of the room Robinson called her a "bitch," a "whore" and a "mother fucker." Ms. Coleman testified that Robinson's behavior scared her, and from then on she was afraid of Robinson. This incident was named the "potato chip incident."

Ms. Coleman also testified that on numerous occasions she heard Robinson call the students names and curse at them. She said she heard Robinson call his students "retarded ass," or he would say to them, "sit the fuck down."

Ms. Coleman recalled that Robinson would leave the classroom five or six times a day and say that he was going outside to smoke some crack or weed so he could make it through the balance of the day. She said he would be out awhile and she would not know where he went. She said she never saw Robinson high, nor did she believe that he was getting high.

Ms. Coleman testified that she saw Robinson hit the students. She testified that Robinson would hit V.H. often. Ms. Coleman said she saw Robinson hit V.H. in the mouth and in the nose on two separate occasions. Both incidents caused V.H. to bleed from the mouth and nose. She said she saw Robinson hit V.H. with a yardstick. She testified that when the class was acting up Robinson would often walk up and down the aisles of the classroom striking students on their legs with the yardstick. Ms. Coleman said she also saw Robinson throw a gym bag at V.H.; the bag did not hit V.H.

Ms. Coleman described an incident in which Robinson hit A.T. on the head. Robinson gave an assignment to the class. Because A.T. did not know how to read as well as the others he was having difficulty doing the assignment. Ms. Coleman demonstrated that as A.T. was sitting at his desk, Robinson came along and "popped" (hit) A.T. in the head. She said A.T. had no reaction.

Ms. Coleman testified that she never reported any of the incidents to any official(s) at the school. However, she said she spoke to the caseworkers about it. She never reported any of the incidents to the DYFS. Coleman testified that she never reported Robinson because he always talked about the power that he had, and this was her first year working for the district. Ms. Coleman was shown her job description, which says that she has to report any sort of child abuse or drug abuse to the authorities. Ms. Coleman said she does not remember seeing that in her job description or knowing that she had a duty to report child abuse or drug abuse in the classroom.

Under cross-examination Ms. Coleman acknowledged that when she was deposed she could only remember one incident with V.H. She testified that V.H. would

often have an attitude. She also said that Robinson would also often have an attitude. She said V.H. and Robinson were always arguing.

Ms. Coleman testified that she had been a teacher's assistant and she was demoted to a personal aide, hence her placement in Robinson's class.

Patricia DiGiaimo

Patricia DiGiaimo is employed by the Paterson public schools as acting coordinator-director of Pupil Special Services. She has been with the district in special education for twenty-one years. She was familiar with Robinson, in that he fell within her job's purview. In school year 2003-2004 she was a supervisor for special education and she was responsible for School 4. She testified that Robinson taught students that were ten to fourteen years old; the students were ungraded.

Ms. DiGiaimo testified that in the 2003-2004 school year she visited the special education classes at School 4. She remembers that during a visit to Robinson's class she saw a female student who was very upset. When she asked Robinson about the situation, Robinson responded by saying that the student was having a bad day.

Ms. DiGiaimo said that Sophia Chain, one of Robinson's classroom aides, approached her and told her how unhappy she was in Robinson's classroom. Chain asked for a transfer. Ms. DiGiaimo said a male student also approached her, telling her he was uncomfortable in Robinson's class. Ms. DiGiaimo said she spoke to Ms. Butler, the school principal, about Ms. Chain's and the student's concerns. She recalls that Ms. Butler said nothing about the request or concerns.

Under cross-examination, Ms. DiGiaimo said she does not recall Ms. Chain saying anything about abuse or abuse-like behaviors on the part of Robinson. She could not recall the specifics of why Ms. Chain asked for a transfer away from Robinson's class.

Juliet DaCosta

Ms. DaCosta testified that she is an instructional assistant for the Paterson Board of Education. She had been an instructional assistant for sixteen years. Ms. DaCosta was Robinson's classroom aide. She was an instructional aide for about two or three months working with one particular student; however, most of the time she served as Robinson's classroom aide.

Ms. DaCosta said that in spring 2002 she was assigned to Robinson's class as a personal aide to a student. She asked to be removed from Robinson's class sometime in December 2002 because she and Robinson had irreconcilable differences. She said she was personally familiar with Robinson because she was friends with his family and his sister, Arletta Salmond. During the time she was working with Robinson she was also working with Michelle Coleman, until Coleman was removed from Robinson's classroom.

Ms. DaCosta stated that she saw Robinson get "really angry." She testified that she never saw Robinson hit a student. However, she testified that she saw Robinson pick a child up from that child's seat by the clothing. She also testified that she has seen Robinson put a child up against the blackboard.

Ms. DaCosta said she never saw Robinson hit V.H.; she did see Robinson shake V.H. up. She said she saw Robinson hold V.H.'s head down on the desk and pull her up by her clothes.

She testified that one time she saw Robinson acting in a rage-like manner. She said he was really upset. This one time she was fearful that Robinson might hurt himself or one of the kids. She said it was so bad that she called the principal, Ms. Butler, and she told Ms. Butler to come to the classroom immediately.

Ms. DaCosta testified that Robinson told her that he had permission from the students' parents or guardians to be rough with them and to discipline them as he sees fit. She said he specifically told her that he could be rough with V.H. because her

grandmother said he could. Ms. DaCosta stated that V.H. would very often be unruly and disrespectful, and that she liked to fight. She said V.H. and Robinson would get angry with each other very often.

Ms. DaCosta also stated that the incident involving Coleman, Robinson and V.H. and the potato chips was very violent. She said she heard Robinson call Coleman a "fucking whore."

Ms. DaCosta said she never saw Robinson strike A.T. She testified as to an incident wherein she saw A.T.'s head move forward when Robinson either struck him or tapped him in the back of the head. Ms. DaCosta further stated that she heard Robinson say to A.T., "you are not going anywhere," and "why are you wasting time?" Ms. DaCosta said that Robinson would say degrading things to A.T. She stated that A.T. was very low functioning.

Ms. DaCosta said she never saw Robinson push student J.P. against the wall. She said J.P. and Robinson were always at each other.

Ms. DaCosta testified that she is familiar with Jacqueline Ebanks because Ms. Ebanks would come to her saying things about Robinson, and that she needed to stop Robinson.

Ms. DaCosta related an incident where she physically got between student N. and Robinson. This incident occurred outside of Robinson's classroom. Ms. DaCosta testified that she did not know what happened prior to her getting between N. and Robinson, but it was very obvious to her that the child was very upset. Ms. DaCosta testified that immediately after this incident, when she pulled N. away from Robinson, N. told her that Robinson had called him many names several times. Under cross-examination Ms. DaCosta said that many times N. would run to her asking to stay with her because Robinson was calling him names. Ms. DaCosta also said that she heard Robinson call the kids "retarded" and make comments to them like "you're going to work at McDonald's."

She said that the only time she heard Robinson use profanity was when he was arguing with Ms. Coleman or Ms. Ebanks.

Ms. DaCosta said that the class was a wild class and that the students would get out of hand. Robinson used general commands to the class such as "sit the fuck down." He would make these kinds of statements to the class in general, not to an individual student.

Ms. DaCosta also testified that Robinson had nothing nice to say about women. He would make comments like, "you make the coffee" and "women are like garbage." He would make comments about women's breasts. She heard Robinson call Ms. Coleman a "lazy bitch." Under cross-examination, Ms. DaCosta said that Robinson said, "it's your job to clean the classroom" or "it's your job to make copies." However, Ms. DaCosta said that Robinson never treated her rudely. She said she asked for a transfer before she lost her temper with Robinson.

According to Ms. DaCosta, Mr. Pierce, a male aide, received much better treatment from Robinson.

Ms. DaCosta stated that she spoke to Ms. Butler several times about Robinson and his behaviors in the classroom towards the students. She said she told Ms. Butler that something had to be done about Robinson. Ms. DaCosta said that she was afraid that one day Robinson would hurt one of the students; she was concerned about the students' safety with Robinson. She told Ms. Butler several times that she was concerned about the children being with Robinson. Under cross-examination Ms. DaCosta testified that one time she actually called Ms. Butler from the phone in the classroom and told Butler to get up to the classroom before Robinson hurt or killed one of the students. She said that Butler never came, nor did she ever do anything about her complaints.

Ms. DaCosta further testified that she never saw Robinson hit any of the kids with a yardstick, nor did she ever see Robinson throw a gym bag at V.H. However, she said that Robinson would slam the yardstick on the desk or on the blackboard. She said

Robinson would get physical when the kids became aggressive. He would not get aggressive at the least little thing, but he would be aggressive often enough.

Ms. DaCosta said V.H. was a fighter. She was the smallest girl in the class but she would get right in Robinson's face in a minute. She would get up to fight anyone in a minute.

Ms. DaCosta testified under cross-examination about the potato chips incident with Ms. Coleman. Ms. DaCosta said that both Coleman and Robinson went at each other. They were both loud and obnoxious. She said she was very concerned that the students were watching the argument.

Ms. DaCosta stated that Mr. Jenkins, the principal before Ms. Butler, told her that he would bet that she could not last a week in Robinson's class.

J.P.

J.P., at the time she testified, was in the twelfth grade. J.P. was a student in Robinson's class for about two or three years. She was a student in his class in 2002. J.P. testified that she heard Robinson say "sit the fuck down" and "shut the fuck up now." J.P. testified that Robinson used mean names. She heard Robinson say to her and to V.H., "your mothers were crack heads." She heard Robinson call V.H. and A.T. "stupid," "retarded" and "retarded ass."

She said she saw and heard Robinson and Coleman argue. She saw Robinson snatch popcorn out of Coleman's hand. She witnessed Robinson push students, pull the students out of their seats, and push them down into their seats. She witnessed Robinson "pop" V.H. in the mouth. Under cross-examination she said she saw Robinson pop V.H. two or three times. She saw Robinson push V.H. down to force her to sit down. She saw Robinson "mush" V.H.'s face in, to the extent that V.H.'s face would go sideways. She saw Robinson hit A.T. in the back of the head once. Robinson also hit A.T.'s hand with a ruler. She said that when Robinson picked on A.T. A.T.

would cry and go crazy. She saw Robinson get really loud. She said Robinson reacted only if the students disrespected him or refused to do as he said.

J.P. said she complained about Robinson to her mother and grandmother, but they never believed her. She said Robinson would go to her house and complain about her to her mother and grandmother when she misbehaved.

J.P. said she reported Robinson's actions to the in-school-suspension teacher, Ms. Salmon, but nothing came of it.

Clarence W. Pierce

Clarence Pierce has been employed by the Paterson School District since February 2000. He is a personal assistant, offering one-on-one aid to students, and he is assigned one student. Currently he is working at JFK High School in Paterson. In February 2002 he was transferred to School 4, where he was assigned to Robinson's class.

Mr. Pierce said he was an aide to student named D.R., who was in Robinson's class. He testified that D.R. was labeled as a "runner" child. D.R. would run out of the class, and sometimes out of the building, when he got upset. Pierce said he had to run after D.R. He said D.R. was in Robinson's class until June 2002, and when D.R. went to JFK High School he went with him.

Pierce stated that Juliet DaCosta and Michelle Coleman were other assistants in Robinson's class with him. Mr. Pierce testified that he heard Robinson say to the kids, "shut the fuck up" and "sit your ass down." He said he heard Robinson call the students "stupid," "retarded," "dumb asses" and "crack babies." He testified that sometimes he heard Robinson say to the students, "you won't amount to anything because your parents were nothing" or "you ain't going to be shit anyway."

Pierce said that many times he heard Robinson call A.T. "retarded" because of A.T.'s disability. Pierce testified that he heard Robinson tell A.T. that he (A.T.) was "retarded." He heard Robinson say to A.T., "sit your retarded ass down."

Pierce testified that he recalled Robinson touching students in an aggressive manner. He said that Robinson would grab a kid by the arm or shirt and yank the kid into place. Pierce stated that if a student did not want to move, Robinson would pull the kid with force off the desk.

Pierce testified that he did not recall any aggressive behavior against V.H. He stated that from time to time Robinson would exhibit "rage." Pierce said that by "rage" he meant that Robinson was physical and would yell and curse at the students. Mr. Pierce stated that sometimes it would get testy because the kids just would not listen.

Mr. Pierce testified that he observed Robinson smack a student in the head from time to time. He also saw Robinson strike student Q. on the leg with the yardstick. Pierce said he saw Robinson push Q. into the blackboard. Mr. Pierce said Robinson said that he had Q.'s father's permission to hit him. Mr. Pierce also testified that he heard Q.'s father say to Robinson that he (Robinson) could do whatever he had to do.

Mr. Pierce testified that Robinson would leave the classroom for an hour or so and no one knew where he was; Robinson would do this about three times a week. Mr. Pierce stated that he never told any administrator what happened in Robinson's classroom. Mr. Pierce testified that Robinson struck and abused the class as a whole.

Eileen Shafer

Eileen Shafer has been employed by the Paterson School District as an assistant superintendent for personnel services since 2005. She was the director of personnel for three years, and has a total of fourteen years with the district. Between 2003 and 2004 she was the director of human resources and was in charge of the hiring, firing and suspensions of all staff members.

Ms. Shafer testified that after reviewing Robinson's personnel records; the DYFS's report of its investigations on the abuse complaints it had received on Robinson, specifically, exhibits P-2, P-3, P-4, P-6, P-7, P-23 and P-28. And, discussing Robinson's alleged behaviors in the classroom, she recommended that the district conduct its own investigation. Ms. Shafer stated that after receiving a report of the investigation from Captain Smith she recommended to the district authorities that tenure charges be filed against Robinson.

Ms. Shafer conducted training seminars for teachers and staff on what types of incidents involving alleged child abuse and/or neglect should be reported and to whom they should be reported. She said she did not train Ms. Chain, Ms. Campbell, Ms. Ebanks or Ms. Coleman.

At a much later date in these proceedings Ms. Shafer was produced again, in an attempt to discredit some or all of the following witnesses' testimony[1].

Joyce Campbell, according to Ms. Shafer, had been suspended because she made statements to Robinson that encouraged him to abuse students. She had not been suspended because she failed to report alleged child abuse incidents.

According to Ms. Shafer, Carol Pierce came to her and complained that Captain Smith said to her, "Not only is [Robinson] a child molester, but he's a fucking homo." Ms. Shafer said that although Pierce said this to her she did not find it necessary to investigate Captain Smith or to have him removed from investigating the Robinson case.

Pamela Harrison, at the time of her testimony, had a case against the district.

Clarence Pierce had an incident with a student, A.V., and there were no disciplinary charges filed against Mr. Pierce. A.V. did not claim any injury.

[1] Joyce Campbell, Pamela Harrison and William Molloy were witnesses that testified on behalf of Mr. Robinson. Clarence Pierce was the District's witness.

William Molloy had been reprimanded eight or nine times. Mr. Molloy's evaluation during the 1998-1999 school year cautioned him against inappropriate behaviors and poor judgment. Mr. Molloy was suspended for having physical contact with a student.

Julian Jenkins, Jr.

Julian Jenkins testified that he was with the Paterson School District for twenty-two years. He was the principal at School 4 before he left the school in November 2001.

Mr. Jenkins testified that he met Robinson in the summer of 1995 when he was the principal at School 4. Mr. Jenkins stated that as the principal he would walk around the school popping in and out of classrooms observing teachers and students interact. He said he walked around the school frequently.

Mr. Jenkins said that Robinson's students were educable mentally impaired. He said Robinson had a tough class, and that Robinson occasionally had to restrain a student. Jenkins testified that he never saw Robinson hit a student or heard Robinson curse at a student.

Mr. Jenkins testified that he knew Michelle Coleman from when she was a high school student at Eastside High School in Paterson. He recalled that Coleman was an instructional aide to Robinson. He testified that he had an open-door policy as principal, and Michelle Coleman never spoke to him about anything out of the ordinary about Robinson. He also stated that the students never told him that Robinson had hit or cursed at them.

Mr. Jenkins stated that he saw Coleman and Robinson interact professionally; he never saw or heard anything inappropriate between them. He testified that he had observed Robinson when Robinson did not know that he was being observed. Jenkins said that he would walk into Robinson's class three to five times a week. During those observations he saw professional interaction between Robinson and Coleman. Mr.

Jenkins stated that he never saw or heard Robinson speaking inappropriately to Ms. Coleman.

Jenkins said he remembers Juliet DaCosta, but does not recall telling her that she would not last a week with Robinson. Jenkins denied telling DaCosta that there was always conflict in Robinson's classroom. Jenkins said he explained to DaCosta that Robinson's class was not easy because of the nature of the students.

Mr. Jenkins said that like all teachers Robinson had his strong and weak points. Mr. Jenkins said that Robinson had a difficult job. He opined that Robinson is and was a patient teacher. He stated that Robinson received constructive criticism well and was always ready and willing to improve his techniques.

Under cross-examination, Jenkins stated that in November 2001 he found Robinson guilty of unprofessional conduct towards Ms. Granata (see P-10). When asked if he approved of Robinson's conduct and if he found Robinson's conduct to be professional and respectful of women, he replied "no." Mr. Jenkins was shown exhibits P-6, of March 1998, and P-7, of May 1999, and he identified them as his writings. Jenkins admitted that on P-6 he questioned Robinson's method of interacting with his students and told him to follow the school's discipline code. Jenkins further admitted that on P-7 he wrote to Robinson, "we can't use corporal punishment to force students to follow directions."

Exhibit P-4 was shown to Jenkins. Mr. Jenkins identified it as his writing of March 1996. Jenkins admitted that in this letter he warned Robinson about engaging in verbal altercations with his assistants in the classroom in full view of students. He admitted that as far back as and prior to 1996 there were problems with Robinson's unprofessional conduct with his colleagues and students. Jenkins acknowledged that on December 17, 1996, Robinson was investigated by the DYFS on an allegation of physical abuse of student I.O. Jenkins testified that physical abuse by Robinson was not substantiated, but there were concerns regarding Robinson's actions. Jenkins admitted that he too was concerned about Robinson's reaction to the student's behavior and that Robinson overreacted in his physical response to the student.

Jenkins testified that he did not include any of the incidents of misconduct in Robinson's performance evaluations. Jenkins said that he viewed Robinson's performance as satisfactory.

Joyce Campbell

Joyce Campbell was initially hired by the district in 1989 as a security guard for School 4. Ms. Campbell served the district in several capacities until attaining the position of a substitute instructional assistant and personal aide. During the 2003-2004 school year she was the personal aide to student K.R. in Robinson's class.

She said K.R. had learning disabilities and physical disabilities and he could not walk or talk correctly. She said that suddenly in February 2004 she was pulled out of Robinson's class and suspended. She testified that she initially did not know why she was suspended, and that she later found out it was because she allegedly told Robinson to hit K.R. She denied telling Robinson to hit K.R.

Ms. Campbell recalled student J.T., who was also in Robinson's class. Ms. Campbell recalled a specific incident with J.T. and Robinson. She said one Monday morning J.T. was particularly irritable and Robinson allowed J.T. to rest awhile in class. Robinson told J.T. to wake up and start doing his work and J.T. said "no," that he did not want to do any work. Ms. Campbell said that Robinson called J.T.'s mother on the phone and the three of them talked. She said after talking with his mother, J.T. did his work. Ms. Campbell described Robinson as an exceptional teacher always willing to go the extra mile for the students. She said Robinson did more for J.T. than any other teacher.

Ms. Campbell testified on direct examination that she remembered student V.H. She said that on February 4, 2004, V.H. came to school in a nasty mood. Ms. Campbell said that Robinson gave V.H. some work to do, but V.H. would not do it. V.H. began pushing people off, cursing and yelling. She testified that V.H. lunged at Robinson as if she were going to hit him. She said she saw Robinson throw his hands up to stop V.H.

from knocking him down, and V.H. fell back into her chair and then the desk flipped over. V.H. was then about to throw things but Robinson restrained her and held her down. According to Campbell, Robinson did not slap or punch V.H. Ms. Campbell said that when V.H. calmed down Robinson called V.H.'s grandmother on the telephone. She said that V.H. also spoke to her grandmother, and then went to the bathroom to wash up. The rest of the day was uneventful. Ms. Campbell said that V.H. did not complain of being hurt.

Ms. Campbell said she never saw Robinson hit V.H. or any other student. She testified that she never heard Robinson call any of the students derogatory names or tell them they had no future.

Under cross-examination she again stated that V.H. jumped at Robinson. She admitted that in July 2004 she was notified that her contract with the district would not be renewed. At the time of her testimony, Ms. Campbell acknowledged that she was not working for the Paterson School District and that she had not worked at all. She admitted that she filed a grievance against the district for having been terminated.

Floyd Perry, Jr., Ph.D.

Floyd Perry was a guidance counselor and social worker at School 4. He has been employed by the district since January 1963.

Dr. Perry testified that he often saw Robinson with his class. He was the guidance counselor for some of Robinson's students. Dr. Perry stated that no student ever reported to him having been abused by Robinson. Dr. Perry said he visited Robinson's classroom about three times a week; he would sit down and observe Robinson's class.

Dr. Perry further testified that Robinson had the most difficult students in the school. He never saw Robinson hit a student. He never heard Robinson say anything inappropriate to the students. He never heard Robinson call a student "retard."

Dr. Perry opined that Robinson was one of the stronger teachers at the school. He opined that the students in Robinson's class were happy with Robinson because Robinson took them on field trips. Dr. Perry stated that when he observed Robinson in class, the aides were usually seated in the back of the room.

Mary L. Crooms

Mary Crooms has been employed by the district since September 1975 and in the Special Education department since 1986. She was a teacher to the learning disabled at School 4. She said she knew Robinson for ten years. She was a case manager for his class.

Ms. Crooms said that Robinson would talk to her about Michelle Coleman. She testified that Robinson would complain about Ms. Coleman, saying that she did not work well with the students. Robinson complained that Coleman did not do her job and that at times she was confrontational with the students.

Ms. Crooms said that she would visit Robinson's class about twice a day or more because she would have to evaluate some of the students in his class. She said some of Robinson's students were mildly cognitively impaired. She said Robinson had a difficult class.

Ms. Crooms testified that she has witnessed Robinson break up a fight. She never saw Robinson hit a child or use undue force. She said she never heard Robinson curse or call a student "retard" or "stupid." She has witnessed Robinson put the entire class in time out.

Ms. Crooms testified that Robinson involved his students in programs such as advanced computer laboratory, library, TV-radio room and cooking programs. Robinson coordinated field trips to the circus, museums, and community colleges, as well as special education picnics, live productions and the Special Olympics.

Ms. Crooms said that whenever something happened to a family in the community such as a fire or a death, Robinson would go around collecting money, food and clothing to assist the family. Ms. Crooms opined that Robinson was an excellent teacher.

Under cross-examination, Ms. Crooms testified that she has socialized with Robinson in the last two years. Robinson cuts her grass and she pays him to do that.

Ms. Crooms said that there are approximately 120 to 135 students at School 4 that receive special services. She provides child study team services to approximately 45 students and she is the case manager for all of them.

Ms. Crooms testified that she has seen Robinson put his arm on a child, not pushing or shoving, and direct the child to sit down. She opined that Robinson goes the extra mile with his students. She found that students in Robinson's class progressed academically, emotionally and socially. According to Ms. Crooms, his students acquired self-esteem.

Carol Pierce

Carol Pierce was employed as a teacher of the handicapped for over twenty-six years. She has a master's degree in teaching of the handicapped. She is a New Jersey certified teacher of the handicapped. Ms. Pierce stopped teaching and worked as a UniServ field representative in Washington State from 1995 to 2000. UniServ is an arm of the teacher's union/association assisting its members in legal matters, bargaining and contract interpretation. In 2000 she returned to New Jersey and now represents the New Jersey Education Association (NJEA) in Passaic County. In Passaic County she deals with union matters involving the school district of Paterson.

Ms. Pierce testified that she met Captain Smith in the late spring or summer of 2004 when Smith told her about the tenure charges to be filed against Robinson. She testified that in the fall of 2004 Smith called her to tell her that Robinson's defense was

that he was a homosexual. Ms. Pierce said that Captain Smith said that not only was Robinson a child abuser, but he was also a "fucking homosexual."

Under cross-examination Ms. Pierce acknowledged that she met Robinson only two times. She stated that she never reported Captain Smith's comments to the State district superintendent, but she told Eileen Shafer. Ms. Pierce stated that she was offended by Captain Smith's comments about Robinson's sexual preference. She said she reported Captain Smith's comments to Robinson's lawyer. She was offended by the comments, as opposed to the nature of the charges. She said Captain Smith gave her a blow-by-blow description of the charges.

Pamela Anita Harrison

Pamela Harrison has been employed by the Paterson School District since November 2, 1989. She is a teacher's aide. She testified that she worked for Robinson as an aide from 1990 until 2000.[2] After she left Robinson's class she worked for Ms. Ebanks for about three years. She said Ms. Ebanks' classroom was next to Robinson's. After Ebanks she worked for Ms. Granata. Ms. Harrison is currently in litigation with the Paterson School District over sick days and back pay.

Ms. Harrison testified that she never saw Robinson hit or curse at a student. She said she never saw or heard Robinson be disrespectful to women. She admitted that she and Robinson argued, but said he was not disrespectful to her. She said there were times when the principal would send students to Robinson's class for successful discipline. She said she witnessed Robinson discipline students by calling their parents and/or removing privileges. Ms. Harrison opined that Robinson is a good teacher.

Ms. Harrison has heard student J.R. call Robinson a lot of names, for example "faggot." She has heard Ms. Ebanks call students derogatory names such as "idiot" and "stupid." Ms. Harrison knows that Robinson and Ms. Ebanks did not get along.

[2] Harrison was not Robinson's aide when the charged conduct occurred.

Under cross-examination, Ms. Harrison acknowledged that she is friendly with Robinson and his sister, Arlette Salmon.

Ms. Harrison testified under cross-examination that she was assigned to Ms. Granata's class in the 2003-2004 academic year, and Ms. Granata and Robinson shared students for math classes. She said she was removed from Ms. Granata's class because she and Ms. Granata had problems. Before she worked with Ms. Granata she worked with Ms. Ebanks. She and Ms. Ebanks had trouble, as well. Ms. Harrison characterized her problems with Robinson as disagreements, and she admitted to asking to be transferred out of his class.

Under cross-examination Ms. Harrison denied that Robinson tried to hurt any student. She denied seeing Robinson put his hands on a student other than to sit the student down.

F.H.

F.H. is V.H.'s grandmother and legal guardian. V.H. was a student in Robinson's class.

F.H. testified that she knew Robinson and Michelle Coleman as her granddaughter's teachers. F.H. said that about two days before Thanksgiving in 2001, Ms. Coleman came to her house and complained about Robinson, stating that Robinson hit V.H. in the nose causing V.H. to bleed. F.H. testified that when she questioned V.H. about it ,V.H. denied that Robinson did that to her.

In February 2004 F.H. received a call from Ms. Chain and Ms. Chain told her that Robinson had pushed V.H. into a desk. She said when she questioned V.H. about it, V.H. said she fell into the desk. V.H. always denied that anything ever happened to her. F.H. testified that Ms. Chain and Ms. Coleman always told her things were happening to V.H. at school with Robinson and she needed to go to the school and address the problems. But, because V.H. never told her anything was going on, she saw no need to go to the school.

F.H. said Robinson would call her when V.H. would misbehave or not do her work. F.H. said she gave Robinson permission to spank V.H. when she did anything wrong, but Robinson told her he was not allowed to do so.

Under cross-examination F.H. stated that Robinson visited her house about two or three times. He came to talk to her about V.H. F.H. testified that she was aware of a DYFS involvement with Robinson and V.H., but denied having ever been contacted by the DYFS or receiving a report from the DYFS. F.H. denied having any knowledge about Robinson's teaching certificate being revoked because of the incident with V.H.

F.H. testified that she and V.H. got a ride to court on August 8, 2006, from Robinson. She denied talking about the case and her testimony with Robinson.

V.H.

V.H. was one of Robinson's students. V.H. testified that she had a teacher by the name of Michelle Coleman. V.H. said that Michelle Coleman cursed. Ms. Coleman called her a "bull-headed ass." V.H. does not remember ever seeing Robinson hit J.T. or A.T.

V.H. denied that Robinson ever held her down on the desk. V.H. denied that Robinson ever shook her. She denied that Robinson ever hit her with a stick. She denied that Robinson ever hit her with his hand. She said Robinson never slapped her. She said Robinson never cursed at her. She denied that Robinson ever called her "retarded." She said she never saw Robinson hit any student. She denied ever seeing Robinson hit any student with a stick. She denied ever hearing Robinson curse at a student.

Under cross-examination V.H. denied that Robinson ever went to her grandmother's house. She denied that her grandmother (F.H.) and Robinson were friends. She denied talking to Robinson about his case and her testifying. V.H. denied

ever getting mad at Robinson when she was in his class. She said she never cursed, yelled or talked back to him. She said Robinson was always respectful.

V.H. admitted to not always being good in class. She said when she was bad it was because she did not do her work. V.H. denied that Ms. Coleman ever gave her popcorn or potato chips in class. She denied that there was an incident while watching a movie wherein Ms. Coleman gave her a snack contrary to Robinson's orders, and then Ms. Coleman and Robinson got into an argument-hence the "potato chip incident" never occurred.

V.H. stated that her grandmother drove her to the hearing in her car and that she and her grandmother traveled together with no one else.

Lee Resnick

Lee Resnick is a teacher employed by the Paterson public schools. He has been teaching in Paterson for thirty-two years. He teaches fifth- and sixth-grade resource mathematics. He said he has known Robinson for at least twenty years; he worked at School 4 from 1976 until November 2005.

Mr. Resnick testified that he frequently saw Robinson because Robinson would bring students into his TV studio twice a week. He rarely went into Robinson's classroom. Mr. Resnick said that he thought Robinson had a very good relationship with his students. Mr. Resnick said he never saw Robinson hit a student or call a student a bad name.

Under cross-examination Mr. Resnick said that he saw Robinson in his TV studio about ten to eleven times a semester because Robinson usually sent his students to the TV studio with a classroom aide. Mr. Resnick testified that he was angry at the school administrators because he was removed from the TV studio in September 2005, and returned to a classroom. The TV studio was on the second floor next to the library, and Robinson's class was on the third floor on the opposite end of the building.

Monet Woods

Monet Woods is a social worker employed by the Paterson School District. She has known Robinson for about ten years; they met at School 4. As a school social worker she would provide counseling services to the students. She testified that she counseled quite a few of Robinson's students.

Ms. Woods testified that she would go into Robinson's classroom just about every other day. She stated that no students ever reported to her that Robinson hit them, cursed at them, or called them bad names. In fact, she testified that a student complained about Ms. Coleman. Specifically, she testified that V.H. complained to her that Ms. Coleman hit students. Ms. Woods described Robinson's students as "most challenging." She said Robinson had many difficult students.

Ms. Woods further testified that she never heard Robinson say anything offensive either about women or his students. She testified that Robinson had many difficult students.

Under cross-examination Ms. Woods revealed that she also worked at two other schools at the same time she worked at School 4. She testified that when she went into Robinson's classroom she would walk right in, generally unannounced. She had a good professional and personal relationship with Robinson. Ms. Woods said that other than the present tenure charges, she never heard of any complaints against Robinson.

Arletta Salmond

Arletta Salmond is a teacher for the Paterson School District. She has taught for the district since 1975. She taught kindergarten, and fourth, fifth, sixth and seventh grade. She also was in charge of the in-school-suspension class for about ten years. At the time of her testimony, Ms. Salmond was on a family leave, and she stated that she was going to retire in January 2007.

Ms. Salmond testified that she was friendly with Juliet DaCosta, and she and Ms. DaCosta interacted on a professional basis. Ms. Salmond said she has heard Ms. DaCosta curse at students. Ms. Salmond stated she knew student J.P. J.P. told her that they were going to "get her faggot brother". Robinson is her brother.

Ms. Salmond testified that she was familiar with student A.T. She described A.T. as a nervous child. If one were to walk by him he would jump. Ms. Salmond testified that she knew Robinson had reported A.T. to the DYFS. Ms. Salmond said that Robinson thought A.T. was being abused by his foster mother. Ms. Salmond said that no student at any time complained to her about her brother hitting or cursing at them.

Under cross-examination Ms. Salmond admitted that she was no longer friendly with Juliet DaCosta, since DaCosta testified against her brother in the instant tenure hearing.

James Joyner

James Joyner is a certified teacher and guidance counselor. He began teaching in Paterson in June 1975. He is currently working as second vice president of the Paterson Educators Association (PEA).

Mr. Joyner testified that he has known Robinson for about ten years. He said he knows Robinson from being a delegate in School 4. Robinson was a PEA delegate.

Mr. Joyner said that he never heard Robinson refer to his students in a negative manner. Under cross-examination he stated that he never received a complaint about Robinson.

Denise Gibson Hoyle

Denise Hoyle has been a teacher with the Paterson School District for nineteen and half years. She taught sixth and seventh grade at School 4.

Ms. Hoyle testified that she has never heard or seen anything inappropriate between Robinson and his students. She never heard Robinson refer to his students as "retarded" or "stupid." She found Robinson to take pride in his students. She said Robinson would always make sure his students were treated fairly.

Under cross-examination Ms. Hoyle testified that she ate lunch with Robinson on a regular basis. But, she has not spoken to Robinson since he has been out of School 4.

Jacqueline Jeter Freeman

Jacqueline Freeman is a certified special education teacher. She has worked in Paterson since 1977; she became a special education teacher for Paterson in 1981. In 1997 she went to School 4 as a special education teacher. She testified that she has known Robinson since high school because they both attended Paterson Catholic High School.

Ms. Freeman testified that she and Robinson worked together, in that her students went to Robinson's class for math and Robinson's students went to her class for literacy. She stated that she never saw or heard Robinson curse at or hit a student. She never heard Robinson say "you bitches." She never heard Robinson say "you Jamaican bitch" at a teacher's meeting.

Ms. Freeman stated that she was present at the meeting wherein Robinson allegedly accused Ms. Granata of being a go-go dancer or a stripper; Ms. Freeman said Robinson said no such thing. Ms. Freeman said that at that meeting she was sitting diagonally across from Ms. Granata. She also said that Mr. Jenkins asked her about this incident and she gave a written statement saying that it never happened. She said she was told that Robinson had been reprimanded.

Ms. Freeman also testified that she saw Robinson holding, as if hugging, student A.V. She said A.V. had a fight with Ms. Pierce and Robinson was holding him down trying to calm him.

Ms. Freeman said that Robinson was good with his students and that the kids loved him.

Mary LaSala

Mary LaSala is a certified reading teacher. She has been working for the Paterson School District since 1984. She met Robinson in September 2000. She was School 4's librarian. Ms. LaSala testified that during her first two years at School 4 her room was three doors down from Robinson's classroom. She saw Robinson every day because Robinson would bring his class to the library every day.

Ms. LaSala testified that she never saw Robinson hit a student. She said that V.H. and student M. were her regular students that helped her in the library. She said that neither V.H. nor M. ever told her anything negative about Robinson. Ms. LaSala also said that she had been in Robinson's classroom many times. She said there were students that were upset that Robinson was not returning to School 4. Some students did not do well after Robinson left.

Ms. LaSala further stated that Robinson was never inappropriate with her; Robinson never made any lewd remarks to her.

Under cross-examination Ms. LaSala admitted that Robinson brought his class to the library once a week; that she was rarely in Robinson's class; and that the students almost always came to her.

Ms. LaSala recalled that one day student D. was misbehaving. She said Robinson asked D. to sit next to him, and that was the extent of the discipline Robinson imposed. Ms. LaSala said most students were well behaved.

Ms. LaSala stated that the students knew something was going on with Robinson and they were very upset. The students were concerned about what was going to happen to them and to Robinson.

Ms. LaSala said she did not socialize with Robinson outside of school, and at the time of her testimony she had not seen Robinson since 2004 when he left the school.

Stephanie Morris Roberts

Stephanie Morris Roberts testified that she is the substance abuse coordinator for the Paterson schools. She met Robinson in 1997. She would go to Robinson's class about once a week. She would observe Robinson interact with his students. Ms. Roberts testified that she observed Robinson interact very well with his students. She said that the joke around the school was that Robinson acted like his kids.

Ms. Roberts testified that she never heard Robinson use the word "retard" in relation to his students. She said Robinson was very proud of his students; he always made sure his students were involved in the school community.

Ms. Roberts said that Robinson would pass around envelopes looking for donations for his students so they could attend a dance or get a cap and gown. She said she knew student A.T. According to Ms. Roberts, A.T. was quiet and timid; she did not think he was a nervous kid. She said that A.T. never reported to her that Robinson hit him.

Ms. Roberts said she never saw Robinson hit a student, curse at a student, or call a student a bad name such as "retard" or "stupid." Ms. Roberts opined that Robinson cared about his students and he would go out of his way to do things for them. She counseled two of Robinson's students. She never counseled students regarding Robinson's alleged abusive behaviors.

Under cross-examination Ms. Roberts stated that her office was on the fourth floor and Robinson's classroom was on the third floor. Ms. Roberts stated that she was the substance abuse counselor for three schools, so she divided her time amongst the three. She said she spent about 40 percent of her working hours in School 4. She would spend about five to ten minutes in Robinson's class.

William Molloy, Sr.

William Molloy teaches technology at School 4. He has been employed by the Paterson School District for twenty-one years. Mr. Molloy said he has known Robinson since the beginning of his teaching career at School 4. Mr. Molloy taught computers to Robinson's students about three times a week.

Mr. Molloy testified that it was not uncommon for him to walk into Robinson's class about four to five times a week. He said he always observed Robinson to be appropriate in the classroom. He characterized Robinson as paternalistic in his teaching.

Mr. Molloy said that Robinson never allowed anyone to call his students names such as "retard."

Under cross-examination Mr. Molloy denied having had any disciplinary problems. He said he had two letters in his personnel file. One letter was about a dead-mouse incident on a teacher's table, and the other was about allowing students to leave his classroom. He denied being reprimanded for insubordination in the 1988-1989 school year. He denied being officially reprimanded for professional insufficiency, failure to submit lesson plans, and using poor judgment with students. He denied ever being suspended for striking a student.

Doris Butler

The testimony of Doris Butler was received via videotaped depositions taken in the state of Delaware pursuant to Court Order.[3]

Doris Butler testified that she worked for the Paterson School District from March 1971 until she retired in May 2005. She worked as a physical education and health

[3] Doris Butler retired from the Paterson School District and moved to the Delaware. An Order Directing Prothonotary to Issue Subpoena Pursuant to Delaware law was obtained.

teacher. She was a vice principal for three years, and then in 1999 she became principal of School 4, in which position she remained until she retired. She was Robinson's supervisor. She had known Robinson since she was at School 4 in the 1980's. She said she and Robinson were work friends; they bowled in the same league together.

Ms. Butler was shown Exhibit P-11, which is a report documenting alleged rude and unprofessional behavior by Robinson towards Teresa Granata at a teachers meeting. Ms. Butler did not recall speaking with either Ms. Granata or Mr. Robinson about the incident.

Ms. Butler did not have a specific memory regarding the "potato chips" incident with V.H.

Ms. Butler remembered the incident with Robinson and student J.T. She recalled having a meeting with J.T. and his parents. Ms. Butler did not recall the specifics of the meeting, nor did she recall J.T. demonstrating how Robinson hit him. She did not recall seeing a bruise on J.T.

Ms. Butler recalled student V.H., and described her as "vocal." Ms. Butler said that V.H. spoke her mind on a regular basis.

Ms. Butler also recalled Patricia DiGiaimo. She said it was Ms. DiGiaimo who told her Ms. Chain wanted a transfer. She denied that Ms. DiGiaimo ever told her about a student(s) who had concerns about Robinson.

Ms. Butler did not remember who the students were that the DYFS investigator interviewed.

Ms. Butler recalled that no instructional aide wanted to work for Robinson and that most of them wanted to be out of Robinson's class.

Ms. Butler testified that she basically saw Robinson with his students in the classroom and hallways. She never saw anything out of the ordinary. She said she had observed Robinson in his class when she appeared unannounced and she always found everything to be fine.

Under cross-examination Ms. Butler recalled the incident between Ms. Granata and Robinson and said that she probably did meet with the two. She remembered that Robinson's apology to Ms. Granata did not seem sincere to her.

Ms. Butler recalled that Ms. Ebanks complained to her about how Robinson spoke to her and to other female teachers and students. Ms. Butler did not receive any reports from Ms. Ebanks in May or June 2003 about Robinson physically abusing a student in his class.

Ms. Butler testified that at special education teachers meetings the special education teachers expressed that they did not like Robinson.

Ms. Butler recalled that she called the DYFS and told them about the incidents with J.T. and V.H. when Ms. Chain came to her with a letter that outlined the incidents with J.T. and V.H. Ms. Butler also recalled that she told Ms. Chain to keep track of her and Robinson's activities in the classroom. She said that Ms. Chain complained that she was not doing the work of an instructional aide. Ms. Butler explained that Ms. Chain always wanted to know what she should be doing as an instructional aide. Ms. Butler said that Ms. Chain complained that Robinson made her do more work than she was supposed to do.

Ms. Butler under cross-examination elaborated further on what happened during the meeting with J.T. and his parents. Ms. Butler stated that at first Robinson denied that he hit J.T., and then Robinson admitted to hitting J.T. but said that he was playing with J.T.

Ms. Butler further testified that in all of the times Ms. Chain complained about the students and Robinson, she never said Robinson hit the students. She said Ms. Chain just wanted to be out of that classroom.

Ms. Butler had no memory of whether Ms. Coleman said she was afraid of Robinson.

Ms. Butler under re-direct examination stated that it appeared that a lot went on in School 4 that she apparently was not aware of. She said she now wonders what went on.

She stated that the staff members did not like Robinson. Ms. Butler said that in meetings, if Robinson agreed or went along with what the other teachers wanted, everything went okay. However, if Robinson had other suggestions or disagreed, he would disrupt the meetings.

Ms. Butler said that Ms. Coleman did not think Robinson was fair. Ms. Chain was unhappy and wanted specificity in her job description, and Ms. DaCosta just wanted to leave.

Curtis Robinson

Curtis Robinson was born in 1956 and is a lifelong resident of Paterson, New Jersey, having attended Paterson schools. He graduated from the University of Dayton in 1978 with a bachelor's degree in education, and then attended American University and earned ten credits towards his master's degree in education. Mr. Robinson taught in a private school in Falls Church, Virginia. He taught educable mentally retarded children for five years at the Association of Retarded Students in Washington, D.C. He is a New Jersey certified elementary school teacher and a special education teacher. Mr. Robinson worked at the North Jersey Developmental Center for eighteen months, where he taught computers, prepared individualized education plans and conducted workshops for teachers and students.

Mr. Robinson stated that he is HIV positive and was diagnosed in 1997.

Mr. Robinson stated that he began working as a teacher for the Paterson School District in 1986. He worked in School 27. He has taught sixth, seventh and eighth grade for the Paterson School District. He testified that he taught students that were socially maladjusted, and students that were destructive in the community and in the school. After one year in School 27 he asked for a transfer. From School 27 he went to School 6, where he taught for two years.

Mr. Robinson testified that although he was eligible for tenure while teaching at School 27 he did not get tenure because he was short one point. According to Mr. Robinson's testimony, he needed 100 points to get tenure, and the principal gave him 99. He said he reported the situation to the superintendent.

Mr. Robinson said that he was re-hired and went to work at School 4. He started at School 4 in 1990 and he never transferred out of School 4. At School 4 he taught the educable mentally retarded students. He had fifteen to sixteen students in his class who were from ten to fourteen years old. Their academic grade levels were anywhere from pre-kindergarten to the third grade. Basically, his class was not graded. He said he had a few regular students in his class for about twenty minutes or so; those students tutored his special education students.

Mr. Robinson said that his first teacher's assistant was Pam W. Harrison. He and Ms. Harrison argued over Harrison's reporting to class, but they did not argue in front of the students. He was shown Exhibit P-4, and he denied that the incident described in the letter ever occurred. Exhibit P-4 documented that he was reprimanded by Mr. Jenkins for arguing in front of the students.

Mr. Robinson stated that his school routine required that he be in the classroom most of the day. He said that he would be "stuck" in the classroom all day. He also said he did not like that because he had hyperactive students.

Mr. Robinson testified that he tried to have his special students integrated in all of the activities of the school. He tried to mainstream his students as much as possible. He said that taking students on field trips was his expertise.

Mr. Robinson identified exhibits R-4 and R-5 as photographs of the desks used in his classroom. Mr. Robinson denied having referred to Ms. Granata as a go-go dancer. He said it was a misunderstanding between them and he apologized. He testified that after this situation he and Ms. Granata worked well together.

As to Ms. Coleman, Mr. Robinson testified that she was his instructional assistant in 2001 and she was there for about one year. He had problems with Ms. Coleman. Mr. Robinson said she was immature. Ms. Coleman did not work with him and she fought him all of the time. Mr. Robinson said that he never called Ms. Coleman any names. He never said to her, "you are a fucking whore," or called her a "bitch."

With respect to the "potato chip" incident with V.H., Mr. Robinson said that he had established a point system with the students. He said that V.H. did not have enough points earned to receive a treat. Ms. Coleman knew that and should not have given V.H. any potato chips. Ms. Coleman was working against him by giving V.H. the chips. He said he did not scream at Ms. Coleman, but told her not to go against his orders. He said that he took the chips from V.H. and threw them in the garbage.

Mr. Robinson said Ms. Coleman grabbed V.H. and they ran down the hall. Mr. Robinson testified that he never hit V.H. in the nose, mouth or legs. He never hit her with a yardstick. He never threw a gym bag at her.

Mr. Robinson said that he never hit A.T. He testified that A.T. was classified as trainable mentally retarded, which is a classification lower than educable mentally retarded. Mr. Robinson described A.T. as thin, very nervous. He said that A.T. used to urinate on himself. Mr. Robinson said that A.T. was abused by his mother and was moved to a foster home. He said one time A.T. came in with a scar at the top of his head and it was bleeding. Mr. Robinson reported it to the DYFS and then A.T. was removed from the home.

Mr. Robinson also stated that he never said to his class or to anyone "sit the fuck down," or said that he was "going out to smoke crack or weed." He said he never referred to his students as "retarded," "retarded ass," "ugly ass," "Puerto Rican ass," or "crack babies," and that he never said to his students that they would never amount to anything.

Mr. Robinson testified that he never hit a student with a stick; he said he used the stick as a pointer. He said he has tapped the desk with the pointer. He also said that he would use the pointer to tap the back of the desk leg, but that he never hit a student on the back of the legs with the pointer.

Mr. Robinson testified that Ms. DaCosta was another one of his instructional assistants. He said Ms. DaCosta was a friend of his sister. Ms. DaCosta was his instructional aide in the 2001-2002 school year. Mr. Robinson stated that he had problems with Ms. DaCosta. He said that she would not take directions and she did what she wanted to do.

Mr. Robinson said that Ms. DaCosta would call students names like "stupid" and "dumb." She complained of A.T. smelling of urine.

Mr. Robinson said that once Ms. DaCosta asked him for two days so she could plan a birthday party for the principal, Ms. Butler. He told her no, and she did not like that. Mr. Robinson stated that Ms. DaCosta told him that since he had AIDS he should not be working with kids.

Mr. Robinson stated that student N., who was in his class, was constantly fighting; he was paranoid. He said N. would very often jump up and run out of the classroom. He said that there were times when he would have to restrain N. Mr. Robinson said that he was trained in restraining people.

Mr. Robinson said that Clarence Pierce was a one-on-one instructional aide in his class. Mr. Robinson requested assistance with student D.R., and Mr. Pierce was

sent. He had problems with Mr. Pierce. Mr. Robinson testified that he explained to Mr. Pierce that the best way to deal with D.R.'s misbehaviors was to ignore him. Mr. Pierce, according to Mr. Robinson, did the opposite and refused to follow Mr. Robinson's directives. Mr. Robinson said that D.R. had a tendency of running out of the building, and after a time Mr. Pierce refused to go after D.R.

Mr. Robinson explained an incident between D.R. and student A. in which Mr. Pierce got involved. Mr. Pierce and A. started to throw punches at each other and Mr. Robinson had to separate Mr. Pierce from A.

Mr. Robinson denied physically forcing students into their seats, but admitted to physically restraining a student from getting out of a seat. He said he would restrain a student from getting out of a seat in order to prevent a fight or to squash a fight. Mr. Robinson said that he never pulled a student by his head, arm or clothing.

Mr. Robinson stated that he worked with Ms. Ebanks and their relationship was not a good one. Ms. Ebanks was always late for their computer training class. Mr. Robinson said that when he brought it to her attention Ms. Ebanks took a swing at him. He did not report this incident to anyone. Mr. Robinson testified during cross-examination that Ms. Ebanks' behavior was attention-seeking, and the more he acknowledged such behavior the more she would misbehave, therefore he never reported her behavior.

Mr. Robinson further stated that Ms. Ebanks did not like it if he or anyone disagreed with her or offered an opinion that differed from hers. Sometimes they would be coming out of a meeting, and because he had disagreed with her she would call him a "faggot."

Mr. Robinson also testified that Ms. Ebanks would make references to his having AIDS. She would say to him that he should not be working with kids.

Mr. Robinson denied ever slamming student N. against a wall. Mr. Robinson denied the incident with J.T. He testified that he did not punch J.T. Mr. Robinson said

that J.T. was an argumentative kid and never did what he was supposed to. Mr. Robinson said that once J.T. was running underneath computer desks and he had to pull J.T. from under a desk. Mr. Robinson also testified that J.T. would get into fights often, and he would have to touch J.T. in order to separate him from the other student.

Mr. Robinson described the incident with student V.H. that became the subject of a DYFS investigation. Mr. Robinson said that he was at the blackboard when he noticed that Ms. Chain and V.H. were arguing. He had passed out some papers and V.H. had thrown her papers on the floor. He told V.H. to calm down but she did not. Mr. Robinson said he bent down to pick up the papers from the floor and put them on V.H.'s desk when V.H. moved, suddenly falling over. Mr. Robinson said that he put his hands up to stop V.H. from knocking him over because V.H. and the desk tipped over. Mr. Robinson picked up V.H. and the desk. V.H. was crying.

Mr. Robinson testified that after the incident with V.H. he called V.H.'s house to relate the incident. Mr. Robinson said that he spoke to V.H.'s uncle and asked him to talk to V.H. so she could calm down. V.H. calmed down. She then went to the bathroom, cleaned herself up and returned to class without further incident. Mr. Robinson denied slapping, punching or kicking V.H.

Mr. Robinson admitted to having to restrain student J.P. numerous times. He testified that J.P. loved to fight. She loved to dig her nails into other students. He said J.P. was verbally abusive. Mr. Robinson denied ever hitting J.P. He said that J.P. was very friendly with Ms. Coleman.

Mr. Robinson identified exhibits R-8, R-9 and R-10 as his performance evaluations for academic years 2000-2001, 2001-2002, and 2002-2003, respectively. He testified that for those three academic years his performance appraisals ranged from outstanding to satisfactory and he was recommended to continue teaching.

Mr. Robinson testified that Ms. Chain was an instructional aide in his class from 2002 to 2004. Ms. Campbell was a personal assistant to student M.S. from 2002 to

2004. Ms. DaCosta was an instructional aide in 2001–2002. Ms. Coleman was an instructional aide in 2000–2001.

Mr. Robinson further stated that for four years he coached the Special Olympics at School 4, and after that he became the coordinator of special events. He ran the extended-day program for special education students so they could prepare for the statewide exams. He said he took students camping and skiing. He received an award of $1,000 for perfect attendance for two consecutive years. He raised funds for needy students and families so that his students could go to the prom or graduation, get a yearbook, go on field trips, etc.

Under cross-examination Mr. Robinson was referred to exhibits concerning numerous incidents involving allegations of unprofessional conduct with other school staff members. He either denied that the incidents happened or denied ever seeing the written reports of the incidents. Mr. Robinson said that the principal, Mr. Jenkins, closely supervised him.

Mr. Robinson stated that he had problems with Ms. Coleman because she was young and inexperienced. He said Ms. Coleman needed "grooming." He testified that he never complained to the administration about Ms. Coleman's inadequacies.

Under cross-examination Mr. Robinson reiterated how Ms. DaCosta talked to him about the children. Mr. Robinson said Ms. DaCosta would call the students "stupid" and "retarded." According to Mr. Robinson, Ms. DaCosta asked for a transfer from his class, and she made comments about his HIV-positive status.

Further, Mr. Robinson said Mr. Pierce refused to do his job as a one-on-one aide to D.R. Therefore, Mr. Robinson did a lot of Pierce's work with D.R., which took him away from his work with the other students. Mr. Robinson said he reported Mr. Pierce to the child study team. Mr. Robinson said he did not ask for Mr. Pierce to be transferred.

Mr. Robinson testified that he never yelled at Ms. Coleman or called her any names. And, the incident with V.H. and the potato chips did not happen as Ms. Coleman testified. He said he simply picked up the chips in a napkin. He did not report the incident because he knew Ms. Coleman would.

Mr. Robinson said that the incident with V.H. wherein the desk fell over happened because V.H. made a sudden move. He thought V.H. was going to collide with him, so he put his arms out to block or stop the fall.

Mr. Robinson testified that he has used drugs in the past. He recalled that in 1991 he attended a thirty-day rehabilitation program, and in 1997 he attended a six-month rehabilitation program.

DISCUSSION

The determination of credibility must be made based upon the totality of the evidence, including an assessment of the witnesses by the trial judge who had the opportunity to see and hear the witnesses at the hearing. See In re final Agency Decision of Bd. of Exam'rs of Elec. Contractors, 356 N.J. Super. 42 (App. Div. 2002). Where facts are contested, as in this case, the trier of fact must assess and weigh the credibility of the witnesses for purposes of making factual findings. Credibility is the value that a finder of fact gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality, its internal consistency, and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). "Credible testimony" must proceed from the mouth of a credible witness and must be such as our common experience, knowledge, and common observation can accept as probable under the circumstances. State v. Taylor, 38 N.J. Super. 6, 24 (App. Div. 1955); see also Gilson v. Gilson, 116 N.J. Eq. 556, 560 (E & A. 1934). In Re Estate of Perrone, 5 N.J. 514 (1950) A fact finder is expected to base decision of credibility on his or her common sense, intuition, or experience. Barnes v. United States, 412 U.S. 837, 93 S. Ct. 2357, 37 L. Ed.2d 380 (1973).

It is well established that in administrative hearings hearsay evidence is admissible. Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. However, at the conclusion of the analysis, for a court to sustain an administrative decision that affects a substantial right of a party, there must be a residuum of legal and competent evidence in the record to support it. Weston v. State, 60 N.J. 36 (1972). See also Matter of Tenure Hearing of Cowan, 224 N.J. Super. 737, (App. Div. 188) and Hemsey v. Board of Trustees, Police and Firemen's System, 393 N.J. Super. 524 (App. Div. 2007) Hearsay evidence is accorded whatever weight the administrative law judge deems appropriate. The nature, character and scope of the evidence, the circumstances of its creation and production, and, in general, its reliability must all be considered. N.J.A.C. 1:1-15.5(a).

Tenure of teaching staff members is bestowed by statute, N.J.S.A. 18A:28-5, and acquired by satisfactory performance by teachers who have a position in which a teaching certificate is required, if they hold the appropriate certificate and if they have been employed for the requisite time, generally, three consecutive calendar years. Because it is a form of job security, teachers must be diligent in retaining their tenured status, and school districts must be scrupulous in meeting their evidentiary burden in order to bring tenure charges against a tenured teacher.

N.J.S.A. 18A:6-10, pertaining to the dismissal of a tenured teacher, provides that:

> No person shall be dismissed or reduced in compensation,
>
> ...except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

Tenure essentially is to protect teachers from removal for "unfounded, flimsy, or political reasons." Zimmerman v. Bd. of Educ., 38 N.J. 65, 71 (1962).

The determination of whether to remove a teacher from a tenured position requires consideration of the nature of the act, the totality of the circumstances, and the impact on the teacher's career. Dismissal is usually reserved for cases in which there has been a continuing pattern of misconduct accompanied by prior warnings. However, if the incident is sufficiently flagrant, one incident will suffice. In re Fulcomer, 93 N.J. Super. 404, 421 (App. Div. 1967). Usually, a series of events demonstrating a pattern of behavior is an indication of "unbecoming conduct."

It is noted that in this case a number of charges have been voluntarily withdrawn by petitioner's counsel due to lack of evidence, no supporting documentation, and/or no witness testimony.

Teachers, due to their custody and care of children, are necessarily required to exercise a degree of self-restraint and controlled behavior unlike that required in most other types of employment. In re Tenure Hearing of Lucarelli, 97 N.J.A.R.2d (EDU) 537, 541. Because teachers are essentially public role models they are held to a higher standard of behavior. See In re Tenure Hearing of Sammons, 1972 S.L.D. 302; 321. In re Tenure Hearing of Wachendorf, EDU 6860-04, Initial Decision (May 3, 2005), aff'd, Comm'r (July 14, 2005), aff'd, St. Bd. (February. 1, 2006) <http://lawlibrary.rutgers.edu/oal/search.html>.

The Paterson School District bears the burden of proof. To prevail in this case the district must establish the truth of the charges by a preponderance of the "credible evidence." Close v. Kordulak Bros., 44 N.J. 589, 598-99 (1965); Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Preponderance is defined as the "greater weight of the credible evidence in the case," not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). The evidence must be such as to lead a reasonably cautious mind to the given conclusions. Bornstein v. Metropolitan Bottling Co., 26 N.J. 263, 275 (1958). Evidence is found to preponderate if it establishes the reasonable probability of the fact alleged and

generates a reliable belief that the tendered hypothesis, in all human likelihood, is true. Jackson v. Delaware, L.&W.R. Co., 111 N.J.L. 487, 490(E.&A 1933)

FINDINGS OF FACT

Based upon consideration of the testimonial and documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following **FACTS**:

Charge One, Counts 1, 2 and 3

Did Mr. Robinson, during the course of the 2000-2001, 2001-2002, and 2002-2003 school years, use inappropriate language towards students constituting conduct unbecoming a teacher?

Ms. Coleman, Ms. Ebanks, J.T., Ms. DaCosta, J.P. and Mr. Pierce testified that they heard Mr. Robinson say "sit the fuck down," "you retarded ass," "retarded" and other words to that effect.

J.T. was a student in Mr. Robinson's class. J.T. testified credibly that he heard Mr. Robinson call students derogatory names. Specifically, he said that he heard Mr. Robinson call student Q. a "dumb ass," and that he heard Mr. Robinson refer to a student as "retarded."

J.P. was also a student in Mr. Robinson's class. She testified that she was in Mr. Robinson's class for about two or three years. She was in his classroom in the year 2002. She said she heard Mr. Robinson call V.H. and S.T. "stupid," "retarded" and "retarded ass." She testified credibly that she heard Mr. Robinson give the class commands like "sit the fuck down" and "shut the fuck up now." She specifically characterized Mr. Robinson's name calling as "mean."

Ms. Coleman testified that she began teaching in the district in January 2001 and she started in School 4. She worked for Mr. Robinson for approximately one year. Ms.

Coleman testified that on numerous occasions she heard Mr. Robinson call the students names and curse at them. She said she heard Mr. Robinson call his students "retarded ass" and would give them directions like "sit the fuck down."

Much weight was placed on the testimony of Juliet DaCosta. Her demeanor and presentation provided a clearer picture of the classroom and the events that took place therein. I **FIND** that Ms. DaCosta testified truthfully and objectively; she did not appear to have any ulterior motives or hidden agendas.

Juliet DaCosta was an instructional assistant and had been one for sixteen years. She was Mr. Robinson's classroom aide. Ms. DaCosta said she was assigned to Mr. Robinson's class as a personal aide to a student in the spring of 2002. Ms. DaCosta testified that she heard Mr. Robinson say degrading things to A.T., who was a very low-functioning student. Ms. DaCosta said that she heard Mr. Robinson call the kids "retarded." She said Mr. Robinson would give the class general commands like "sit the fuck down." As previously stated, I **FIND** that Ms. DaCosta's testimony was very credible

Jacqueline Ebanks taught at School 4 during the 2002-2003 academic year, her classroom was next to Mr. Robinson's. Ms. Ebanks testified that many times she would hear Mr. Robinson curse at his students. She overheard Mr. Robinson call his students "retarded" and "retarded ass."

Clarence Pierce was a personal assistant; he was a one-on-one aide to students. He said that in February 2002 he was in School 4 and in Mr. Robinson's class. Mr. Pierce testified that he heard Mr. Robinson say to the kids "shut the fuck up" and "sit your ass down." He said he heard Mr. Robinson call the students "stupid," "retarded," "dumb asses" and "crack babies." He also testified that he heard Mr. Robinson say to his students, "you won't amount to anything because your parents were nothing" or "you ain't going to be shit anyway."

Having considered the foregoing testimony and some accompanying evidence, I **FIND** that the preponderance of the evidence establishes that the respondent used

inappropriate language towards students from 2000 to 2003, and that this behavior constitutes conduct unbecoming a teacher.

I **DO NOT FIND** that Mr. Robinson used inappropriate language in the presence of his instructional aide, Sophia Chain, because I received no evidence that placed Ms. Chain in Mr. Robinson's classroom at the time he allegedly spoke the inappropriate words. However, I do **FIND** that Mr. Robinson generally used such inappropriate language in the classroom and directed such language at the students.

Charge Two, Counts 1, 2, 3, 4 and 6

Did Mr. Robinson exhibit inappropriate physical conduct towards V.H. constituting conduct unbecoming a teacher?

J.P. was a student in Mr. Robinson's class in 2002. J. P. testified that she saw Mr. Robinson "pop" V.H. in the mouth two or three times. J.P. testified that she saw Mr. Robinson "mush" or push V.H.'s face in, to the extent that V.H.'s face would be squished sideways.

Michelle Coleman, who was in Mr. Robinson's classroom, often witnessed Mr. Robinson hit V.H. She testified to seeing Mr. Robinson hit V.H. in the mouth and nose on two separate occasions. She testified to witnessing Mr. Robinson hit V.H. with a yardstick and throwing a gym bag at V.H.

J.T. testified to seeing V.H. falling to the floor with Mr. Robinson standing over her.

Juliet DaCosta testified that she never saw Mr. Robinson hit V.H., but she did see Mr. Robinson shake V.H. up. She testified to seeing Mr. Robinson hold V.H.'s head down on the desk and pull her up from the desk by her clothes. Ms. DaCosta testified that V.H. and Robinson would get angry with each other very often.

Joyce Campbell testified that she saw V.H. lunge at Mr. Robinson and Mr. Robinson raised his arms up to protect himself. V.H. fell back into her chair, causing the desk to flip over, and V.H. fell on the floor.

Mr. Pierce testified that he did not remember any aggressive behavior against V.H., but he said that Mr. Robinson would exhibit rage. Mr. Pierce testified that Mr. Robinson would get physical and would yell and curse at the students. Mr. Pierce said that he saw Mr. Robinson smack a student in the head from time to time. Mr. Pierce said that he saw Mr. Robinson hit a student with a yardstick. Mr. Pierce testified that Mr. Robinson struck and abused the class as a whole.

Mr. Robinson testified to having an incident with V.H. wherein V.H.'s desk tipped over and she landed on the floor. He denied ever hitting V.H., but admitted that V.H.'s grandmother gave him permission to hit V.H.

Based on the testimonial evidence, I **FIND** that on or about February 4, 2004, Mr. Robinson hit and/or punched V.H. in the face several times and pushed her out of her chair, causing V.H. to fall to the floor, and that this inappropriate contact constitutes conduct unbecoming a teacher. However, I **DO NOT FIND** that after V.H. fell to the floor, Mr. Robinson continued to hit and/or punch her.

Although V.H. testified that Mr. Robinson never was inappropriate to her, I do not believe her. V.H. testified that the "potato chip" incident with Ms. Coleman never happened, yet Ms. DaCosta and Ms. Coleman, who were in the classroom, both testified regarding the incident. J.T. testified about an incident occurring between Mr. Robinson and V.H. V.H. denied the hitting incident that caused her to bleed from the nose, yet Ms. Coleman reported the incident to V.H.'s grandmother. V.H.'s testimony does not hang together with her grandmother's. F.H. testified that she and V.H. were driven to the courthouse for the hearing by Mr. Robinson, yet V.H. said that her grandmother drove her to the hearing and it was just the two of them. I **FIND** that V.H.'s testimony is incredible.

I **FIND** that V.H.'s testimony does not hang together with her grandmother's. Therefore, I **FIND** V.H.'s testimony incredible.

Charge Three, Counts 1 and 2

Did Mr. Robinson exhibit inappropriate physical conduct towards A.T. constituting conduct unbecoming a teacher?

Michelle Coleman, who worked in Mr. Robinson's class as a classroom aide for approximately one year beginning in January 2001, described an incident when Mr. Robinson "popped" A.T. on the head. She testified that A.T. was having difficulty doing an assignment and Mr. Robinson came along and hit him on the head.

Ms. DaCosta testified she never saw Mr. Robinson strike A.T.; however, she said she saw A.T.'s head move forward when Mr. Robinson either tapped or struck him on the back of the head. Ms. DaCosta testified that Mr. Robinson would say degrading things to A.T. She said A.T. was very low functioning.

J.P. was a student in Mr. Robinson's class in 2002. She said she once saw Mr. Robinson hit A.T. on the back of the head. J.P. testified to seeing Mr. Robinson hit A.T.'s hand with a ruler. J.P. also said that Mr. Robinson picked on A.T. and that A.T. would go crazy.

Clarence Pierce testified that Mr. Robinson called A.T. "retarded" because of A.T.'s disabilities.

Arletta Salmond testified that she was familiar with A.T. and she knew he was a nervous child with disabilities. She did not say if she ever observed A.T. in class with Mr. Robinson, she only testified as to A.T.'s condition. Arletta Salmond is Mr. Robinson's sister.

Stephanie Morris Roberts, a substance abuse coordinator who visited Mr. Robinson's class about once a week and a witness for the respondent, testified that she

was familiar with A.T. She described A.T. as a quiet and timid kid and not a nervous child. She confirmed that A.T. had a lot of disabilities.

Mr. Robinson denied that he ever hit or "popped" A.T. in the head. Mr. Robinson said that A.T. was a classified student, with a classification of trainable mentally retarded. Mr. Robinson said A.T. was thin and very nervous and would urinate on himself. He said A.T. was abused by his mother and was in foster care. He also said he reported to the DYFS that he noticed that A.T. had a scar on his head and was bleeding. Clearly Mr. Robinson knew how delicate and fragile A.T. was.

I **FIND** that the preponderance of the evidence establishes that Mr. Robinson had inappropriate physical contact with A.T. All of the witnesses, whether they testified on behalf of the district or the respondent, including Mr. Robinson, agreed that A.T. had serious disabilities, therefore special care and attention had to be paid to A.T. The fact that he was timid and/or nervous says A.T. needed to be handled with care by everyone, and the mere appearance of any impropriety or mishandling had to be avoided.

Charge Four, Counts 1, 2 and 3

Did Mr. Robinson use inappropriate language and physical conduct towards instructional aide Michelle Coleman constituting conduct unbecoming a teacher?

As to counts 1 and 2, I **FIND** that the allegation that Mr. Robinson is guilty of telling his instructional aide, Michelle Coleman, in front of the class, that he needed to go outside to smoke crack or marijuana in order to make it through the day is not supported by anyone other than Michelle Coleman. Mr. Pierce testified that Mr. Robinson would leave the classroom for an hour or so, but he did not know where Mr. Robinson went or what he was doing.

However, as to count 3, I **FIND** that on or about November 21, 2001, Mr. Robinson jumped in the face of instructional aide Michelle Coleman and screamed at her and V.H., "get the hell out," or words to that effect. I **FIND** that during this incident

Mr. Robinson called Ms. Coleman "bitch," "whore," "motherfucker" and/or other such names in the presence of the students. I **FIND** the testimony of Michelle Coleman and Juliet DaCosta in relation to this incident to be credible.

Charge Five, Count 1

Did Mr. Robinson use inappropriate language towards Teresa Granata constituting conduct unbecoming a teacher?

I **FIND** that the alleged incident of November 26, 2001, wherein Mr. Robinson made unwarranted, unprofessional, offensive and/or sexist remarks to Ms. Granata occurred. I **FIND** that the use of such inappropriate language constitutes conduct unbecoming a teacher. However, this incident, by itself, is not sufficient to warrant respondent's dismissal.

Charge Seven, Counts 1 and 2

Did Mr. Robinson exhibit inappropriate physical conduct towards student N.H. constituting conduct unbecoming a teacher?

I **FIND** that during the 2002-2003 school year, Mr. Robinson would hit, punch and/or beat N.H., a classified handicapped male student, with his hands and/or a yardstick.

I **FIND** that on or about May or June 2003, Mr. Robinson picked up N.H., a classified male student, by his upper body and shoved him against the blackboard telling him to sit down, causing N.H. to cry.

I **FIND** that there is sufficient evidence to support such findings by the testimony of Jacqueline Ebanks, Juliet DaCosta, Michelle Coleman, Clarence Pierce, and J.P. and exhibit P-14.

Charge Eight, Counts 1, 2 and 3

Did Mr. Robinson exhibit inappropriate physical conduct towards student J.T. constituting conduct unbecoming a teacher?

I **FIND** that there is insufficient evidence to support a finding that Mr. Robinson was physically inappropriate with student J.T. during the 2002-2003 school year. No evidence was produced to support this allegation. J.T. clearly made the distinction between a malicious and a playful touch. J.T. testified that there were times when Mr. Robinson did not intend to hurt him; in other words, Mr. Robinson touched him in a salute. Also, there was no direct evidence produced that J.T. was in Mr. Robinson's class in the 2002-2003 school year.

I **FIND** that during the 2003-2004 school year Mr. Robinson routinely hit, punched and/or beat J.T., a classified, handicapped male student in his class. I also **FIND** that on or about February 4, 2004, Mr. Robinson punched J.T. in his chest as a method of disciplining him for failure to do his class work. There is sufficient evidence to support such findings by the testimony of Clarence Pierce, J.T., G.M., T.M., and Doris Butler and exhibits P-25, P-26 and P-27.

Charge Twelve, Counts 1 and 2

Did Mr. Robinson use inappropriate language towards teacher Jacqueline Ebanks constituting conduct unbecoming a teacher?

I **FIND** that there is insufficient evidence to support a finding that Mr. Robinson referred to fellow teacher, Jacqueline Ebanks, during the 2002-2003 and 2003-2004 school years as a "bitch" and/or "old Jamaican bitch," or otherwise used inappropriate language when referring to Ms. Ebanks. Other than the direct testimony of Ms. Ebanks herself, nothing else supported this charge. Ms. Granata testified that she vividly recalled Mr. Robinson and Ms. Ebanks always arguing with each other. Ms. Granata said she heard Mr. Robinson refer to Ms. Ebanks as a "Jamaican . . . ," but she did not specify what the rest of the phrase was. Ms. Granata testified that she did not hear

what Mr. Robinson said. Ms. Butler, the principal at the time, denied that Ms. Ebanks ever reported to her Mr. Robinson's alleged inappropriate language towards her.

Charge Sixteen

Charge sixteen alleges that all of the charges outlined above should be incorporated to find that Mr. Robinson, as a whole, conducted himself in a manner unbecoming a teacher.

I **FIND** that respondent has conducted himself in a manner unbecoming a teacher. I **FIND** Mr. Robinson's repeated unbecoming behavior towards his students and colleagues deplorable. I have considered the testimony of the witnesses as well as the documentary evidence. I **FIND** that the following exhibits support the testimonial evidence.

P-4—Letter from principal Julian Jenkins to Mr. Robinson dated March 27, 1996, regarding an incident between Mr. Robinson and the classroom aide that occurred in full view of the students.

P-6—Memo dated March 10, 1998, from principal Julian Jenkins to Mr. Robinson concerning Mr. Robinson's manner of interacting with his students.

P-7—Memo regarding incident of May 5, 1999, from principal Julian Jenkins to Mr. Robinson telling Mr. Robinson to refrain from using corporal punishment on his students.

Furthermore, I **FIND** Mr. Robinson's use of profanity directed at the student(s) in his class to be intimidating and disrespectful. The use of profanity has no place in a classroom, especially in a special education classroom in an elementary school. I **FIND** that Mr. Robinson used such language only to berate, ridicule or demean his students. A teacher does not have license to say or do whatever he or she feels like in a classroom. A school cannot tolerate lewd, indecent or offensive speech or behavior from its staff.

CONCLUSION AND ORDER

Mr. Robinson as an educator is held to certain prescribed standards of conduct because of the trust the public has placed in teachers. Teachers are required to exercise a degree of self-restraint and controlled behavior not necessarily required of other types of employees. Mr. Robinson was a special education teacher appointed to teach the socially maladjusted student (see P-1). Therefore, he was required to exercise an even higher degree of care, self-restraint and controlled behavior. Mr. Robinson's behavior on all fronts had to consistently be beyond reproach, especially when interacting with his students and when in full view of his students.

The Commissioner of Education has stated that teachers

> are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of **self-restraint and controlled behavior** rarely requisite to other types of employment. . . . Those who teach do so by choice, and in this respect the teaching profession is more than a simple job; it is a calling.
>
> [In re Tenure Hearing of Sammons, supra, 1972 S.L.D. 302, 321 (emphasis added).]

In School District of Parsippany-Troy Hills v. Hess, 97 N.J.A.R.2d (EDU) 34, 51, it was stated that

> [i]n determining the appropriateness of . . . conduct, the Commissioner of Education has often stressed ". . . that those persons who enter the teaching profession exercise a significant influence upon those they teach and . . . must exercise a high degree of exemplary behavior."
>
> [Citing In re Tyler, 13 N.J.A.R. 297).]

In In re Tenure Hearing of Tordo, 1974 S.L.D. 97, 98-99, the Commissioner stated:

> Teachers [and educators] are public employees who hold positions demanding public trust, and in such positions they teach, inform, and mold habits and attitudes, and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher. When a teacher . . . violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner.

Factors determining the degree of discipline to be imposed include the employee's prior disciplinary record and the gravity of the misconduct in the instant case, as well as the concept of progressive discipline. West New York v. Bock, 38 N.J. 500, 522-24 (1962). Robinson has had numerous complaints about his behavior towards staff and the students. In March 1996 Robinson was written up by principal Julian Jenkins. Mr. Jenkins admitted under oath that there were problems with Robinson's unprofessional conduct with his colleagues and students. Robinson has been investigated by the DYFS on allegations of physical abuse of students. Former principal Jenkins also admitted to questioning Robinson's method of interacting with his students and requested that he follow the school's discipline code (see P-6). In a letter to Mr. Robinson, Mr. Jenkins wrote, "we can't use corporal punishment to force students to follow directions" (P-7).

Further, former principal Doris Butler recalled that Mr. Robinson was unprofessional towards his coworker Teresa Granata during a teachers meeting. She recalled the "potato chip" incident in general. She also recalled Robinson's altercation with student J.T. She recalled having a meeting with J.T. and his parents, although she did not recall the specifics of that meeting. She also recalled that Ms. Ebanks complained to her about how Robinson spoke to her and to other female teachers and students. However, she did not recall Ms. Ebanks complaining about Robinson physically abusing students in his class. Butler also recalled calling the DYFS on Mr. Robinson regarding the incidents with J.T. and V.H. when Ms. Chain came to her with a letter outlining the incidents with those students. Ms. Butler also testified that special education teachers expressed their dislike of Robinson to her.

Based on the above analysis and findings, I **CONCLUDE** that the respondent's behavior constituted conducting unbecoming an employee, and that the determination of the Board to remove respondent Robinson was reasonable and necessary in order to insure the safety and well being of the students and staff.

Therefore, it is **ORDERED** that the tenure charges certified against respondent Curtis Robinson are **SUSTAINED** and recommended that his teaching certificate be **REVOKED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 24, 2008
DATE

CARIDAD F. RIGO, ALJ

Date Received at Agency: July 24, 2008

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUL 28 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

ljb

APPENDIX

WITNESSES

For petitioner:

Jacqueline Ebanks
Capt. James Smith
Teresa Granata
G.C.
T.C.
J.T. (juvenile)
Patricia DiGiaimo
Michelle Coleman
Juliet DaCosta
J.P. (juvenile)
Clarence Pierce
Eileen Shafer

For respondent:

Julian Jenkins
Joyce Campbell
Dr. Floyd Perry
Mary Crooms
V.H.
F.H.
Carol Pierce
Lee Resnick
Pam Harrison
Monet Woods
Arletta Salmond
James Joyner
Jacqueline Jeter Freeman
Stephanie Morris-Roberts
Mary LaSala
Denise Gibson Hoyle
William Molloy
Curtis Robinson
Doris Butler (videotaped deposition)

EXHIBITS

For petitioner, marked (P):

P-1 Letter to Curtis Robinson from Dr. Frank Napier, Jr., dated July 14, 1986
P-2 Letter to Dr. Napier, Jr., from DYFS, dated March 4, 1988
P-4 Letter to Curtis Robinson from Julian Jenkins, dated March 27, 1996
P-5c Letter to Dr. Anthony Scalzo, assistant superintendent from Julian Jenkins, dated February 11, 1997
P-5d Letter from Julian Jenkins to Curits Robinson, dated January 3, 1997 (re: corporal punishment)
P-6 Memo to Curtis Robinson from Julian Jenkins, dated March 10, 1998
P-7 Letter to Curtis Robinson from Julian Jenkins, undated
P-8 Statement of Teresa Granata, dated June 2, 2004
P-9 Statement of Curtis Robinson regarding incident with Granata, undated
P-10 Memo to Curtis Robinson from Julian Jenkins, dated November 27, 2001
P-11 Affirmative Action Observation and Report, dated November 28, 2001
P-12 Handwritten notes of Michelle Coleman
P-13 Typed notes of Doris Butler
P-14 Letter to Zaida Padilla from Jacqueline Ebanks, dated Feb. 13, 2004
P-15 Sworn Statement of Jacqueline Ebanks, dated June 3, 2004
P-16 Letter to Zaida Padilla from Michelle Coleman, dated Feb. 13, 2004
P-17 Sworn Statement of Michelle Coleman, dated June 4, 2004
P-19 Letter to Doris Butler from Sophia Chain, dated Feb. 10, 2004
P-22 Memo to Arletta Salmond from Doris Butler, dated Feb. 13, 2004
P-23 Letter to Curtis Robinson from Dr. Edwin Duroy, dated Feb. 12, 2004
P-24 Memo to Zaida Padilla from Eileen Shafer, dated Feb. 13, 2004
P-25 Certification of Capt. James Smith, dated May 13, 2004
P-26 Certification of G.M., dated May 13, 2004
P-27 Certification of T.M., dated May 13, 2004
P-28 Letter to Dr. Dennis Clancy from DYFS, dated July 5, 2005
P-29 Drawing of classroom by Michelle Coleman
P-30 Job description for Special Education Instructional Assistant 1992
P-30 Performance Report of Curtis Robinson for 1998-1999 school year
P-31 Performance Report of Curtis Robinson for 1999-2000 school year
P-32 Performance Report of Curtis Robinson for 1997-1998 school year
P-33 Letter to Joyce Campbell from Dr. Edwin Duroy, dated Feb. 19, 2004
P-34 Letter to Joyce Campbell from Eileen Shafer, dated July 17, 2003
P-35 Letter to Joyce Campbell from Eileen Shafer, dated October 10, 2003
P-36 Letter to Joyce Campbell from Dr. Dennis Clancy, dated July 13, 2004
P-40 Letter to Paterson Public Schools from Richard Scheer dated May 9, 2005, and subpoena
P-41 Policy 8320, Personnel Records
P-44 Letter to Juliet DaCosta from Judi Granick, dated July 20, 2002
P-56 Performance Report of William Molloy for 1998-1999 school year and letter to William Molloy from Deborah West, dated Jan. 13, 1999
P-58 Handwritten Request to review personnel record dated Nov. 5, 2003
P-59 Memo to William Molloy from Doris Butler, dated Feb. 18, 2004

P-60 Memo to William Molloy from Doris Butler, dated Feb. 25, 2004
P-62 Memo to William Molloy from Doris Butler, dated April 23, 2004
P-64 Performance Evaluation of Michelle Coleman, dated Jan. 2001
P-65 Performance Evaluation of Michelle Coleman, dated March 2001
P-66 Performance Evaluation of Michelle Coleman, dated Nov. 15, 2001
P-67 Performance Evaluation of Juliet DaCosta, dated Nov. 15, 2001

For respondent, marked (R):

R-1 Certification of Teresa Granata, dated July 28, 2004
R-2 Transcript of deposition of Michelle Coleman taken on March 22, 2006
R-3 Memo to Michelle Coleman from Mark Sherman, dated Oct. 24, 2003
R-4 Photo of desk identical to desks in respondent's class during relevant period
R-5 Photo of desk identical to desks in respondent's class during relevant period
R-6 Respondent's transcript from American University
R-7 Respondent's Teaching Certificate
R-8 Respondent's 2000-2001 evaluation by Julian Jenkins
R-9 Respondent's 2001-2002 evaluation by Doris Butler and Dan DiGiacomo
R-10 Respondent's 2002-2003 evaluation by Doris Butler
R-11 Letter to Respondent from Dr. Marian Osborne, dated May 17, 2000
R-12 List of participants in the Overnight Environmental Program
R-13 Drawing of Classroom by respondent (formerly R-15)
R-14 Questions for Doris Butler with Answers and Notes attached (4 pages)
R-15 Questions for Pat DiGiaimo with Answers (2 pages)

408-08L

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

JON S. CORZINE
Governor

LUCILLE E. DAVY
Commissioner

October 8, 2008

Stephen B. Hunter, Esq.
Detzky & Hunter, LLC
33 North Bridge Street
Somerville, NJ 08876

Daniel R. Roberts, Esq.
Kenny, Gross, Kovats & Parton
The Courts of Red Bank
130 Maple Avenue/Building 8
P.O. Box 8610
Red Bank, NJ 07701

Dear Counsel:

I have reviewed the Petition for Declaratory Ruling entitled *Hazlet Township Education Association v. Board of Education of the Township of Hazlet, Monmouth County,* Agency Dkt. No. 272-9/08, together with the Board's Motion to Dismiss in Lieu of Answer.

Upon such review, I have determined to exercise my discretion to decline the request pursuant to *N.J.S.A.* 52:14B-8 and *N.J.A.C.* 6A:3-2.1(a)1, and instead direct that the matter shall proceed as a petition of appeal pursuant to *N.J.A.C.* 6A:3-1.1 *et seq.*

Accordingly, petitioner's request for declaratory ruling is declined and this matter shall be transmitted forthwith to the Office of Administrative Law for hearing, with the instruction that the Board's assertions of untimely filing and lack of Commissioner jurisdiction be addressed as threshold issues.

Sincerely,

Lucille E. Davy
Commissioner

c: Board Secretary
County Superintendent

410-08

#410-08SEC

IN THE MATTER OF RASHUN	:	
STEWART, BOARD OF EDUCATION	:	COMMISSIONER OF EDUCATION
OF THE CITY OF ATLANTIC CITY,	:	DECISION
ATLANTIC COUNTY.	:	

SYNOPSIS

The School Ethics Commission (Commission) found that respondent – president of the Atlantic City Board of Education – violated *N.J.S.A.* 18A:12-24.1(c) of the Code of Ethics for School Board Members of the School Ethics Act when he participated in votes to authorize payments to the Oceanside Charter School during the 2006-2007 school year, while he was a member of the staff at the charter school. The Commission recommended the penalty of reprimand in this matter. The respondent filed no exceptions, nor did he appeal the Commission's underlying finding of violation.

The Commissioner, whose jurisdiction – in the absence of an appeal – is limited to reviewing the Commission's recommended sanction, adopted the Commission's recommendation that respondent be reprimanded. Accordingly, the respondent is reprimanded as a school official found to have violated the School Ethics Act.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

October 9, 2008

AGENCY DKT. NO. 262-8/08

IN THE MATTER OF RASHUN	:	
STEWART, BOARD OF EDUCATION	:	COMMISSIONER OF EDUCATION
OF THE CITY OF ATLANTIC CITY,	:	DECISION
ATLANTIC COUNTY.	:	

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 for final determination on the Commission's recommended penalty, have been reviewed: Respondent did not file exceptions, nor was the Commission's underlying finding of violation appealed to the Commissioner pursuant to *N.J.A.C.* 6A:4.

Upon review, the Commissioner concurs with the penalty recommended by the Commission. Accordingly, the above-named respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 10/09/08

Date of Mailing: 10/10/08

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

IN THE MATTER OF	:	**BEFORE THE SCHOOL**
RASHUN STEWART,	:	**ETHICS COMMISSION**
ATLANTIC CITY	:	
BOARD OF EDUCATION	:	**Docket No. C20-07**
ATLANTIC COUNTY	:	**DECISION**
	:	

PROCEDURAL HISTORY

This matter arises from a complaint filed on May 14, 2007 by Rochelle Salway, a former member of the Atlantic City Board of Education ("Board") against RaShun Stewart, president of the Board. The complainant alleges that the respondent violated The School Ethics Act, ("Act"), N.J.S.A. 18A:12-24 et seq. when, *inter alia*, he voted on funding for the Oceanside Charter School where he is an employee and when he failed to duly disclose that employment. The complaint did not originally specify (in counts 1 and 3) which portions of the Act were alleged to have been violated. By letter dated June 19, 2007, the complainant was provided a copy of the Act and requested to specify the alleged violation. By letter filed on July 2, 2007, she informed the Commission that the specific provisions alleged to have been violated are N.J.S.A. 18A:12-24(b), (c), (d), (f) and (h). An answer was filed on August 6, 2007.

The Commission invited the complainant and respondent to attend its meeting on May 27, 2008. Neither the complainant nor the respondent attended the meeting. The Commission tabled the discussion of this matter and its determination on probable cause until its meeting on June 24, 2008 so as to acquire additional information from the Oceanside Charter School, which was duly submitted.

At its meeting on June 24, 2008, the Commission found probable cause to credit the complainant's allegation that respondent violated N.J.S.A. 18A:12-24(b), (c), (d), (f) and (h) of the School Ethics Act as set forth in the first count of the complaint and also found that material facts were not in dispute. The Commission found no probable cause to credit the allegations set forth in counts two and three of the complaint; these counts were dismissed accordingly. The respondent was so notified by letter dated July 9, 2008 and was accorded 30 days to submit a written statement setting forth the reasons why he should not be found in violation of the Act. The respondent submitted a written statement, as summarized below.

THE PLEADINGS

In the first count of the complaint, the complainant alleges that the respondent held a position in the Oceanside Charter School for fiscal year 2006-2007 as an administrative support programs coordinator at an annual salary of $82,000. According to the complainant, on several occasions, the respondent voted on funding for Oceanside Charter School wherein he was an employee. (Complaint at paragraph 1). The complainant asserts this was a violation of N.J.S.A. 18A:12-24(b), (c), (d), (f) and (h).

In his Answer, the respondent denies that he "voted for funding" for the Oceanside Charter School while he was an employee of the Charter School. Rather, the respondent asserts that "pursuant to N.J.A.C. 6A:23-9.5(k)(1), the Board was required to initiate payments to Oceanside (Answer at p. 1) Therefore, the respondent denies the existence of a conflict of interest or any other inappropriate activity in his position as President of the Board.

In his response to the Commission's probable cause finding, the respondent underscores that he "did not vote for funding of the Charter School." Rather, according to Mr. Stewart, "I voted to approve the business office to carry out the duties pursuant to N.J.A.C. 6A:23-9.5(k)(1) of initiating payments to receiving Charter Schools based on their projected enrollment of district pupils." (Stewart Statement at p. 1) The respondent further states that prior to this complaint being filed in May 2007, a concern was never raised as to this matter. The respondent continues, "When I received information as it relates to this concern, I immediately consulted with our board attorney. As a result of this consultation, I have abstained from taking action/voting on all district payment approvals and open request for payments for over a year now." (Id. at pp. 1-2) Thus, Mr. Stewart reasons that the issue has been duly addressed by the Board, in consultation with its counsel. Additionally, he contends that a violation issued by the School Ethics Commission will not just affect him individually, but has a "collective effect on the Board's overall governance rating an ability." (Id. at p. 2)

EVIDENCE

With respect to the remaining count against Mr. Stewart, the Commission subpoenaed from the Board all minutes for meetings held from May 2006 through May 2007 wherein the Board took action relative to the Oceanside Charter School. These documents show that the respondent presided over the following meetings and voted on resolutions, as follows:

- July 11, 2006: On a motion made by Mrs. Salway and seconded by Ms. Callaway, the Board voted unanimously to ratify the report of payments for the period 5/19/06 to 6/21/06, which included a payment to the Oceanside Charter School;

- August 29, 2006: On a motion made by Mrs. Salway and seconded by Ms. Callaway, the Board voted unanimously to ratify the report of payments for the period 7/26/06 to 8/16/06, which included a payment to the Oceanside Charter School;

- October 10, 2006: On a motion made by Mrs. Salway and seconded by Ms. Callaway, the Board voted unanimously to ratify the report of payments for the period 8/17/06 to 9/25/06, which included a payment to the Oceanside Charter School;

- October 30, 2006: On a motion made by Mrs. Salway and seconded by Ms. Kelly, the Board voted unanimously to ratify the report of payments for the period 8/27/06 to 10/20/06, which included a payment to the Oceanside Charter School;

- November 21, 2006: On a motion made by Mrs. Salway and seconded by Ms. Jones, the Board voted unanimously to approve the report of payments for the period 10/21/06 to 11/15/06, which included a payment to the Oceanside Charter School;

- December 12, 2006: On a motion made by Ms. Callaway and seconded by Ms. Jones, the Board voted unanimously to approve the report of payments for the period 11/06/06 to 12/06/06, which included a payment to the Oceanside Charter School;

- January 30, 2007: On a motion made by Mrs. Salway and seconded by Mr. Bonanni, the Board voted unanimously to approve the report of payments for the period 12/07/06 to 1/24/07, which included a payment to the Oceanside Charter School;

- March 27, 2007: On a motion made by Mr. Dollard and seconded by Mr. Bonanni, the Board voted unanimously to ratify the report of payments for the period 1/25/07 to 2/21/07, which included a payment to the Oceanside Charter School; and

- March 27, 2007: On a motion made by Mr. Dollard and seconded by Mr. Bonanni, the Board voted unanimously to approve the report of payments for the period 2/22/07 to 3/21/07, which included a payment to the Oceanside Charter School.

Finally, the Commission subpoenaed from the Oceanside Charter School the minutes from the meeting(s) of the Board of trustees which showed the effective hiring date of RaShun Stewart, together with employment records that document the same. These records show that the respondent was hired by the Oceanside Charter School on July 1, 2006 as the Coordinator of Student Support and Related Services and his employment was again approved in July 2007.

FINDINGS OF FACT

The Commission was able to discern the following facts based on the pleadings and all documents submitted:

1. At all times relevant to this complaint, the respondent was the president of the Board of Education of Atlantic City.

2. While serving as a member of the Board, the respondent was hired by the Oceanside Charter School on July 1, 2006 to the position of Coordinator of Student Support and Related Services; his employment was again approved in July 2007.

3. During the 2006-2007 school year, the respondent presided over the following meetings wherein the Board unanimously approved payments to the Oceanside Charter School, as set forth above on July 11, 2006, August 29, 2006, October 10, 2006, October 30, 2006, November 21, 2006, December 12, 2006, January 30, 2007, and March 27, 2007.

4. The respondent did not abstain from participating in these actions.

ANALYSIS

The complainant asserts that because Mr. Stewart, during the 2006-2007 school year, voted on payments to be issued to the Oceanside Charter School wherein he was an employee, he violated N.J.S.A. 18A:12-24(b), (c), (d), (f) and (h) of the School Ethics Act. In his Answer, the respondent contends that he "did not vote to approve funding nor enter into any resolutions for the award of funds." Rather, Mr. Stewart points out that, pursuant to N.J.A.C. 6A:23-9.5(k)(1), "the Board is required to initiate payments to Oceanside based upon projected enrollment for the school." Thus, according to the respondent, "voting is not essential for the award to occur," and there is no conflict of interest.[1] (Answer at p. 1)

Initially, the Commission considers whether the respondent violated N.J.S.A. 18A:12-24(b) and (f) which provide:

> b. No school official shall use or attempt to use his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family or others;
>
> f. No school official shall use, or allow to be used, his public office or employment, or any information, not generally available to the members of the public, which he receives or acquires in the course of and by reason of his office or employment, for the purpose of securing financial gain for himself, any member of his immediate family, or any business organization with which he is associated;

Here, the Commission finds there is no evidence on this record to indicate that the respondent used his position as a Board member in the Atlantic City School District to obtain employment with the Oceanside Charter School so as to potentially violate N.J.S.A. 18A:12-24(b). Neither does the Commission discern on these facts what other unwarranted privileges or advantages may have accrued to the respondent, members of his immediate family or others, by virtue of his participation in the aforementioned votes.[2] Similarly, the Commission finds no evidence on this

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[1] N.J.A.C. 6A:23-9.5(k)(1) states, "A district board of education shall process payment(s) and payment adjustments to a charter school during any given school year as follows:

> 1. The district of residence and non-resident district(s) shall initiate payments to the charter school based on projected enrollment, as set forth in N.J.A.C. 6A:23-9.4(a)."

[2] Contrast, IMO Raymond Bonker, Lenape Valley Regional Bd. of Ed., C11-97, (March 30, 1998) wherein the Commission found that a Board member attempted to secure an unwarranted privilege for himself in violation of N.J.S.A. 18A:12-24(b) when, prior to the Board's approval, he released staff email addresses in his campaign literature which detailed his technology-related accomplishments in the district; IMO Lawrence James, Chesilhurst Bd. of Ed., C10-98, (December 15, 1998) wherein the Commission found that a Board member violated N.J.S.A. 18A:12-24(b) when he used his official position to secure privileges for himself with a bank when he asked the Business Administrator to intercede for him in acquiring an unsecured loan from the bank that held the Board's accounts; and IMO Alphonse DeMao, Belleville Bd. of Ed., C09-04, (September 30, 2004) wherein the Commission found that a Board member violated N.J.S.A. 18A:12-24(b) when he endorsed a candidate for the municipal council through a mailing of letters to members of the community where the letterhead, envelope and contents of the letter could mislead recipients to believe that the endorsement was made in his official capacity as Board president.

record to indicate that the respondent used, or allowed to be used, his public office or employment, or any information, not generally available to the members of the public, which he received or acquired in the course of and by reason of his office or employment, for the purpose of securing financial gain for himself, any member of his immediate family, or any business organization with which he is associated in violation of N.J.S.A. 18A:12-24(f). Accordingly, the Commission dismisses the allegations that the respondent violated N.J.S.A. 18A:12-24(b) and (f).

The Commission next notes that the complainant does not assert that the respondent's employment with the Oceanside Charter School created an inherent conflict with his official board member duties. Therefore, the Commission dismisses the allegation that Mr. Stewart violated N.J.S.A. 18A:12-24(d), since this provision prohibits a school official from undertaking "any employment or service, whether compensated or not, which might reasonably be expected to prejudice his independence of judgment in the exercise of his official duties."

The Commission next considers whether the respondent's participation in the votes for payments to the Oceanside Charter School violated N.J.S.A. 18A:12-24(c), as set forth below:

> c. No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. No school official shall act in his official capacity in any matter where he or a member of his immediate family has a personal involvement that is or creates some benefit to the school official or member of his immediate family;

Here, the Commission finds that, as an employee of the Oceanside Charter School, the respondent had an indirect financial involvement which a reasonable person could perceive to impair his objectivity or independence of judgment. In IMO Bruce White, Ewing Township Bd. of Ed., C01-01 (July 21, 2001), the Commission determined that the respondent Board member, who was employed as a Principal by the Mercer County Vocational School District (MCVSD), had an indirect financial involvement that would reasonably be expected to impair his objectivity in violation of N.J.S.A. 18A:12-24(c) when he voted on the payment of tuition to the MCVSD for the students who would be attending the alternative school for which the MCVSD served as the local education agency. Similarly, in the matter entitled IMO Rosemary Jackson, Camden City Bd. of Ed. C11-01 (June 26, 2001), the Commission and a respondent Board member reached a settlement wherein they agreed that the respondent violated N.J.S.A. 18A:12-24(c) when she inadvertently voted on a bill list that contained a bill of her employer. In IMO James Carpenter, Pennsville Bd. of Education, C21-01, C22-01 (consolidated) (November 27, 2001), a Board member was found to have violated N.J.S.A. 18A:12-24(c) when he participated in the discussion and vote on the resolution to continue the appointment of his employer as the depository for the Board of Education.

Thus, while the Commission acknowledges that pursuant to N.J.A.C. 6A:23-9.5(k)(1), payments to the charter school are required by the Board, and are arguably perfunctory, the Commission is mindful of the purpose of the School Ethics Act: to avoid conduct which is in violation of the public trust or which creates a justifiable impression among the public that such trust is being violated. N.J.S.A. 18A:12-22(a). Mr. Stewart also appears to recognize this principle, as he states:

> Even though my voting pattern did not influence or manipulate the predetermined calculations and district required actions[,] I clearly understand the concerns of the Commission and how such actions may create the justifiable impression among the public that these actions could yield personal gain. (Stewart Statement at p. 1)

Mr. Stewart's subsequent abstention from voting regarding payments to the charter school, upon receiving counsel from the Board's solicitor after this complaint was filed, further supports the conclusion that his participation in votes to authorize payments to the Oceanside Charter School during the 2006-2007 school year was a violation of N.J.S.A. 18A:12-24(c).

The Commission finally considers whether N.J.S.A. 18A:12-24(h) applies in this matter so as to permit an exception to the acts which are prohibited under N.J.S.A. 18A:12-24. The provision states:

> h. No school official shall be deemed in conflict with these provisions if, by reason of his participation in any matter required to be voted upon, no material or monetary gain accrues to him as a member of any business, profession, occupation or group, to any greater extent than any gain could reasonably be expected to accrue to any other member of that business, profession, occupation or group;

The Commission has narrowly applied this exception to instances where Board members have children attending school in the district so as to enable their participation in decisions involving a larger group of students. Where no material gain can be expected to accrue to the Board member's child to any greater extent than the other children, the Board member's participation was found not to be in violation of the Act. Hoboken Education Association v. Anthony, Hoboken Bd. of Ed., C11-08 (December 19, 2000); Advisory Opinion A01-98 (February 27, 2008).

Additionally, in IMO Bruce Freilich, Washington Township Bd. of Ed., C18-04 and C19-04 (April 4, 2005), the Commission found that N.J.S.A. 18A:12-24(h) could be applied where the respondent Board member voted in the affirmative on a bill list which included a $375.50 reimbursement to him for aid in lieu of transportation, as required by the transportation statute, N.J.S.A. 18A:39-1. The Commission therein based its decision on the unique circumstances established in statute, finding that Mr. Freilich was a member of a group created by N.J.S.A. 18A:39-1 et seq. and, as a member of that group, he received aid in lieu of transportation in the amount set by the statute. The Commission noted that if a parent qualified for aid in lieu of

transportation, the Board would have no discretion in the amount of aid that the parent was entitled to receive. The Commission reasoned that since the amount of aid is set by statute, Mr. Freilich could not have received aid in lieu of transportation in an amount greater than any member of the group that received such aid from the Board. Furthermore, as a board member, he had no discretion in setting the amount of the aid that he would receive. Freilich at page 7.

Here, however, the Commission does not find the existence of such unique circumstances in that the respondent is not a member of a particular business, profession, occupation or group. Thus the Commission finds that, as an employee of the Oceanside Charter School, the respondent had an indirect financial involvement which a reasonable person could perceive to impair his objectivity or independence of judgment and his failure to recuse himself on matters which involved funding to the charter school constituted a violation of N.J.S.A. 18A:12-24(c).

DECISION

For the reasons expressed above, the Commission finds that RaShun Stewart violated N.J.S.A. 18A:12-24(c) of the School Ethics Act.

PENALTY

The Commission recommends that the Commissioner of Education impose a penalty of reprimand. In Jackson, the Commission recommended a penalty of reprimand and the Commissioner concurred. IMO Rosemary Jackson, Camden City Bd. of Ed., Commissioner's Decision, July 27, 2001. Similarly, in Carpenter, the Commission recommended a penalty of reprimand and the Commissioner concurred. IMO James Carpenter, Pennsville Bd. of Education, Commissioner's Decision, January 31, 2002. Although the Commission recommended a penalty of censure in White, it also noted that Mr. White had been previously found in violation of the School Ethics Act. White at p. 4.

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the School Ethics Commission's recommended sanction. Parties may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of violation may file, within **13 days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4 within **30 days** of the filing date of the

decision from which the appeal is taken. The filing date shall be three days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (13 days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Paul C. Garbarini

Paul C. Garbarini
Chairperson

Mailing Date: August 28, 2008

Resolution Adopting Decision – C20-07

Whereas, the School Ethics Commission has considered the pleadings filed by the parties, the documents submitted in support thereof, and documents brought to the record pursuant to its investigation; and

Whereas, at it meeting of June 24, 2008, the Commission found probable cause to credit the complainant's allegation that respondent violated N.J.S.A. 18A:12-24(b), (c), (d), (f) and (h) of the School Ethics Act as set forth in the first count of the complaint; and

Whereas, the respondent was so notified and accorded 30 days to submit a written statement setting forth the reasons why he should not be found in violation of the Act.

Whereas, the respondent submitted a written statement which was considered by the Commission;

Whereas, at its meeting on August 26, 2008, the Commission determined that the respondent violated the School Ethics Act and adopted this decision consistent with the aforementioned conclusion; and

Now Therefore Be It Resolved, that the Commission hereby adopts the proposed decision referenced as it decision in this matter and directs it staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini

Paul C. Garbarini, Chairperson

I hereby certify that this Resolution
was duly adopted by the School Ethics
Commission at it public meeting on
August 26, 2008.

Joanne Boyle, Executive Director

411-08

#411-08

BOARD OF EDUCATION OF THE BOROUGH OF RUTHERFORD, BERGEN COUNTY,

PETITIONER,

V.

J.L. and F.L. on behalf of minor children A.L. and B.L.,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Board filed a complaint seeking reimbursement from respondents, J.L. and F.L., of the costs of tuition pertinent to the alleged period of ineligible attendance of their children, A.L. and B.L., during the 2005-2006, 2006-2007, and 2007-2008 school years. Respondents failed to answer the petition seeking payment of tuition.

The Commissioner directed respondents to submit an answer to the petition pursuant to *N.J.A.C.* 6A:3-1.5, and informed respondents that if no answer was submitted, each count of the petition would be deemed admitted and the matter could then be decided on a summary basis. As no answer was subsequently submitted, the Commissioner granted summary decision in favor of the Board, and ordered respondents to remit to the Board tuition in the amount of $71,442 for the period of time in which their children were ineligible for a free education in the district's schools.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

October 9, 2008

AGENCY DKT. NO. 245-8/08

BOARD OF EDUCATION OF THE BOROUGH OF RUTHERFORD, BERGEN COUNTY,

PETITIONER,

V.

J.L. and F.L. on behalf of minor children A.L. and B.L.,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

For Petitioner, Fogarty and Hara

No appearance by or on behalf of J. L. and F.L.

This matter was opened before the Commissioner of Education on August 12, 2008 by way of a verified petition against respondents, the parents of two students who formerly attended school in petitioner's district. Petitioner alleged that the students had attended school in its district during the 2005-2006, 2006-2007 and 2007-2008 school years, without being domiciled in the district. Respondents had acknowledged, in correspondence to petitioner dated July 8, 2008, that financial circumstances had prevented them from completing construction of and residing at the Rutherford address set forth in the students' registration materials, and that the students had been living in the home of a relative in Weehawkin during the school years in question. Petitioner thus contends that A.L. and B.L. were ineligible for a free public education from September 2005 through June 2008, and that it is due tuition reimbursement for that period of time.

By notice dated August 12, 2008 – which was sent to the Rutherford address listed in the student's files, the address in Weehawkin that respondents admit has been the children's residence, and F.L.'s address in West New York – the Bureau of Controversies and Disputes (the Bureau) directed respondent, via regular mail, to file an answer to the petition. The notices to the Weehawkin and Rutherford addresses were returned, but the notice to the West New York address was not. On September 11, 2008, the Bureau directed respondents for a second time, via both certified and regular mail to the West New York address, to file an answer to the petition. The certified notice was returned on September 28, 2008, marked "unclaimed," but the notice sent by regular mail was not returned, and no answer has been received from respondents.

The first communication from the Bureau clearly provided respondents with notice that, pursuant to *N.J.A.C.* 6A:3-1.5, individuals against whom a petition is filed shall have 20 days from receipt of the petition to file an answer. The second notice advised that if respondents did not file an answer within ten days of their receipt of same, each count of the petition would be deemed to have been admitted and the Commissioner might decide the matter on a summary basis. The Bureau has received neither an answer to the petition from the respondents, nor from any attorney purporting to represent respondents.

Petitioner's verified petition and Exhibit M have identified $71,442 as the amount of tuition due for both students for the three years during which they attended school in petitioner's district. Respondents have neither challenged the amount nor their responsibility for same.

The Commissioner concludes that the allegations – which respondent has chosen not to deny – may be deemed admitted, pursuant to *N.J.A.C.* 6A:3-1.5(e), and are sufficient to justify an order that respondent pay the tuition.

IT IS THEREFORE ORDERED that summary decision shall be granted to the petitioner, and that respondents shall pay tuition in the amount of $71,442 for the period of time in which A.L. and B.L. were ineligible for free education in the Rutherford School District.*

COMMISSIONER OF EDUCATION

Date of Decision: 10/09/08

Date of Mailing: 10/10/08

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

412-08

OAL DKT. NO. EDU 8469-08
AGENCY DKT. NO. 255-8/08

DAVID TYSON,

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, CRIMINAL HISTORY REVIEW UNIT,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record of this matter – including the audio recording of proceedings at the Office of Administrative Law (OAL) – and the recommended order of the Administrative Law Judge (ALJ) denying petitioner's motion for emergent relief have been reviewed. Because the ALJ's recommendation – notwithstanding its issuance in the form of an order – effectively resolves the merits of petitioner's appeal, the Commissioner has determined, with the consent of the parties, to review the Order as an Initial Decision pursuant to *N.J.A.C.* 1:1-18.1 *et seq.*, and to consider the exceptions and replies filed by petitioner and respondent, respectively, pursuant to *N.J.A.C.* 1:1-18.4.

In his exceptions, petitioner contends that the ALJ erred in finding that his disqualification from school employment was permanent, when the clear intent of *P.L.* 2007, *c.* 327 – as evidenced by the comments of its legislative sponsor – was to ensure that reformed offenders are not eternally punished for their past offenses. He further contends that the ALJ erred in concluding that *c.* 327 cannot apply to school employment because it is superseded by a specific education law providing for disqualification of convicted offenders, which was not expressly repealed. Petitioner asserts that such

reasoning renders *c.* 327 a nullity since New Jersey has no general disqualification law, instead establishing disqualification through any number of specific statutory provisions which foreclose convicted offenders from various types of employment or licensure – all of which would, following the ALJ's logic, be exempt from application of the new law. Moreover, according to petitioner, *c.* 327 was not intended to repeal *N.J.S.A.* 18A:6-7.1 or any other specific disqualification statute, but rather to establish a uniform mechanism by which persons meeting certain criteria can obtain relief from the bars they establish. (Petitioner's Exceptions at 1-3)[1]

In reply, the Department counters that the Legislature amended *N.J.S.A.* 18A:6-7.1 expressly to eliminate any possibility of a convicted offender obtaining qualification for school employment through a showing of rehabilitation, framing the law so that as long as the underlying conviction exists – as it continues to do under a Certificate of Rehabilitation, unlike an expungement – the offender's disqualification stands as permanent and irrevocable. Petitioner also errs, the Department asserts, in contending that *c.* 327 as interpreted by the ALJ would be inapplicable in any situation where a specific statute exists; rather, according to the Department, the ALJ's reading is consonant with application of the law in those situations where – unlike here – a showing of rehabilitation is permitted and appropriate. Finally, the Department reiterates that *c.* 327 makes no provision for involvement by – or even notice to – the Commissioner or Department of Education when a disqualified individual applies for a Certificate of Rehabilitation, so that finding the law applicable to school employment would have the

[1] Petitioner also objected (at 1) to two factual errors in the ALJ's order; however, these were corrected by the ALJ through an amended order issued on September 2, 2008.

effect of circumventing the carefully constructed safeguards established by the Legislature to ensure the protection of vulnerable school children. (Department's Reply at 1-7)[2]

Upon review, the Commissioner concurs with the ALJ and the Department that *P.L.* 2007, *c.* 327 should not be applied to remove the bars to school employment set forth at *N.J.S.A.* 18A:6-7.1 *et seq.* and its related enactments.

Initially, nothing in the plain language of *c.* 327 expressly requires that the law be applied – nor does anything in its legislative history suggest that the Legislature intended it to apply – to school employment. Neither the statute itself nor any of its attendant legislative statements[3] make reference – directly or indirectly – to school districts or school employment, and, while it is undeniable that school districts are public employers and instrumentalities of the State, they are not – as noted by the Department at hearing before the ALJ – "State agencies" in the ordinary sense in which *c.* 327 appears to use that term. Indeed, had the Legislature intended the law to apply to school employment, it could easily have chosen to make explicit that "State, county or municipal agency" included a local district board of education, or to have used – instead of a specific listing of separate and distinct governmental entities – the generic term employed throughout the statutes ("State or any of its political subdivisions") to encompass the State, counties, municipalities, and school districts, collectively.

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[2] The Department also objected to petitioner's inclusion of three exhibits not introduced before the ALJ: the final page of two chapter laws (*P.L.* 2007, c. 82 and *P.L.* 2007, c. 327), showing their dates of enactment, and a news release from the primary sponsor of the bill (Assembly Bill 3623) that became c. 327. Since this matter did not proceed to full evidentiary hearing and the documents proffered are public records pursuant to *N.J.S.A.* 47:1A-1 et seq. – two of them reaching to factual errors already corrected by the ALJ (see Note 1 above) and the third consistent with the official sponsor statement appended to Assembly Bill 3623 – the Commissioner finds that the Department's objection, although technically correct pursuant to *N.J.A.C.* 1:1-18.4(c), places form over substance; consequently, she takes notice of petitioner's exhibits herein.

[3] See http://www.njleg.state.nj.us/, 2006-07 Legislative Session, Bill Number A3623.

Moreover, since initial adoption of *N.J.S.A.* 18A:6-7.1 *et seq.* in 1986, the Legislature has, without exception, sought to place progressively tighter restrictions on the type of persons who may be found qualified for school employment. At first confined to sexual offenses and child endangerment, the statute was expanded in 1989 to include drug offenses and crimes of violence – and yet again in 1998 to include a wide-ranging host of additional crimes and offenses – while at the same time categorically eliminating an offender's ability to overcome disqualification by a showing of rehabilitation before the Commissioner. Similarly, the scope of individuals reached by the statute has also expanded – most notably in 2002, when the law was extended to monitor persons with pending offenses so as to ensure their disqualification upon conviction, and as recently as May 2007, when it was extended to apply to unpaid volunteers. Under these circumstances – where the Legislature has historically acted to ensure that an ever-greater range of convicted offenders is foreclosed from contact with school children, and where there is no certain indication that in enacting *c.* 327 the Legislature did, in fact, intend to allow these prohibitions to be overcome, without providing for even the onetime safeguard of review of claims of rehabilitation by the State education agency under standards appropriate to the school environment – the Commissioner cannot in good conscience direct that the new law be applied to school employment.[4]

[4] In so holding, the Commissioner recognizes that there is a substantial degree of overlap between crimes for which a Certificate of Rehabilitation cannot be issued (*c.* 327, Section 2) and those disqualifying an offender from school employment. However, the Commissioner stresses that the scope of the two statutes is by no means identical, and notes, for example, that persons convicted of drug offenses would be eligible for certificates unless they had committed crimes of the first degree, as would persons convicted of crimes or offenses of less than the first or second degree in any number of areas where *N.J.S.A.* 18A:6-7.1 *et seq.* provides for disqualification from school employment for a conviction of *any* grade.

Accordingly, the Initial Decision of the OAL upholding the Department's determination of disqualification is adopted for the reasons expressed therein and above, and the petition of appeal is dismissed.

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: 10/14/08

Date of Mailing: 10/15/08

[5] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING MOTION FOR EMERGENT RELIEF
OAL DKT. NO. EDU 8469-08
AGENCY DKT. NO. 255-8/08

DAVID TYSON,
Petitioner,
v.
DEPARTMENT OF EDUCATION,
CRIMINAL HISTORY REVIEW UNIT,
Respondent.

Mark Cimino, Esq., for petitioner

Melissa T. Dutton, Senior Deputy Attorney General, for respondent (Anne Milgram, Attorney General of New Jersey, attorney)

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

Petitioner David Tyson, who has been convicted of a crime, moves for an order granting emergent relief and requiring the respondent Department of Education's Criminal History Unit to remove any prohibition from his employment by a local school district. The Department submits that he has not satisfied requirements for such relief and opposes the motion. The case is summarized below.

The Clearview Regional High School District employed the petitioner as a custodian, beginning in 1997. In 1998 the petitioner was convicted of possession of drug paraphernalia, a disorderly persons offense. See N.J.S.A. 2C:36-1, -2; see also N.J.S.A. 18A:6-7.1(b). In 2003 the petitioner was convicted of the crime of aggravated assault upon a law enforcement officer acting in performance of his duties. See N.J.S.A. 2C:12-1(b)(5)(a). The school laws provide that, if an individual's criminal history includes a conviction of a crime "involving the use of force or threat of force to or upon a person . . . , including, but not limited to . . . aggravated assault," the individual shall be "permanently disqualified" from school district employment. N.J.S.A. 18A:6-7.1(c). In 2007 the petitioner applied for part-time employment with the Salem County Vocational-Technical School system and a background check and criminal history review were performed. See N.J.S.A. 18A:6-7.1, -7.2. The Department of Education's Office of Physical Accountability and Compliance then notified the Clearview school district that the background check had disclosed a disqualifying offense and the Clearview school district notified the appellant that it was terminating his employment, effective April 21, 2008. The petitioner moved for, and, on July 18, 2008, the Superior Court entered, an order granting him a certificate of rehabilitation under the Rehabilitated Convicted Offenders Act. See N.J.S.A. 2A:168A-7, -8. The petitioner contends that, consistent with his certificate of rehabilitation, an order should be entered here requiring the Department to remove any prohibition from his employment with the Clearview school district, which he alleges will hold his job until September 1, 2008, to await the result of this motion. The Department submits that, under the above-cited school laws, which are more specific to this subject matter, given the petitioner's criminal conviction, which may not (yet) be expunged, he remains disqualified from school district employment. See N.J.S.A. 2C:52-2. In the alternative, the Department submits that genuine issues of material fact require denial of the petitioner's motion.

PROCEDURAL HISTORY

On August 25, 2008, petitioner's papers were filed with the Department of Education. N.J.S.A. 18A:6-9. The Department transmitted the contested case to the Office of Administrative Law (OAL), where it was filed on August 26, 2008. N.J.S.A. 52:14B-2(b). On August 27, 2008, the Department's papers in opposition to the motion were filed in the OAL. I

heard the motion on August 28, 2008. This order amends the earlier order: on page 5, the last full paragraph's last sentence is deleted and replaced with another sentence and, on page 6, the last paragraph's next to last sentence is changed. The result of the order is not changed.

THE RECORD

The Clearview Regional High School District employed the petitioner as a custodian beginning in 1997. P-1. He does not assert that he is tenured. See N.J.S.A. 18A:17-3.

On January 2, 1998, in the East Greenwich Township municipal court, petitioner was convicted of possession of drug paraphernalia, a disorderly persons offense. See N.J.S.A. 18A:6-7.1(b).

On November 17, 2002, in Harrison Township, Gloucester County, the petitioner, while severely intoxicated, was operating a motor vehicle, lost control of the vehicle, and collided with a Harrison Township police vehicle, severely injuring patrolman Carl Urban, who was engaged in the performance of his duties. P-A. Relative to the collision, the petitioner pleaded guilty to aggravated assault upon a law enforcement officer acting in the performance of his duties in violation of N.J.S.A. 2C:12-1(b)(5)(a), and, on October 17, 2003, the Superior Court, Law Division, Criminal, Gloucester County, sentenced him to three years' probation and community service. P-B.

In 2007 the petitioner applied to the Salem County Vocational-Technical School for part-time employment, so the Criminal History Review Unit performed a background check. P-1. See N.J.S.A. 18A:6-7.2a. Thereafter, the Department of Education's Office of Physical Accountability and Compliance notified the Clearview school district that the background check of the petitioner had disclosed a disqualifying offense and, by letter, dated April 21, 2008, the Clearview school district notified the petitioner that, consequently, it had terminated his employment effective April 21, 2008. P-C.

The petitioner moved for and, on July 18, 2008, the Superior Court, Law Division, Criminal, Gloucester County, entered an order granting him a certificate of rehabilitation and the

certificate was to be effective immediately. P-D; see N.J.S.A. 2A:168A-7, -8.

By memorandum dated July 21, 2008, the Clearview school district transmitted to the Criminal History Review Unit a copy of the order granting the petitioner's motion for a certificate of rehabilitation. R-A.

By letter dated July 31, 2008, the Department of Education's Criminal History Review Unit notified the petitioner of the following: Records of the Criminal History Review Unit included (1) the municipal court judgment of his conviction for possession of drug paraphernalia, (2) a Superior Court, Gloucester County, record showing that, on December 9, 1971, he was arrested for possession of stolen property; and (3) the Superior Court judgment of his conviction of aggravated assault. Consistent with N.J.S.A. 18A:6-7.1, he was convicted of a disqualifying crime or offense, and the Department of Education had determined that he was permanently disqualified from school district employment. Consistent with N.J.S.A. 18A:6-7.1(e), the Criminal History Review Unit had notified him that he had a right to challenge his criminal history record. The Criminal History Review Unit had no record that he had requested such a challenge. He could pursue qualification for school employment by seeking expungement of his criminal history. If expungement were ordered, he could then apply as a new applicant for school employment. He could also challenge the determination of disqualification by way of appeal to the Commissioner of Education. P-E.

There is no record here that the petitioner has filed a challenge to his criminal record. There is no record here that he has requested an order expunging his criminal record. In any event, under the Code of Criminal justice, since ten years have not expired since his criminal conviction, it appears that that record may not yet be expunged. See N.J.S.A. 2C:52-2.

The petitioner alleges that the Clearview district will hold his job until September 1, 2008, to await the result of this motion.

CONCLUSIONS OF LAW

New Jersey's Constitution states that the Legislature shall provide for a system of public

schools for the instruction of all children in the state between the ages of five and eighteen years and, consistent with this requirement, the Legislature authorizes local boards of education to operate school districts according to the school laws. N.J. Const. Art. VIII, § 4, ¶ 1; N.J.S.A. 18A:11-1.

The petitioner cites the Rehabilitated Convicted Offenders Act in support of his claim that he is no longer disqualified from the subject employment, and the Department cites the school laws as disqualifying the petitioner from employment by the local school district.

The Legislature is presumed to act consistently and, where reasonably possible, apparently conflicting statutes should be reconciled to give effect to each. Gannon v. Saddle Brook Twp., 56 N.J. Super. 76, 80 (App. Div. 1959); Vedutis v. Tesi, 135 N.J. Super. 337, 344 (Law Div. 1975), aff'd, Vedutis v. S. Plainfield Bd. of Educ., 142 N.J. Super. 492 (App. Div. 1976); Planning Bd. of W. Milford v. Twp. Council, 123 N.J. Super. 135, 150 (Law Div. 1973).

In construing statutes, the overriding goal is to determine legislative intent. Young v. Schering Corp., 141 N.J. 16, 25 (1995); Krupp v. Union County Reg. High Sch. Dist. #1, 278 N.J. Super. 31, 38 (App. Div. 1994).

Generally, where statutes relate to the same subject matter, the Legislature is presumed to intend that the more specific and more recently enacted statute supersedes the more general and older statute. State v. One 1976 Firebird, 168 N.J. Super. 168, 176, (App. Div. 1979); Cafe Gallery, Inc. v. State, 189 N.J. Super. 468, 473 (Law Div. 1983); Meridian Dev. Co. v. Edison Twp., 91 N.J. Super. 310, 314 (Law Div. 1966).

The cited school laws are more specific to the subject matter. Both the cited school laws and the Rehabilitated Convicted Offenders Act have been amended in recent years. The Legislature has not repealed the above-cited school laws, so that they still disqualify the petitioner from employment in the public school system.

The Rehabilitated Convicted Offenders Act does not expressly repeal the relevant school laws and there is a strong presumption against repeal of a statute by implication, which requires

clear and convincing evidence of legislative intent free from reasonable doubt. Brewer v. Porch, 53 N.J. 167, 173 (1969); Twp. of Mahwah v. Bergen County Bd. of Taxation, 98 N.J. 268, 280 (1985). (The petitioner has made no record that he provided to the Department of Education notice of his application for a certificate of rehabilitation and the Rehabilitated Convicted Offenders Act does not appear to require such notice as might be expected if the Legislature were to repeal the cited school laws governing disqualification from employment.)

The Rehabilitated Convicted Offenders Act is consistent with the general interest in redemption of convicted offenders and removal of impediments and restrictions on the ability of certain offenders to obtain employment or to participate in other programs based solely upon their criminal records. See N.J.S.A. 2A:168A-1.

The cited school laws are more specific to the subject matter and the Department's construction of those laws is consistent with the well-known legislative intent to protect vulnerable school children. According the words and phrases of the school laws their "generally accepted meaning," the Legislature intended the petitioner, who has been convicted of "aggravated assault," to be "permanently disqualified" from employment or service in a local school district. N.J.S.A. 1:1-1; N.J.S.A. 18A:6-7.1(c)(1).

To succeed in a motion for a temporary restraint and/or interlocutory injunction and/or emergent relief, the movant must show (1) that the parties' rights and duties are clear and well settled; (2) that, when the case is fully heard, it (the moving party) will probably prevail; (3) that, if the relief is not granted, it (the moving party) will suffer immediate and irreparable harm and, e.g., that money damages would not adequately compensate the moving party; and (4) that, balancing the equities, granting the relief moved for will not unduly harm or prejudice the party opposing the motion. See, e.g., N.J.A.C. 1:1-12.6; R. 4:52-1; Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982).

The petitioner has not shown that his right to the relief claimed is well settled. To the contrary, under the school laws, the petitioner appears to be disqualified from employment by the local school district. The petitioner also has not shown by sufficient and evidence that he will suffer irreparable harm. He can obtain employment elsewhere. Consequently, the petitioner's

motion must be denied.

ORDER

Consistent with the above, I **DENY** the motion for emergent relief.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

September 2, 2008

DATE

JOHN R. TASSINI, ALJ

EXHIBITS

For Petitioners:

P-1 Petition, verified August 20, 2008

P-A NewsBank InfoWeb, Courier-Post, November 18, 2002, "Harrison officer seriously hurt in two-car crash" (printout of article); November 19, 2002, "Authorities . . . file more charges . . ." (printout of article); Police Department Investigation Report, Harrison Township, November 17, 2002

P-B New Jersey Promis/Gavel record of charge and sentence, State v. Tyson, Ind/Acc No. 03-05-00389-I, N.J.S.A. 2C:12-1b.(5)(a), April 21, 2008

P-C Letter from Clearview Regional High School District Superintendent, April 21, 2008

P-D Order Granting Defendant's May 10, 2008 Motion for Certificate of Rehabilitation, State v. Tyson, N.J. Super., Gloucester Cty., Law Div., Criminal, Indictment No. 03-2-359, July 18, 2008

P-E Letter from State of New Jersey, Department of Education, Criminal History Review Unit, Carl H. Carabelli, Manager, July 31, 2008

P-F Part of S 851

P-G Statement to Senate Committee Substitute for Senate, No. 2387, dated January 3, 2008

P-H Statement to Senate Committee Substitute for Assembly, No. 1569, dated June 22, 1998

For Respondent:

R-A Memorandum from Clearview school district, July 21, 2008

413-08

O.B. on behalf of minor child, K.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT OLIVE, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, a resident of Mount Olive, filed a *pro se* residency appeal on behalf of K.C., who was enrolled as a high school student in the Mount Olive School District for the 2007-08 school year. The respondent Board contended that K.C. is not eligible for a free public education in the district. The petitioner failed to appear for a scheduled hearing on May 19, 2008, and failed to provide any explanation for her non-appearance. The respondent Board moved for a dismissal of the case, and submitted a cross-petition for tuition reimbursement for the period of K.C.'s ineligible attendance in Mount Olive schools.

The ALJ found that: the petitioner has abandoned this matter; K.C. was enrolled in Mount Olive High School from September 2007 until June 2008, a period totaling 181 school days; the daily tuition rate in the district is $68.68 per day, as certified by the superintendent of schools; and the correct amount of tuition which may be billed to O.B. for K.C.'s improper attendance is $12,431.08. The ALJ granted the respondent's counterclaim for tuition reimbursement in the amount of $12,431.08, and ordered that O.B. make payment in this amount to the Mount Olive Board of Education.

Upon review, the Commissioner agreed with the ALJ's conclusion that petitioner is liable for tuition to the Board as set forth above, and directed the petitioner to pay said tuition to the Mount Olive Board of Education.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

October 15, 2008

OAL DKT. NO. EDU 9283-08
(EDU 11928-07 ON REMAND)
AGENCY DKT. NO. 282-9/07

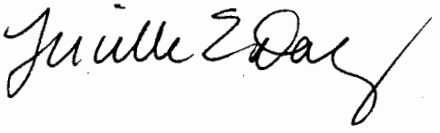
O.B., on behalf of minor child, K.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT OLIVE, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to this decision.

Upon review, the Commissioner agrees with the Administrative Law Judge's conclusion that petitioner is liable for tuition to the Board in the amount of $12,431.08 for the ineligible attendance of K.C. in the Board's schools during the period September 3, 2007 through June 20, 2008 (181 school days @ $68.68 per diem).

Accordingly, the Initial Decision of the OAL is adopted for the reasons stated therein. Petitioner is hereby directed to pay tuition – in the amount of $12,431.08 – to the Mount Olive Board of Education.

IT IS SO ORDERED.*



COMMISSIONER OF EDUCATION

Date of Decision: 10/15/08
Date of Mailing: 10/15/08

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 09283-08
AGENCY DKT. NO. 282-9/07
ON REMAND EDU 11928-07

O.B. ON BEHALF OF MINOR CHILD K.C.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT OLIVE, MORRIS COUNTY,
Respondent.

O.B., pro se

Marc H. Zitomer, Esq., for respondent (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: August 20, 2008 Decided: September 4, 2008

BEFORE **WALTER M. BRASWELL**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On September 26, 2007, petitioner O.B. filed a petition with the Department of Education challenging respondent Mount Olive Board of Education's residency

determination. N.J.S.A. 18A:38-1. The contested case was forwarded to the Office of Administrative Law (OAL), where it was filed on November 15, 2007, and docketed as EDU 11928-07. N.J.S.A. 52:14B-2(b). A hearing was scheduled for April 18, 2008, which was adjourned to allow the undersigned to answer the Board's Motion to Dismiss. The Motion was denied and a hearing was scheduled for May 19, 2008. The petitioner did not respond to the Notice of Motion, nor did she appear at the hearing. The respondent moved for a dismissal of petitioner's case and submitted a cross-petition for tuition reimbursement on May 27, 2008, on which date the record closed. An Initial Decision was rendered on June 2, 2008.

On July 14, 2008, the Commissioner of Education remanded this matter back to the OAL because the record contained insufficient evidence concerning the per diem tuition rate, or the number of days chargeable to O.B., for the period of K.C.'s ineligible attendance. The matter was transmitted to the OAL on July 30, 2008. By letter dated August 4, 2008, I informed O.B. of the daily tuition rate and informed her that she is required to pay $12,431.08. I also gave O.B. an opportunity to dispute the amount. O.B. offered no opposition and on August 20, 2008, the record closed.

FINDINGS OF FACT

Based on the documents of record, I **FIND**:

1. K.C. enrolled in Mount Olive High School on September 3, 2007. His last day of school was June 20, 2008.

2. There were 181 school days (excluding holidays, snow days and spring recess) between the time of K.C.'s enrollment in the Mount Olive School District and K.C.'s final day in school.

3. By letter dated July 17, 2008, Dr. Rosalie Lamonte, superintendent of schools of the Mount Olive School District, certified that the daily tuition in Mount Olive is $68.68 per day.

4. Multiplying 181 days by the daily tuition of $68.68 results in a tuition bill of $12,431.08 for the 2007/2008 school year.

5. By letter dated August 4, 2008, I notified O.B. that unless she disagrees with the bill for K.C.'s improper attendance at Mount Olive High School, an Initial Decision that requires her to pay the Mount Olive Board of Education $12,431.08 will be issued.

6. O.B. was given until August 19, 2008, to respond to the August 4, 2008, letter. As of August 20, 2008, I had not received a response from O.B.

CONCLUSIONS AND ORDER

Accordingly, I **CONCLUDE** that the correct amount that the Mount Olive School District can bill O.B. for K.C.'s improper attendance at the Mount Olive High School is $12,431.08.

It is **ORDERED** that O.B., within fourteen days of the date of this decision, make payment to the Mount Olive Board of Education in the amount of $12,431.08.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

9-4-08
DATE

Walter M Braswell
WALTER M. BRASWELL, ALJ

Date Received at Agency: September 4, 2008

Mailed to Parties:
Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SEP 8 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

ljb

L.L., on behalf of minor child, B.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Pro se petitioner sought to expunge a one-day suspension from her son's pupil record, contending that during a physical altercation in the locker room, B.L. was not the aggressor; rather, he was punched in the face by a bigger child and pushed him away in self-defense. The Board alleges that: its investigation revealed that B.L. used force against another student; the district has a "zero-tolerance" policy against violence at school; and its decision to suspend B.L. was not arbitrary or capricious.

The ALJ found that the charge against B.L. is supported by the evidence and should be sustained. However, given the circumstances surrounding the incident, the penalty ascribed by the Board is unduly harsh. The ALJ ordered that the penalty be reduced from a one-day suspension to a written reprimand.

Upon a full and independent review, the Commissioner adopted the Initial Decision as the final decision in this matter and directed that B.L. should receive a written reprimand for his role in the incident which occurred in the school locker room on October 1, 2004.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

October 15, 2008

OAL DKT. NO. EDU 5652-05
AGENCY DKT. NO. 90-4/05

L.L., on behalf of minor child, B.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to this decision.

Upon review, the Commissioner concurs with the Administrative Law Judge that – for the reasons comprehensively detailed in his decision – the charge against B.L. is supported by the evidence and must, therefore, be sustained. The Commissioner further agrees with the ALJ's determination that, under the particular circumstances of this matter, the Board-imposed penalty of a 1-day suspension is unduly harsh and should be reduced to a written reprimand.

Accordingly, the Initial Decision of the OAL is adopted for the reasons articulated therein. The Commissioner directs that B.L. should receive a written reprimand for his role in the incident which occurred in the school locker room on October 1, 2004.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 10/15/08
Date of Mailing: 10/15/08

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5652-05
AGENCY DKT. NO. 90-4/05

L.L., ON BEHALF OF MINOR CHILD, B. L.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF CLIFTON,
Respondent.

L.L., pro se

Anthony V. D'Elia, Esq., for respondent (Chasan, Leyner, & Lamparello, attorneys)

Record Closed: September 5, 2008 Decided: September 10, 2008

BEFORE **KEN R. SPRINGER**, ALJ:

STATEMENT OF THE CASE

This in an appeal on behalf of a middle-school student seeking to expunge a one-day suspension from his pupil record. Clifton Board of Education (Board) proposed to impose a one-day suspension on a twelve-year old petitioner (identified here as L.B.) for "striking another student" in the school locker room on October 1, 2004. The Board

contends that it is enforcing the District's "zero-tolerance" policy against violence at school. Since its investigation revealed that L.B. used force against another student, the Board maintains that its decision was not arbitrary, capricious or unreasonable and, therefore, must be upheld.

Accepting her son's version of events, petitioner's mother alleges that a bigger child punched her son in face and that B.L. "pushed him out of the way" in self-defense. Further, she blames the school for permitting the incident to happen by failing to provide adequate adult supervision of the locker room. She also claims that her due-process rights were violated when the Board discussed the case in private with school administrators before hearing her side of the story.

For the reasons that follow, the charge against B.L. is supported by the evidence and should be sustained. Under the surrounding circumstances, however, the penalty is unduly harsh and should be reduced to a written reprimand.

PROCEDURAL HISTORY

On or about October 5, 2004, school officials notified petitioner's mother that B.L. would be suspended from school for three days because of his involvement in a physical altercation with another student.

Petitioner's mother exhausted several intermediate levels of review, first to Vice Principal Francine Parker, next to Principal James Walker, then to Assistant Superintendent Ira Oustacher and finally to Superintendent of Schools Michael Rice. Finding that the other boy involved in the fight had been the aggressor, Dr. Oustacher reduced B.L.'s suspension from three days to one day.

Still dissatisfied with the outcome, the mother appealed the one-day suspension to the Board. The Board considered the matter at closed executive session on January 13, 2005 and voted four to three, with two abstentions, to uphold the one-day suspension. Before meeting with the mother, Board members met privately with school

administrators while the mother was "left sitting in the hallway." By notice dated January 19, 2005, the Board informed the petitioner and his mother of its decision.

B.L.'s mother filed an appeal to the Commissioner of Education (Commissioner) on April 11, 2005. Subsequently, on May 26, 2005, the Commissioner transmitted the matter to the Office of Administrative Law (OAL) for hearing pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The OAL held a hearing on September 5, 2006. Imposition of the one-day suspension has been stayed pending the outcome of this appeal. Due to administrative error, the case was reassigned for scheduling of a settlement conference. When the error was discovered, the case was restored to the active calendar on September 5, 2008.

FINDINGS OF FACT

General Background Information

Most of the general background information is undisputed. At the time of the alleged incident, petitioner B.L., then twelve years old, was a seventh-grade student at Christopher Columbus Middle School, part of the Clifton public school system. Christopher Columbus Middle School, which houses sixth, seventh and eighth grades, has an enrollment of approximately 1,000 students.

B.L. was a "very thin and lanky" child, about four feet seven inches in height and weighing about 125 pounds. According to petitioner's mother, the other boy involved in the alleged incident was much taller and heavier than her son.

In or about first grade, B.L. underwent surgery to remove a cist in his hip joint. Unfortunately, the surgery was not completely successful and B.L. was left with an unfilled hole in his hip joint. Treating doctors advised the parents that B.L. should not participate in contact sports, such as football, because the impact to his body could risk

a hip fracture. However, B.L. can and does participate in other, less strenuous sports, including the school baseball team.

Aside from the incident involved in this case, B.L. has not been the subject of any other disciplinary action at school. School officials recognize that B.L. "is a good student and a good middle school citizen." The incident occurring on October 1, 2004 took place in the school locker room. Immediately prior to the encounter, B.L., together with other members of his class, had been playing touch football outside the building. Two physical education teachers, Mr. Barros and Mr. Gallita, were assigned to supervise the gym class that day.

Incident on October 1, 2004

Nearly all of the proofs regarding what occurred in the locker room consist of hearsay evidence. Neither petitioner nor the District called any witnesses who had seen what occurred. Instead, the District relied exclusively on hearsay statements collected from child witnesses and from one of the teachers who intervened to prevent the continuation of any fight. Apparently, the origin of the fight began while the class was outside on the playing field. A.T., the other child involved in the incident, admitted that he "ran into B. so he pushed me and when we came inside he pushed me by accident again." Another child, J.G. gave a somewhat different version, namely that B.L. "pushed A. so he wouldn't catch a ball and A. got mad." Although the time sequence is not entirely clear, the rest of the statements seemingly deal with what happened after the game when the class returned to the locker room. According to A.T., "when we came inside [B.] pushed me by accident again so I punched him and he punched me then he kicked and ran outside." Further, A.T. acknowledges that he "chased after [B.] and pushed him and Mr. Barros broke us up."

Other than who threw the first punch, B.L.'s own statement is generally consistent with A.T.'s version. Thus, B.L. wrote that, as he was getting changed, A.T. "bumped into me so I turned and looked at him." Then A.T. "hit me in the face so I pushed him and ran and told the gym teacher what happened." What is important about

B.L.'s statement is his admission that, "I pushed him and ran." Significantly, B.L. does not claim that he was cornered or trapped in the locker room or that he needed to push A.T. out of the way in order to clear a path to summon help.

Several of the other students made similar statements, with differing accounts of who was the instigator. Many of these student witnesses were friends of A.T. and might naturally be expected to support his story. Thus, J.G. wrote that, "when we got inside B. started making fun of A. and A. threw one punch at B." and "then B. punched A. back." M.D. accused B. of "hit [ting] A. two times," at which point A.T. removed his glasses and went outside "and just pushed him." E.M. also implicated both boys in the fighting, stating that B. and A. "walked in and started pushing each other and then they both started punching" and eventually, A. removed his glasses and ran after B. Similarly, M.L. reported seeing "B hit A. 2 times and A. hit him back." Likewise, J.D. stated that, "they both pushed each other" and then "A. punched B. and . . . B. punched him back." Continuing his observation, J.D. added that "when B. was leaving, A. chased him and punched him and he almost fell down the stairs."

A few of the students clearly identified A.T. as having been the aggressor. For instance, J.C. noted that "A. threw the first punch, B. threw the second punch and punched again." C.T. thought that B. had initially pushed A. "by accident," but that A. than deliberately punched B. and that B." punched back." Sifting through these inconsistent and contradictory versions of who started the fight, the school administration ultimately determined that A.T. was responsible for turning the encounter into a physical confrontation. Therefore, the district imposed a three-day suspension on A.T. and a one-day suspension on B.L.

It is unclear from the record exactly where the two physical education instructors were located when the altercation began. Soon afterwards, however, B.L. "came running out [of the locker room] with A.T. chasing after him." Mr. Barros "stepped in between them" and "broke up the fight." Although petitioner's mother contends that lack of adult supervision allowed the incident to occur, she concedes that Mr. Barros interceded "very fast" as soon as he became aware of the situation. B.L. was examined

by the school nurse shortly after the incident, but there was no report of any serious injury.

In determining what weight to accord the conflicting proofs, it is noteworthy that most of the evidence was sheer hearsay. Only one of the written statements falls within a recognized exception to the hearsay-evidence rule, namely B.L.'s version which constitutes an admission by a party.[1] Significantly, B.L. admits that he was an active participant in the incident.

I FIND that B.L. intentionally "pushed" A.T. while in the locker room during the school day and, thus, engaged in a physical altercation at school. While the evidence strongly suggests that B.L. was provoked and that the first blow was struck by the other student, such circumstances do not completely absolve him of responsibility for his own actions. Even though he may have been defending himself, he nonetheless violated school rules and must accept responsibility for his involvement in a physical altercation.

There is insufficient competent evidence to show a lack of adult supervision in the locker room. Physical-education instructors must have been nearby since, as soon the fight began, Mr. Barros intervened to prevent the situation from escalating.

CONCLUSIONS OF LAW

Based on the foregoing facts and the applicable law, **I CONCLUDE** that B.L. participated in a fight at school and is deserving of some penalty. Under the particular factual circumstances, a written reprimand should be sufficient to enforce school policy and deter B.L. from engaging in future school fights.

School districts are obligated to protect the safety and welfare of students entrusted to their care. N.J.S.A. 18A:37-2 authorizes school officials to suspend or expel students for good cause, including "conduct of such character as to constitute a

[1] New Jersey Rules of Evidence 803(b) recognizes an exception to the hearsay rule for "the party's own statement, made either in an individual or in a representative capacity."

continuing danger to the physical well-being of other students" and "physical assault upon another student." State regulations require local boards of education to develop and implement a code of student conduct establishing student behavioral expectations on school grounds. N.J.A.C. 6A:16-7.1. Although the Board claims to have adopted a "zero tolerance" policy toward any physical violence on school grounds, it did not introduce such policy into evidence and B.L.'s mother denies having been informed of that policy prior to the incident in question. Nonetheless, it lies clearly within the district's statutory authority to preserve an orderly learning environment by punishing every student who engages in physical violence on the school premises.

Certainly there is nothing improper about meting out discipline to all students who misbehave in school and adjusting the penalty to reflect the degree of culpability. It may be understandable that a child might feel justified in defending himself against attack by another student or that his mother might encourage him to use appropriate force to resist a bully. Cf. DeCamp v. New Jersey Dep't of Corrections, 386 N.J. Super. 631 (App. Div. 2006). (inmate has right to raise self-defense in prison disciplinary hearing, at least as an extreme last resort where his life is threatened.) Here, however, there is no showing that B.L. was in genuine danger of serious bodily injury or that he had no reasonable opportunity to avoid the confrontation (e.g., by retreat or by summoning a teacher.) Therefore, the importance of preventing all physical violence among students in a school setting overrides any individual's interest in self-help.

The school administration did not act arbitrarily, capriciously or unreasonably by exercising its statutory authority to discipline one student for a physical assault upon another. One may, however, legitimately question the wisdom of suspending a student who was the victim rather than the aggressor. While evenhandedness in enforcing discipline must be applied, the school district should take into account degrees of culpability in determining the appropriateness of any penalty. Since B.L. has no prior record of disciplinary infractions and did not initiate the physical confrontation, even a suspension of only one day would be excessive. Instead, a written reprimand is sufficient to vindicate district policy and punish B.L. for breach of school discipline.

Finally, the mother objects to the Board's practice of discussing the incident with school administrators outside the presence of both parties. Undoubtedly it would have been preferable for the Board to include the mother at all stages of its fact-gathering, but the practice followed does not violate basic due process or standards of fundamental fairness. Generally, students facing short suspensions of ten days or less are not entitled to the full panoply of procedural protections, but rather to "the rudimentary precautions" of due process, comprised of oral or written notice of the charges, an explanation of the evidence against him and an opportunity to present his side of the story. Goss v. Lopez, 419 U.S. 565, 581 (1975). Compare the abbreviated procedures for short-term suspensions in N.J.A.C. 6A:16-7.2 with more elaborate procedures for long-term suspensions in N.J.A.C. 6A:16-7.3. Petitioner's mother does not contend that she was deprived of an adequate opportunity to present her son's version of events at an "informal hearing." N.J.A.C. 6A:17-2(a)(2). Consequently, petitioner received the benefit of the informal procedures applicable to this type of suspension proceeding. Moreover, petitioner enjoyed the right to a hearing before the OAL, where an opportunity exists for a full trial-type proceeding. Any deficiencies that may have occurred at the district level were cured by the appeal to the OAL.

ORDER

It is **ORDERED** that the charge of involvement in a physical altercation with another student is sustained.

And it is further **ORDERED** that the penalty be reduced from a one-day suspension to a written reprimand.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Sept. 10, 2008
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Date Received at Agency:

September 10, 2008

Mailed to Parties:

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SEP 11 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

db

APPENDIX

LIST OF WITNESSES

1. L.L., parent of B.L.

LIST OF EXHIBITS

No.	Description
P-1	Copy of letter to Mr. and Mrs. D.L. from Ira E. Oustatcher, Ed.D., dated October 18, 2004
P-2	Copy of letter addressed To Whom it May Concern from Cathleen Bradley, dated November 1, 2004
R-1	Copy of statement of A.T., dated October 1, 2004
R-2	Copy of statement of J.G., dated October 1, 2004
R-3	Copy of statement of E.M., dated October 5, 2004
R-4	Copy of statement of M.D., dated October 5, 2004
R-5	Copy of statement of J.D., dated October 5, 2004
R-6	Copy of statement of C.T., dated October 5, 2004
R-7	Copy of statement of J.C., dated October 5, 2004
R-8	Copy of statement of M.L., dated October 5, 2004
R-9	Copy of statement of B.L., dated October 1, 2004

R-10 Copy of handwritten notes of Francine R. Parker, dated October 1, 2004

R-11 Copy of statement by Fernando Barros, undated

R-12 Copy of statement of Fernando Barros, undated

R-13 Copy of statement of Fernando Barros, dated October 6, 2004

417-08

#417-08S

OAL DKT. NO. EDU 5588-08
AGENCY DKT. NO. 89-3/08

RECORD SEALED

IN THE MATTER OF THE TENURE	:	
HEARING OF LORRAINE GARVILLA,	:	COMMISSIONER OF EDUCATION
SUSSEX WANTAGE REGIONAL	:	DECISION
SCHOOL DISTRICT, SUSSEX COUNTY.	:	

The record of this matter, the parties' proposed Settlement Agreement and Release, and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.[1]

Upon such review, the Commissioner concurs with the ALJ that, under the circumstances, the proposed settlement is consistent with established standards governing settlement of tenure matters. *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846.

Accordingly, the settlement is hereby approved and the tenure matter dismissed, subject to compliance with the terms of the settlement.[2] A copy of this decision shall be forwarded to the State Board of Examiners for action as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 10/16/08
Date of Mailing: 10/17/08

[1] It is noted that, by separate orders dated June 27, 2008, the Administrative Law Judge (ALJ) issued a protective order with respect to respondent's medical records and an order sealing all exhibits and transcripts of hearing.

[2] In so holding, the Commissioner notes that: 1) the settlement agreement provides for respondent's sabbatical leave to be at half pay, not full pay as indicated in her letter of request; 2) respondent's letter of resignation erroneously refers to the performance of the agreement by the "College" rather than the Board; and 3) the language of the Initial Decision at page 3, paragraph five, has no application in this matter and appears to have been included in error.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 05588-08

AGENCY DKT. NO. 89-3/08

(RECORD SEALED)

IN THE MATTER OF THE TENURE HEARING OF LORRAINE GARVILLA, SUSSEX WANTAGE REGIONAL SCHOOL DISTRICT, SUSSEX COUNTY

Bruce W. Padula, Esq., for petitioner (Scarinci & Hollenbeck)

Sheldon H. Pincus, Esq., for respondent (Bucceri and Pincus, attorneys)

Record Closed: September 22, 2008 Decided: September 23, 2008

BEFORE **JOANN LASALA CANDIDO,** ALJ:

This matter involves tenure charges of conduct unbecoming, insubordination and other just cause certified by Sussex Wantage Regional School District (District) against Lorraine Garvilla (Garvilla) under the Tenure Employees' Hearing Law, N.J.S.A. 18A:6-10 to -18.1.

Garvilla is a tenured teaching staff member employed by the District. The District accused Garvilla of arriving to work on October 15, 2007 with a strong odor of alcohol emanating from her despite a previous incident in 1998 whereby Garvilla agreed to seek treatment for alcohol dependency.

On February 21, 2008, the District filed its written charges and sworn statement of evidence with the Commissioner of Education (Commissioner). The District received Garvilla's opposition to the tenure charges on March 10, 2008. Subsequently, the matter was referred by the Commissioner to the Office of Administrative Law (OAL) on April 22, 2008 for a hearing as a contested case.

After numerous discussions pertaining to the OAL matter, the parties have agreed and have prepared a Settlement Agreement and Release indicating the terms thereof, which is attached and fully incorporated herein, as well as the Board minutes of August 21, 2008, approving the Sabbatical in accordance with the agreement.

In accordance with the decision of the State Board of Education in In re Cardonick, State Board decision of April 6, 1983 [1990 School Law Decisions (S.L.D.) 842, 846] and as codified by N.J.A.C. 6A:3-5.6, the record of any proposed settlement must include:

> . . . the nature of the charges, the length of the teacher's employment, circumstances justifying the settlement, consent or authorization by the Board of Education and the teacher to the proposed agreement, the administrative law judge's finding that the teacher entered into the agreement with a full understanding of his or her rights and [a finding] that the agreement is consistent with the public interests.

Based upon my review of the record, I **FIND** that the proposed settlement is consistent with the public interests for the following reasons:

1. Garvilla is employed by the District as a tenured teaching staff member.
2. The nature of the charges has been documented by the submission of a Statement of Charges and Certificate of Determination.
3. It is anticipated that the hearing in this matter would be protracted and costly.
4. If a hearing becomes necessary, the District has identified school personnel who are potential witnesses.
5. Litigation of the charges would lead to the disruption of the District's educational program due to the great amount of time lost by administrators and other personnel who would be required to testify to the incidence which led to the filing

of the tenure charges against an employee who has forfeited his custodial position and who is barred from obtaining public employment in the future.

6. Under the proposed settlement, Garvilla has submitted her irrevocable resignation effective the close of business on June 30, 2010. Her request for a two year sabbatical leave of absence has been approved by the Board of Education at its regular meeting of August 21, 2008. Garvilla will be paid one-half (50%) of her full salary net deductions for 2008-2009 and 2009-2010 school years, paid in the normal course of business. Her pension deductions will be based upon her full salary and her insurance coverage(s) will continue until June 30, 2010. (COBRA will be available at Garvilla's expense at the end of the term as well as unemployment benefits if applicable)

7. Both parties agree to exchange general releases of any and all claims which the parties may have against the other. Garvilla waives any and all rights to tenure, seniority, recall or reinstatement from the District as of the effective date of her resignation.

8. Garvilla acknowledges that she has had the benefit of counsel before entering this agreement, understands its terms and is aware the Commissioner of Education may refer the matter to the New Jersey State Board of Examiners for action that it may deem appropriate regarding her teaching certificates.

9. Under the best of circumstances, the hearing needs to be conducted and then the administrative law judge would have forty-five days to prepare an initial decision and the Commissioner would have an additional forty-five days for review and issuance of a final decision.

10. If the tenure matter proceeds to hearing, both parties would incur costs of paying their attorneys for a likely lengthy hearing.

11. The settlement fully disposes of all issues in controversy.

Based upon the foregoing, I **CONCLUDE** that the terms of settlement are in the public interest.

It is **ORDERED** that the parties comply with the terms of settlement and that these proceedings are hereby concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

September 23, 2008
DATE

Joann LaSala Candido
JOANN LASALA CANDIDO, ALJ

Date Received at Agency: 9-25-08

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SEP 25 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

ljb

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (hereinafter referred to as the "Agreement") is entered into this 25th day of August, 2008 between the Sussex Wantage Regional Board of Education, with its principal offices located at 31 Ryan Road, Wantage, New Jersey 07461 (hereinafter referred to as the "Board") and Lorraine Garvilla, residing at 609 Route 519, Wantage, New Jersey 07461 (hereinafter referred to as "Garvilla").

WHEREAS, Garvilla is employed as a tenured teaching staff member by the Board; and

WHEREAS, the Board certified tenure charges of conduct unbecoming, misbehavior, insubordination and other just cause against Garvilla, and

WHEREAS, by way of response to the charges, Garvilla filed an Answer which, in part, denied each of the charges, and further asserted certain affirmative defenses including, but not limited to, an allegation that the Board's action in certifying the charges constituted discriminatory and/or retaliatory acts or practices against her on the basis of disability (alcoholism and cancer) in violation of the N.J. Law Against Discrimination ("LAD"), N.J.S.A. 10:5-1 et.seq.; and

WHEREAS, the Board denies that its actions in any way were undertaken to or constituted a violation of the LAD;

WHEREAS, during the course of the parties engaging in discovery in this case, Garvilla provided the Board with detailed medical proof of treatment, rehabilitation, sustaining therapy and other support services relating to her alcoholism and cancer, and

WHEREAS, notwithstanding the proof of treatment, rehabilitation, sustaining therapy and other support services provided, both Garvilla and the Board desire to enter into a Settlement Agreement stipulating the terms of her separation from all employment with the Board, as well as providing for the exchange of General Releases of any and all claims which the parties may have against the other arising from Garvilla's employment or otherwise;

NOW, THEREFORE, in consideration for the promises and conditions set forth herein, the Board and Garvilla agree as follows:

1. Garvilla agrees to sign, simultaneously with this Settlement Agreement, an irrevocable letter of resignation from all employment with the Board effective at the close of business on June 30, 2010. The resignation letter shall be in the form annexed hereto as Exhibit A and shall be expressly conditioned upon the Board's compliance with this Settlement Agreement. The letter of resignation shall be null and void if the Board does not comply with the terms of the Agreement. The resignation is otherwise irrevocable. The Board waives all statutory or contractual claims for notification of Garvilla's resignation.

2. The Board, by resolution, will approve and accept the resignation of Garvilla's employment at a regularly scheduled meeting, effective the close of business on June 30, 2010.

3. Garvilla hereby requests a sabbatical leave of absence, with half pay, in accordance with Article XVIII of the collective negotiations agreement (or its successor) between the Board and the Sussex Wantage Education Association, for the period commencing September 1, 2008 and ending on June 30, 2010. The form of Garvilla's

letter requesting a sabbatical leave of absence, with half pay, is attached hereto as Exhibit B.

4. The Board will approve Garvilla's requested sabbatical leave of absence, with half pay (50%), commencing September 1, 2008 and ending June 30, 2010. The Board, however, waives any requirement that Garvilla return to the district for a period of two (2) years subsequent to the completion of the sabbatical leave of absence.

5. Throughout the period of leave of absence aforesaid, Garvilla shall be paid at the level and rate of one-half (50%) of her full salary for each of the 2008-2009, and 2009-2010 school years (inclusive of all salary increases required pursuant to the applicable collective negotiations agreement). Such salaries shall be paid to Garvilla in the normal course of business, net of normal payroll deductions for State and Federal income taxes and pension. It is expressly agreed that all deductions for pension shall be based on the normal deduction from Garvilla's full (and not half) salary so as to provide full pension service credit in accordance with N.J.A.C. 17:3-4.2(b).

6. Throughout the period of the leave of absence aforesaid, the Board shall continue to provide Garvilla all of the insurance coverage(s) that are presently being provided to Garvilla under the plan(s) applicable to Garvilla by virtue of her employment by the Board.

7. Nothing contained within this Settlement Agreement shall alter Garvilla's rights to continuation of health insurance through Federal law, i.e. the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA") upon separation from employment with the Board. Garvilla shall be able to purchase, solely at her own cost and expense, the insurance coverage presently provided to other teaching staff members employed by the Board.

8. In the event that Garvilla is unable to find alternative employment, the Board agrees that it will not contest, or oppose, in any manner, any claim for unemployment compensation that Garvilla may elect to initiate after the termination of her employment on June 30, 2010.

9. The Board agrees that the Tenure Charges in this matter bearing Agency Dkt. No. 89-3/08, O.A.L. Dkt. No. EDU 5588-08 shall be dismissed, with prejudice, subject to the approval of this Agreement by the Office of Administrative Law and the Commissioner of Education.

10. Garvilla waives any and all rights to tenure, seniority, recall or reinstatement as of the effective date of her resignation. It is understood and agreed that Garvilla shall not, as of the effective date of her resignation, receive any other compensation or benefits or emoluments of employment except as otherwise provided in this Settlement Agreement.

11. The parties' entry in this Settlement Agreement shall not constitute nor shall it be interpreted as an admission of wrongdoing or guilt, or liability in any manner on either of the parties' part. Any such obligation or liability on either party's part is expressly denied.

12. The parties agree that, subsequent to the date of this Agreement, any inquiries from potential employers regarding Garvilla directed to the District shall be channeled solely to the Superintendent of Schools. Responses to such inquiries shall be limited to providing the dates of Garvilla's employment, her position, her salary, (and that she left the District voluntarily to pursue other career opportunities.) Nothing in this Separation of Employment Agreement shall prohibit Garvilla from seeking other employment after the date of this Agreement and during said leave of absence. No such employment shall

diminish or reduce the obligation of the Board to pay the salary and benefits required under this Settlement Agreement.

13. Garvilla and her heirs, assigns and agents, in consideration of the terms described in this Agreement, hereby release, waive and discharge the Board, its affiliated departments, and its officers, trustees, elected members, agents, employees, successors and assigns (hereinafter collectively referred to as the "Releasees") from each and every claim, demand, cause of action, obligation, damage, complaint, expense, compensation or action or writ of any kind, nature, character of description that Garvilla had, now has, or may in the future have against the Releasees on account of or arising out of her employment with the Board and her separation therefrom. This Complete Release includes, but is not limited to, any claim, demand, cause of action, obligation, damage, complaint, expense, compensation, or action or writ of any kind, nature, character or description arising out of or under Federal, State or municipal statute or ordinance and any other law (whether such be common law, decisional law or statutory law), rule, regulation, executive order or guideline, and any and all claims for attorneys' fees and costs arising from the above acts including, but not limited to:

i. Any claim, cause of action, demand or complaint arising out of or under the New Jersey Law Against Discrimination (NJLAD) which, among other things, prohibits discrimination in employment on the basis of an individual's race, creed, color, religion, sex, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, disability, atypical hereditary cellular or blood trait or liability for service in the Armed Forces of the United States.

ii. Any claim, cause of action, demand or complaint arising out of or under Title VII of the Civil Rights Act of 1964 (Title VII) or the Civil Rights Act of 1991, as amended, which, among other things, prohibit discrimination in employment on account of a person's race, color, religion, sex or national origin.

iii. Any claim, cause of action, demand or complaint arising out of or under the Federal Age Discrimination in Employment Act of 1967, as amended (ADEA), which, among other things, prohibits discrimination in employment on account of a person's age.

iv. Any claim, cause of action, demand or complaint arising out of or under the Federal Americans with Disabilities Act (ADA) which, among other things, prohibits discrimination in employment on account of a person's disability or handicap.

v. Any claim, cause of action, demand or complaint arising out of or under the Federal Family and Medical Leave Act (FMLA) which, among other things, entitles an employee to take reasonable leave for medical reasons for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition, and any claim, cause of action, demand or complaint arising under the New Jersey Family Leave Act.

vi. Any claim, cause of action, demand or complaint arising out of or under the Federal Rehabilitation Act of 1973, as amended, which, among other things, prohibits discrimination in employment by Federal contractors against individuals with disabilities.

vii. Any claim, cause of action, demand or complaint arising out of or under the Federal Employee Retirement Income Security Act of 1974, as amended (ERISA), which, among other things, regulates pension and welfare plans and prohibits interference with individual rights protected under that statute.

viii. Any claim, cause of action, demand or complaint arising out of or under the Federal Older Workers Benefit Protection Act (OWBPA) which, among other things, amends provisions of ADEA and prohibits discrimination in employment and employment benefits on account of a person's age.

Garvilla shall not file any claim, charge or complaint of any nature with the New Jersey Division of Civil Rights, the U.S. Equal Employment Opportunity Commission (EEOC) or with any Federal, State or local court or agency against the Board or the Releasees concerning her employment or the separation there from. If Garvilla violates this Complete Release by filing any claim, charge or complaint as prohibited in this subparagraph, Garvilla agrees to pay all costs and expenses of defending against the suit incurred by the Board and/or the Releasees, including reasonable attorneys' fees.

Notwithstanding the signing of the release by Board, the Board shall remain obligated to indemnify Garvilla against claims of third parties arising on or before June 30, 2010 pursuant to N.J.S.A. 18A: 16-6 and 6.1.

14. The Board, its members, agents, servants and employees ("Releasees"), agree to release irrevocably and unconditionally, and discharge Garvilla from any and all claims which it may have against Garvilla . It specifically releases Garvilla from any and all claims arising out of the employment relationship, including but not limited to any cause of action pursuable before any state or federal court or agency, or any other federal

or state statutory provision, administrative regulation, collective negotiations agreement or other act that has the force and effect of law; as well as any claims for counsel fees, or any statutory or common law claim or cause of action for defamation, libel, tortious interference, breach of duty or loyalty, harassment, or for discrimination on the basis of race, color, sex, religion, national origin, age, handicap or disability, sexual orientation, veteran's status, or marital status or on any other prohibited basis.

15. Garvilla acknowledges that her employment relationship with the Board will be permanently and irrevocably severed on June 30, 2010. Garvilla agrees that she will not apply for or accept employment in any capacity with the Board at any time in the future. Garvilla will not appeal or challenge the Board's refusal to hire her in any court of law, administrative agency, in arbitration or before any governmental body.

16. The Board and Garvilla agree that Garvilla shall be provided a mutually convenient opportunity to obtain whatever personal belongings of hers remain within the school district, as well as to return any district materials that Garvilla has in her possession.

17. The parties acknowledge that this Settlement Agreement shall be submitted to the Office of Administrative Law and to the Commissioner of Education for review and approval, and that the terms of the Agreement are expressly made subject to and contingent upon such review and approval by each of said agencies. In the event that either the Office of Administrative Law and/or Commissioner of Education disapproves and/or rejects any of the terms contained herein, this Settlement Agreement shall be null and void and shall not be evidential or used by any party in any proceeding involving any party to this Settlement Agreement. In addition, each of the parties shall return to the same position(s) which they held prior to this Settlement Agreement, and all rights are reserved in that event.

18. Garvilla acknowledges that, notwithstanding the parties entry into this Settlement Agreement, she has been made aware that the Commissioner of Education may nonetheless refer the matter to the New Jersey State Board of Examiners for such action regarding her teaching certificates as it deems appropriate. The Board states affirmatively that, based on the proof of treatment, rehabilitation, sustaining therapy and other support services having been provided to it, and which is continuing to be sought and provided to Garvilla, it is not requesting the Commissioner of Education to, or desirous, or believe that it is necessary to refer the matter to the State Board of Examiners.

19. In the event that the State Board of Examiners determines to initiate proceedings that results in a final determination for the suspension or revocation of Garvilla's teaching certificates, the Board agrees that it will nonetheless remain obligated to pay to Garvilla the full amount of salary, benefits and/or other consideration required under this Settlement Agreement. Any salary or benefits that would have been due to be paid to Garvilla between the effective date of any such final decision suspending or revoking Garvilla's teaching certificates and the effective date of Garvilla's resignation shall thereafter be paid to Garvilla by the Board in lump sum.

20. Nothing in this Settlement Agreement or the Releases set forth above shall preclude either party from bringing an action to enforce performance of any term of this Agreement should there be a default in performance.

21. The parties expressly agree that they shall act in good faith to ensure implementation of this Settlement Agreement. The parties mutually agree to refrain from retaliation, in any manner, against the other party (or, their families, members, agents and employees). The parties further mutually agree not to make any derogatory comments, statements or misrepresentations about the other (or, their families, members, agents and employees).

22. The undersigned representatives of the Board hereby acknowledge that they have been duly authorized by the Board to sign this Settlement Agreement and bind the Board to its terms. Upon ratification of this Settlement Agreement, the Board authorizes its President and Secretary to execute the same on its behalf.

23. The parties acknowledge that each has been given the opportunity to consult with an attorney or a representative of their own choosing with respect to this Agreement and reviewed with their attorney or representative all the terms and conditions of this Agreement prior to executing this Agreement. Each party signs this Settlement Agreement freely and voluntarily and without coercion or duress. The parties further acknowledge that they fully understand the duties and obligations enumerated herein and have been informed of their legal rights and obligations.

24. This Agreement contains the entire agreement between Garvilla and the Board, and each of them, with respect to the subject matter and supercedes all prior agreements or understandings dealing with the same subject matter. It settles all claims and disputes which may exist between Garvilla and the Board arising from her employment or otherwise. There is no agreement on the part of the Board to do anything other than as is expressly stated in this Agreement. This Settlement Agreement incorporates the complete financial obligation of the Board with regard to its employment relationship with Garvilla and Garvilla's separation from employment.

25. This Agreement shall in all respects be interpreted, enforced and governed by the Laws of the State of New Jersey.

26. All terms of this Settlement Agreement are deemed material. No modification or amendment of this Agreement will be enforceable unless it is in writing and signed by the party to be charged.

27. Pursusant to law, Garvilla has twenty-one (21) days to consider this Agreement, which she may waive. Further, Garvilla has seven (7) days following executing this Agreement to revoke her acceptance to same. Any such revocation must

be made in writing addressed to Matthew J. Giacobbe, Esq. at Scarinci Hollenbeck, 1100 Valley Brook Avenue, Lyndhurst, New Jersey 07071, and must be received within seven (7) days.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid intending to be legally bound thereby, and are executing the foregoing agreement this 25th day of August, 2008.

Lorraine Garvilla
LORRAINE GARVILLA

Sworn and Subscribed to before me
this 25th day of August, 2008.

~~Notary Public~~ Attorney at Law N.J.
State of New Jersey

SUSSEX WANTAGE REGIONAL BOARD OF EDUCATION

Secretary

BY: _____
Thomas Card, President

DATED: 9/11/08

Exhibit A

Lorraine Garvilla
609 County Road 519
Wantage, New Jersey 07461

August 25, 2008

Mr. Thomas Card, President
Sussex Wantage Regional Board of Education
31 Ryan Road
Wantage, New Jersey 07461

Re: Letter of Resignation

Dear Mr. Card:

Pursuant to the terms of the Settlement Agreement between the Sussex Wantage Regional Board of Education and myself, I hereby submit my irrevocable resignation as tenured teaching staff member, effective the close of business on June 30, 2010. This resignation is expressly conditioned upon the Board's compliance with the terms of the parties' Settlement Agreement and the general releases contained therein; and, is of no force and effect, even if accepted, unless said Settlement Agreement and the general releases contained therein which I have executed are fully performed by the College.

Sincerely,

Lorraine Garvilla

Lorraine Garvilla

Exhibit B

Lorraine Garvilla
609 County Road 519
Wantage, New Jersey 07461

August 25, 2008

Mr. Thomas Card, President
Sussex Wantage Regional Board of Education
31 Ryan Road
Wantage, New Jersey 07461

Re: Letter Requesting Sabbatical Leave of Absence

Dear Mr. Card:

I hereby request of the Board that I be granted a sabbatical leave of absence with full pay according to the terms of the Settlement Agreement, dated August 25, 2008. I request that this leave begin on September 1, 2008 and end at the close of business on June 30, 2010.

Thank you for your consideration of my request.

Sincerely,

Lorraine Garvilla

Lorraine Garvilla

EXTRACT FROM THE MINUTES OF A MEETING OF THE
BOARD OF EDUCATION OF SUSSEX-WANTAGE REGIONAL
SUSSEX COUNTY, NJ AS RECORDED IN THE OFFICIAL SET OF MINUTES

The Board of Education of Sussex-Wantage Regional in the County of Sussex, New Jersey, convened in **Regular meeting** on August 21, 2008 at 7:30 p.m. in the Sussex Middle School auditorium, Loomis Avenue, Sussex, New Jersey.

The following members of the Board of Education were present: Mrs. Kathryn Compa, Mrs. Diane Snure, Mrs. Marina Krynicky, Mrs. Ann Smulewicz, Mr. Robert Heiden, Mr. Arthur Jacobs, Mr. Raymond Delbury

The following members were absent: Mr. Robert Holowach, Mr. Thomas Card

Also in attendance were Dr. Edward Izbicki, Superintendent of Schools, Mrs. Christina Riker, Board Secretary, and Mr. Matthew Giacobbe, Board Attorney.

The following resolution was offered by Mr. Jacobs, seconded by Mrs. Compa and adopted by the Board of Education by the following roll call vote:
TITLE OF RESOLUTION: Sabbatical

That the Board approve a two year sabbatical leave for Lorraine Garvilla in accordance with the terms and conditions of the settlement agreement as on file in the employee's personnel file.

Roll Call:	Ayes:	6
	Noes:	1 (Jacobs)
	Absent:	2

State of New Jersey)
County of Sussex) SS

I, Christina M. Riker, Secretary of the Board of Education of Sussex-Wantage Regional in the County of Sussex, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of said district duly called and held on August 21, 2008, has been compared by me with the original minutes as officially recorded in my office in the minute book of said Sussex-Wantage Regional Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract in witness I hereunto set my hand and affixed the corporate seal of said Board of Education the 22nd day of September, 2008.

BOARD SECRETARY

(AFFIX SEAL)

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (hereinafter referred to as the "Agreement") is entered into this 25th day of August, 2008 between the Sussex Wantage Regional Board of Education, with its principal offices located at 31 Ryan Road, Wantage, New Jersey 07461 (hereinafter referred to as the "Board") and Lorraine Garvilla, residing at 609 Route 519, Wantage, New Jersey 07461 (hereinafter referred to as "Garvilla").

WHEREAS, Garvilla is employed as a tenured teaching staff member by the Board; and

WHEREAS, the Board certified tenure charges of conduct unbecoming, misbehavior, insubordination and other just cause against Garvilla, and

WHEREAS, by way of response to the charges, Garvilla filed an Answer which, in part, denied each of the charges, and further asserted certain affirmative defenses including, but not limited to, an allegation that the Board's action in certifying the charges constituted discriminatory and/or retaliatory acts or practices against her on the basis of disability (alcoholism and cancer) in violation of the N.J. Law Against Discrimination ("LAD"), N.J.S.A. 10:5-1 et.seq.; and

WHEREAS, the Board denies that its actions in any way were undertaken to or constituted a violation of the LAD;

WHEREAS, during the course of the parties engaging in discovery in this case, Garvilla provided the Board with detailed medical proof of treatment, rehabilitation, sustaining therapy and other support services relating to her alcoholism and cancer, and

WHEREAS, notwithstanding the proof of treatment, rehabilitation, sustaining therapy and other support services provided, both Garvilla and the Board desire to enter into a Settlement Agreement stipulating the terms of her separation from all employment with the Board, as well as providing for the exchange of General Releases of any and all claims which the parties may have against the other arising from Garvilla's employment or otherwise;

NOW, THEREFORE, in consideration for the promises and conditions set forth herein, the Board and Garvilla agree as follows:

1. Garvilla agrees to sign, simultaneously with this Settlement Agreement, an irrevocable letter of resignation from all employment with the Board effective at the close of business on June 30, 2010. The resignation letter shall be in the form annexed hereto as Exhibit A and shall be expressly conditioned upon the Board's compliance with this Settlement Agreement. The letter of resignation shall be null and void if the Board does not comply with the terms of the Agreement. The resignation is otherwise irrevocable. The Board waives all statutory or contractual claims for notification of Garvilla's resignation.

2. The Board, by resolution, will approve and accept the resignation of Garvilla's employment at a regularly scheduled meeting, effective the close of business on June 30, 2010.

3. Garvilla hereby requests a sabbatical leave of absence, with half pay, in accordance with Article XVIII of the collective negotiations agreement (or its successor) between the Board and the Sussex Wantage Education Association, for the period commencing September 1, 2008 and ending on June 30, 2010. The form of Garvilla's

letter requesting a sabbatical leave of absence, with half pay, is attached hereto as Exhibit B.

4. The Board will approve Garvilla's requested sabbatical leave of absence, with half pay (50%), commencing September 1, 2008 and ending June 30, 2010. The Board, however, waives any requirement that Garvilla return to the district for a period of two (2) years subsequent to the completion of the sabbatical leave of absence.

5. Throughout the period of leave of absence aforesaid, Garvilla shall be paid at the level and rate of one-half (50%) of her full salary for each of the 2008-2009, and 2009-2010 school years (inclusive of all salary increases required pursuant to the applicable collective negotiations agreement). Such salaries shall be paid to Garvilla in the normal course of business, net of normal payroll deductions for State and Federal income taxes and pension. It is expressly agreed that all deductions for pension shall be based on the normal deduction from Garvilla's full (and not half) salary so as to provide full pension service credit in accordance with N.J.A.C. 17:3-4.2(b).

6. Throughout the period of the leave of absence aforesaid, the Board shall continue to provide Garvilla all of the insurance coverage(s) that are presently being provided to Garvilla under the plan(s) applicable to Garvilla by virtue of her employment by the Board.

7. Nothing contained within this Settlement Agreement shall alter Garvilla's rights to continuation of health insurance through Federal law, i.e. the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA") upon separation from employment with the Board. Garvilla shall be able to purchase, solely at her own cost and expense, the insurance coverage presently provided to other teaching staff members employed by the Board.

8. In the event that Garvilla is unable to find alternative employment, the Board agrees that it will not contest, or oppose, in any manner, any claim for unemployment compensation that Garvilla may elect to initiate after the termination of her employment on June 30, 2010.

9. The Board agrees that the Tenure Charges in this matter bearing Agency Dkt. No. 89-3/08, O.A.L. Dkt. No. EDU 5588-08 shall be dismissed, with prejudice, subject to the approval of this Agreement by the Office of Administrative Law and the Commissioner of Education.

10. Garvilla waives any and all rights to tenure, seniority, recall or reinstatement as of the effective date of her resignation. It is understood and agreed that Garvilla shall not, as of the effective date of her resignation, receive any other compensation or benefits or emoluments of employment except as otherwise provided in this Settlement Agreement.

11. The parties' entry in this Settlement Agreement shall not constitute nor shall it be interpreted as an admission of wrongdoing or guilt, or liability in any manner on either of the parties' part. Any such obligation or liability on either party's part is expressly denied.

12. The parties agree that, subsequent to the date of this Agreement, any inquiries from potential employers regarding Garvilla directed to the District shall be channeled solely to the Superintendent of Schools. Responses to such inquiries shall be limited to providing the dates of Garvilla's employment, her position, her salary, (and that she left the District voluntarily to pursue other career opportunities.) Nothing in this Separation of Employment Agreement shall prohibit Garvilla from seeking other employment after the date of this Agreement and during said leave of absence. No such employment shall

diminish or reduce the obligation of the Board to pay the salary and benefits required under this Settlement Agreement.

13. Garvilla and her heirs, assigns and agents, in consideration of the terms described in this Agreement, hereby release, waive and discharge the Board, its affiliated departments, and its officers, trustees, elected members, agents, employees, successors and assigns (hereinafter collectively referred to as the "Releasees") from each and every claim, demand, cause of action, obligation, damage, complaint, expense, compensation or action or writ of any kind, nature, character of description that Garvilla had, now has, or may in the future have against the Releasees on account of or arising out of her employment with the Board and her separation therefrom. This Complete Release includes, but is not limited to, any claim, demand, cause of action, obligation, damage, complaint, expense, compensation, or action or writ of any kind, nature, character or description arising out of or under Federal, State or municipal statute or ordinance and any other law (whether such be common law, decisional law or statutory law), rule, regulation, executive order or guideline, and any and all claims for attorneys' fees and costs arising from the above acts including, but not limited to:

i. Any claim, cause of action, demand or complaint arising out of or under the New Jersey Law Against Discrimination (NJLAD) which, among other things, prohibits discrimination in employment on the basis of an individual's race, creed, color, religion, sex, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, disability, atypical hereditary cellular or blood trait or liability for service in the Armed Forces of the United States.

ii. Any claim, cause of action, demand or complaint arising out of or under Title VII of the Civil Rights Act of 1964 (Title VII) or the Civil Rights Act of 1991, as amended, which, among other things, prohibit discrimination in employment on account of a person's race, color, religion, sex or national origin.

iii. Any claim, cause of action, demand or complaint arising out of or under the Federal Age Discrimination in Employment Act of 1967, as amended (ADEA), which, among other things, prohibits discrimination in employment on account of a person's age.

iv. Any claim, cause of action, demand or complaint arising out of or under the Federal Americans with Disabilities Act (ADA) which, among other things, prohibits discrimination in employment on account of a person's disability or handicap.

v. Any claim, cause of action, demand or complaint arising out of or under the Federal Family and Medical Leave Act (FMLA) which, among other things, entitles an employee to take reasonable leave for medical reasons for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition, and any claim, cause of action, demand or complaint arising under the New Jersey Family Leave Act.

vi. Any claim, cause of action, demand or complaint arising out of or under the Federal Rehabilitation Act of 1973, as amended, which, among other things, prohibits discrimination in employment by Federal contractors against individuals with disabilities.

vii. Any claim, cause of action, demand or complaint arising out of or under the Federal Employee Retirement Income Security Act of 1974, as amended (ERISA), which, among other things, regulates pension and welfare plans and prohibits interference with individual rights protected under that statute.

viii. Any claim, cause of action, demand or complaint arising out of or under the Federal Older Workers Benefit Protection Act (OWBPA) which, among other things, amends provisions of ADEA and prohibits discrimination in employment and employment benefits on account of a person's age.

Garvilla shall not file any claim, charge or complaint of any nature with the New Jersey Division of Civil Rights, the U.S. Equal Employment Opportunity Commission (EEOC) or with any Federal, State or local court or agency against the Board or the Releasees concerning her employment or the separation there from. If Garvilla violates this Complete Release by filing any claim, charge or complaint as prohibited in this subparagraph, Garvilla agrees to pay all costs and expenses of defending against the suit incurred by the Board and/or the Releasees, including reasonable attorneys' fees.

Notwithstanding the signing of the release by Board, the Board shall remain obligated to indemnify Garvilla against claims of third parties arising on or before June 30, 2010 pursuant to N.J.S.A. 18A: 16-6 and 6.1.

14. The Board, its members, agents, servants and employees ("Releasees"), agree to release irrevocably and unconditionally, and discharge Garvilla from any and all claims which it may have against Garvilla . It specifically releases Garvilla from any and all claims arising out of the employment relationship, including but not limited to any cause of action pursuable before any state or federal court or agency, or any other federal

or state statutory provision, administrative regulation, collective negotiations agreement or other act that has the force and effect of law; as well as any claims for counsel fees, or any statutory or common law claim or cause of action for defamation, libel, tortious interference, breach of duty or loyalty, harassment, or for discrimination on the basis of race, color, sex, religion, national origin, age, handicap or disability, sexual orientation, veteran's status, or marital status or on any other prohibited basis.

15. Garvilla acknowledges that her employment relationship with the Board will be permanently and irrevocably severed on June 30, 2010. Garvilla agrees that she will not apply for or accept employment in any capacity with the Board at any time in the future. Garvilla will not appeal or challenge the Board's refusal to hire her in any court of law, administrative agency, in arbitration or before any governmental body.

16. The Board and Garvilla agree that Garvilla shall be provided a mutually convenient opportunity to obtain whatever personal belongings of hers remain within the school district, as well as to return any district materials that Garvilla has in her possession.

17. The parties acknowledge that this Settlement Agreement shall be submitted to the Office of Administrative Law and to the Commissioner of Education for review and approval, and that the terms of the Agreement are expressly made subject to and contingent upon such review and approval by each of said agencies. In the event that either the Office of Administrative Law and/or Commissioner of Education disapproves and/or rejects any of the terms contained herein, this Settlement Agreement shall be null and void and shall not be evidential or used by any party in any proceeding involving any party to this Settlement Agreement. In addition, each of the parties shall return to the same position(s) which they held prior to this Settlement Agreement, and all rights are reserved in that event.

18. Garvilla acknowledges that, notwithstanding the parties entry into this Settlement Agreement, she has been made aware that the Commissioner of Education may nonetheless refer the matter to the New Jersey State Board of Examiners for such action regarding her teaching certificates as it deems appropriate. The Board states affirmatively that, based on the proof of treatment, rehabilitation, sustaining therapy and other support services having been provided to it, and which is continuing to be sought and provided to Garvilla, it is not requesting the Commissioner of Education to, or desirous, or believe that it is necessary to refer the matter to the State Board of Examiners.

19. In the event that the State Board of Examiners determines to initiate proceedings that results in a final determination for the suspension or revocation of Garvilla's teaching certificates, the Board agrees that it will nonetheless remain obligated to pay to Garvilla the full amount of salary, benefits and/or other consideration required under this Settlement Agreement. Any salary or benefits that would have been due to be paid to Garvilla between the effective date of any such final decision suspending or revoking Garvilla's teaching certificates and the effective date of Garvilla's resignation shall thereafter be paid to Garvilla by the Board in lump sum.

20. Nothing in this Settlement Agreement or the Releases set forth above shall preclude either party from bringing an action to enforce performance of any term of this Agreement should there be a default in performance.

21. The parties expressly agree that they shall act in good faith to ensure implementation of this Settlement Agreement. The parties mutually agree to refrain from retaliation, in any manner, against the other party (or, their families, members, agents and employees). The parties further mutually agree not to make any derogatory comments, statements or misrepresentations about the other (or, their families, members, agents and employees).

22. The undersigned representatives of the Board hereby acknowledge that they have been duly authorized by the Board to sign this Settlement Agreement and bind the Board to its terms. Upon ratification of this Settlement Agreement, the Board authorizes its President and Secretary to execute the same on its behalf.

23. The parties acknowledge that each has been given the opportunity to consult with an attorney or a representative of their own choosing with respect to this Agreement and reviewed with their attorney or representative all the terms and conditions of this Agreement prior to executing this Agreement. Each party signs this Settlement Agreement freely and voluntarily and without coercion or duress. The parties further acknowledge that they fully understand the duties and obligations enumerated herein and have been informed of their legal rights and obligations.

24. This Agreement contains the entire agreement between Garvilla and the Board, and each of them, with respect to the subject matter and supercedes all prior agreements or understandings dealing with the same subject matter. It settles all claims and disputes which may exist between Garvilla and the Board arising from her employment or otherwise. There is no agreement on the part of the Board to do anything other than as is expressly stated in this Agreement. This Settlement Agreement incorporates the complete financial obligation of the Board with regard to its employment relationship with Garvilla and Garvilla's separation from employment.

25. This Agreement shall in all respects be interpreted, enforced and governed by the Laws of the State of New Jersey.

26. All terms of this Settlement Agreement are deemed material. No modification or amendment of this Agreement will be enforceable unless it is in writing and signed by the party to be charged.

27. Pursusant to law, Garvilla has twenty-one (21) days to consider this Agreement, which she may waive. Further, Garvilla has seven (7) days following executing this Agreement to revoke her acceptance to same. Any such revocation must

be made in writing addressed to Matthew J. Giacobbe, Esq. at Scarinci Hollenbeck, 1100 Valley Brook Avenue, Lyndhurst, New Jersey 07071, and must be received within seven (7) days.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid intending to be legally bound thereby, and are executing the foregoing agreement this 25th day of August, 2008.

Lorraine Garvilla
LORRAINE GARVILLA

Sworn and Subscribed to before me
this 25th day of August, 2008.

Notary Public
State of New Jersey

SUSSEX WANTAGE REGIONAL BOARD OF EDUCATION

Secretary

BY: _____
Thomas Card, President

DATED: 9/11/08

Exhibit A

Lorraine Garvilla
609 County Road 519
Wantage, New Jersey 07461

August 25, 2008

Mr. Thomas Card, President
Sussex Wantage Regional Board of Education
31 Ryan Road
Wantage, New Jersey 07461

Re: Letter of Resignation

Dear Mr. Card:

Pursuant to the terms of the Settlement Agreement between the Sussex Wantage Regional Board of Education and myself, I hereby submit my irrevocable resignation as tenured teaching staff member, effective the close of business on June 30, 2010. This resignation is expressly conditioned upon the Board's compliance with the terms of the parties' Settlement Agreement and the general releases contained therein; and, is of no force and effect, even if accepted, unless said Settlement Agreement and the general releases contained therein which I have executed are fully performed by the College.

Sincerely,

Lorraine Garvilla

Lorraine Garvilla

Exhibit B

Lorraine Garvilla
609 County Road 519
Wantage, New Jersey 07461

August 25, 2008

Mr. Thomas Card, President
Sussex Wantage Regional Board of Education
31 Ryan Road
Wantage, New Jersey 07461

Re: Letter Requesting Sabbatical Leave of Absence

Dear Mr. Card:

I hereby request of the Board that I be granted a sabbatical leave of absence with full pay according to the terms of the Settlement Agreement, dated August 25, 2008. I request that this leave begin on September 1, 2008 and end at the close of business on June 30, 2010.

Thank you for your consideration of my request.

Sincerely,

Lorraine Garvilla

Lorraine Garvilla

EXTRACT FROM THE MINUTES OF A MEETING OF THE
BOARD OF EDUCATION OF SUSSEX-WANTAGE REGIONAL
SUSSEX COUNTY, NJ AS RECORDED IN THE OFFICIAL SET OF MINUTES

The Board of Education of Sussex-Wantage Regional in the County of Sussex, New Jersey, convened in **Regular meeting** on August 21, 2008 at 7:30 p.m. in the Sussex Middle School auditorium, Loomis Avenue, Sussex, New Jersey.

The following members of the Board of Education were present: Mrs. Kathryn Compa, Mrs. Diane Snure, Mrs. Marina Krynicky, Mrs. Ann Smulewicz, Mr. Robert Heiden, Mr. Arthur Jacobs, Mr. Raymond Delbury

The following members were absent: Mr. Robert Holowach, Mr. Thomas Card

Also in attendance were Dr. Edward Izbicki, Superintendent of Schools, Mrs. Christina Riker, Board Secretary, and Mr. Matthew Giacobbe, Board Attorney.

The following resolution was offered by Mr. Jacobs, seconded by Mrs. Compa and adopted by the Board of Education by the following roll call vote:
TITLE OF RESOLUTION: Sabbatical

That the Board approve a two year sabbatical leave for Lorraine Garvilla in accordance with the terms and conditions of the settlement agreement as on file in the employee's personnel file.

Roll Call:	Ayes:	6
	Noes:	1 (Jacobs)
	Absent:	2

State of New Jersey)
County of Sussex) SS

I, Christina M. Riker, Secretary of the Board of Education of Sussex-Wantage Regional in the County of Sussex, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of said district duly called and held on August 21, 2008, has been compared by me with the original minutes as officially recorded in my office in the minute book of said Sussex-Wantage Regional Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract in witness I hereunto set my hand and affixed the corporate seal of said Board of Education the 22nd day of September, 2008.

BOARD SECRETARY

(AFFIX SEAL)

418-08

#418-08

OAL DKT. NO. EDU 12529-07
AGENCY DKT. NO. 328-10/07

SHARON KNOEPFLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter, the parties' proposed Settlement Agreement and Release, and the Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 10/16/08

Date of Mailing: 10/17/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 12529-07

AGENCY DKT. NO. 328-10/07

SHARON KNOEPFLER,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,

Respondent.

Sanford R. Oxfeld, Esq., for petitioner (Oxfeld Cohen, attorneys)

Kalimah Ahmad, Esq., for respondent (Hunt, Hamlin & Ridley, attorneys)

Record Closed: September 24, 2008 Decided: September 25, 2008

BEFORE **MARGARET M. MONACO,** ALJ:

On October 30, 2007, petitioner Sharon Knoepfler filed a Petition of Appeal with the Commissioner of Education contesting the alleged refusal by respondent Board of Education of the Township of Irvington (the Board) to allow petitioner to return to work after being released from her medical restrictions. On December 12, 2007, the Board filed an Answer to Petition. The Department of Education transmitted the matter to the Office of

Administrative Law where, on December 21, 2007, it was filed for determination as a contested case. Settlement conferences were conducted on May 21 and June 6, 2008. On the June 27, 2008 hearing date, the parties engaged in further discussions toward an amicable resolution, and the undersigned adjourned the hearing to provide the parties additional time toward finalizing a settlement. Subsequently, counsel for the Board submitted the attached Settlement Agreement and Release and the attached Resolution of the Board approving the terms of the settlement.

Having reviewed the record and the terms of the settlement I **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that settlement should be approved. Accordingly, I approve the settlement **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless

such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

September 25, 2008
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

Date Received at Agency: 10-1-08

Mailed to Parties:
Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OCT 1 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

SETTLEMENT AGREEMENT AND RELEASE

It is hereby agreed in full settlement of the matter captioned Sharon Knoepfler vs. Board of Education of the Township of Irvington, Essex County; OAL Docket No.: EDUOR 12529-2007N, Agency Ref No.: 328-10/07, as follows:

1. Sharon Knoepfler will return to work at the beginning of the 2008-09 school year with the Irvington Board of Education. She will be given a position within the scope of her certifications; i.e., Elementary School Teacher and/or Early Childhood. The Board shall attempt to assign her to a Basic Skills position.
2. Sharon Knoepfler will receive back-pay retroactive to June 11, 2007. She shall be paid on the current salary guide, which amount will be readjusted when there is a new Collective Negotiations Agreement between the Board and the Irvington Education Association, which will govern the 2007-08 school year and thereafter. Ms. Knoepfler's salary for 2006-07 was approximately $79,800.
3. Sharon Knoepfler will retire no later than her achieving 25 years and one day in the Teacher's Pension and Annuity Fund (TPAF). This Settlement Agreement shall be considered an irrevocable letter of resignation to that effect. As of this date, it is believed that Ms. Knoepfler has 22 years and 4 months credit in the TPAF. It is understood that this amount will be readjusted by the TPAF once Ms. Knoepfler receives her back-pay, as set forth in paragraph 2, supra. Notwithstanding the above, if Ms. Knoepfler obtains employment elsewhere, she shall not be obligated to so retire.

4. Lawrence Knoepfler, the husband of Sharon Knoepfler, has agreed to and will not enter any property of the Irvington Board of Education unless he is specifically invited to do so or unless Sharon Knoepfler suffers a medical emergency.

5. Recognizing the economic condition of the Board, although for all purposes Sharon Knoepfler will be treated as receiving full back-pay for the period of June 11, 2007 until June 30, 2008 (and specifically the Board will make full pension contributions in one lump sum, no later than September 30, 2008, as if the moneys were paid in one lump sum), it is hereby agreed to by the parties that the Board will make the payments towards the back-pay to Ms. Knoepfler in equal payments, together with Ms. Knoepfler's regular salary payments, over a 20- month period.

   - The first payment will be in the sum of $25,000 on September 15, 2008. This payment shall be made in addition to her regular salary payment on that date.
   - The remaining amount of back-pay due Ms. Knoepfler will be pro-rated over the remaining 20-month period (ending no later than June 30, 2010). It is recognized that the payment of Ms. Knoepfler's back-pay may continue after she has retired from employment with the Board.
   - If Ms. Knoepfler is required to proceed before any agency or court to enforce this settlement agreement the Board will be responsible for her attorney's fees.

6. Sharon Knoepfler, on behalf of her heirs and assigns only, hereby release the Board, its officer, agents and employees from any claim of any kind, including any claim of discrimination, that arose at any time prior to the signing of this Agreement.
7. The Irvington Board of Education, it officers, agents and employees, hereby release Sharon Knoepfler from any claim of any kind that arose at any time prior to the signing of this Agreement.
8. This Agreement settles disputed claims and is not to be regarded as one side prevailing over the other concerning the subject matter of the within litigation.
9. The Irvington Board of Education must ratify the terms of this Settlement Agreement.

7/29/08
Dated

Sharon Knoepfler

07/29-2008
Dated

Lawrence Knoepfler (as to item # 4 only)

9/14/2008
Dated

For the Irvington Board of Education

9/17/08
Dated

For the Irvington Board of Education

REGULAR BOARD MEETING SEPTEMBER 17, 2008
WALK - ON

RESOLUTION TO ENTER SETTLEMENT OF ALL CLAIMS AGAINST THE IRVINGTON BOARD OF EDUCATION IN THE MATTER ENTITLED, SHARON KNOEPFLER v. IRVINGTON BOARD OF EDUCATION FOR THE SUM OF $85.000.00

WHEREAS, the Irvington Board of Education was named as the Respondent in a lawsuit entitled Sharon Knoepfler v. Irvington Board of Education in the Office of Administrative Law, Docket Number, EDUOR-1229-2007N; and

WHEREAS, the parties having begun litigation of the matter, have reached an amicable settlement of all claims without admission of fault or liability on behalf of the school district; and

WHEREAS, the Irvington Board of Education is desirous of settlement of this matter to end further litigation and to avoid additional attorneys fees and costs.

NOW THEREFORE BE IT RESOLVED, that the Irvington Board of Education hereby agrees to the proposed settlement of the aforementioned case for back pay of the Petitioner's salary from June 11, 2007 until June 30, 2008 for the approximate sum of $85,000.00.

ACTION:
Motion by: Darlene Reeves, Seconded by: Anthony
Roll Call: 5) Ayes – Carty, Inman, Reeves, Scott, Screven, Vauss, Williams
1) No - Waller

As Certified by:

Reggie Lamptey, CPA
Assistant Superintendent for Business/Board Secretary

rp

#419-08

AGENCY DKT. NO. 78-3/08

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	ORDER
D.K., ON BEHALF OF MINOR CHILDREN, K.T. AND K.A.T.,	:	
RESPONDENT.	:	

On June 25, 2008, a final agency decision was rendered in this matter, wherein the Commissioner ordered that respondent, Diana Keim, be assessed $29,303.08 in tuition to compensate the Hamilton Township Board of Education for her children's period of ineligible attendance in the public schools of the district pursuant to *N.J.S.A.* 18A:38-1. The Board subsequently notified the Commissioner that respondent had failed to pay any of the judgment against her, and it requested that the Commissioner seek entry of the assessment on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. Petitioner offered no reasons why the judgment against her should not be so docketed, although given an opportunity by this agency to do so.

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, Diana Keim is now subject to entry of a judgment by the court in the amount of $29,303.08, with interest to accrue as provided by law.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 10/17/08

Date of Mailing: 10/20/08

#421-08

421-08

AGENCY DKT. NO. 177-6/08

THOMAS ISHERWOOD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The submissions by the above referenced parties and the letter dated October 8, 2008 from petitioner's counsel withdrawing the petition in the above captioned case have been reviewed. The Commissioner hereby approves the withdrawal of the controversy and the matter is accordingly closed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 10/17/08

Date of Mailing: 10/20/08

424-08

G.J., on behalf of minor child, E.J.,	:	
PETITIONER,	:	
V.	:	
WESLEY HILL, BERLIN COMMUNITY ELEMENTARY SCHOOL, CAMDEN COUNTY,	:	
RESPONDENT.	:	
AND	:	COMMISSIONER OF EDUCATION
G.J., on behalf of minor child, E.J.,	:	DECISION
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF BERLIN, CAMDEN COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Pro se petitioner filed a petition of appeal and application for emergent relief appeal, seeking immediate removal of teacher Wesley Hill from the classroom following an incident in which he allegedly struck and injured the petitioner's son on a school bus, during a field trip. Emergent relief was denied, and the matter proceeded at the Office of Administrative Law (OAL) on its merits, i.e. the question of whether the Board acted unreasonably in determining not to remove respondent from contact with students during the pendency of its investigation into the underlying incident. Respondent Hill filed a motion for summary decision on the grounds that the investigation conducted by the Board had concluded that the incident was an accident. Petitioner filed no response to the motion.

The ALJ concluded that: petitioner's claim is now moot as the Board's investigation concluded with a decision that no action was necessary; there is no legal authority by which to suspend or terminate employment of a teaching staff member separate from the process laid out in the tenure laws (*N.J.S.A.* 18A:6-10 *et seq*); there are no material facts in dispute, and summary decision for both respondents should be granted as a matter of law.

Upon a full and independent review, the Commissioner adopted the Initial Decision as the final decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

October 22, 2008

OAL DKT. NOS. EDU 4282-08
AGENCY DKT. NOS. 137-5/08 AND 139-5/08 (CONSOLIDATED)

G.J., on behalf of minor child, E.J.,

PETITIONER,

V.

WESLEY HILL, BERLIN COMMUNITY ELEMENTARY SCHOOL, CAMDEN COUNTY,

RESPONDENT.

AND

G.J., on behalf of minor child, E.J.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF BERLIN, CAMDEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon her full review, the Commissioner concurs with the Administrative Law Judge that summary decision is appropriately granted to respondents and this matter should be dismissed as moot.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter for the reasons presented therein and the instant case is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 10/22/08

Date of Mailing: 10/22/08

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 04282-08

AGENCY DKT. NOS. 137-5/08 and 139-5/08 (Consolidated)

G.J. ON BEHALF OF MINOR CHILD, E.J.,

Petitioner,

v.

WESLEY HILL, BERLIN COMMUNITY ELEMENTARY SCHOOL, CAMDEN COUNTY,

Respondent.

and

G.J. ON BEHALF OF MINOR CHILD, E.J.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF BERLIN, CAMDEN COUNTY,

Respondent.

G.J., petitioner, pro se

Michael Damm, Esq., for respondent Wesley Hill (Selikoff & Cohen, attorneys)

Allan P. Dzwilewski, Esq., for respondent Berlin Borough Board of Education (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: August 15, 2008 Decided: September 25, 2008

BEFORE **LISA JAMES-BEAVERS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner G.J. o/b/o E.J., a minor child, initially petitioned the Commissioner of Education, pursuant to N.J.A.C. 6A:3-1.1 et seq., for an order (1) seeking immediate removal of a teacher from his classroom assignment due to his alleged assault against E.J.; and (2) removing the teacher from any contact with minors at all for the safety of the other students.

On May 19, 2008, petitioner G.J., E.J.'s mother, filed a petition with the Commissioner seeking emergent relief. On May 21, 2008, the Director of the Bureau of Controversies and Disputes of the New Jersey Department of Education notified petitioner that the Bureau could take no action regarding her request for termination of respondent Wesley Hill's employment or loss of his license due to the fact that such matters are within the exclusive purview of the local district board of education and State Board of Examiners, respectively. However, the Bureau set forth that it would construe her petitions as an emergent appeal of the Berlin school district's determination not to suspend teacher Wesley Hill while its investigation into her allegations is pending pursuant to N.J.S.A. 18A:25-6 and N.J.S.A. 18A:6-8.3. The Bureau advised her that she would have to demonstrate the standards set forth in N.J.A.C. 6A:3-1.6. The Director thereafter transmitted the matter to the Office of Administrative Law (OAL), where it was filed on May 22, 2008, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13 for determination as a contested case.

On May 27, 2008, I heard the application for emergent relief. On May 28, 2008, I issued an Order denying the application for emergency relief on the basis that petitioner failed to meet the standards required for such relief. On June 5, 2008, the Commissioner of Education adopted the Order as the final Order in the emergent matter

and returned the matter to the Office of Administrative Law for such proceedings as may be necessary to bring it to closure. On June 16, 2008, Wesley Hill filed a motion for summary decision on the grounds that the investigation conducted by the Berlin Borough of Education has concluded and there are no other matters remaining that are within the jurisdiction of the Office of Administrative Law. The record closed when it was clear that G.J. was not going to file a response.

FINDINGS OF FACT

1. The Commissioner of Education transmitted the present case to the Office of Administrative Law solely on the question of whether the Board acted unreasonably in determining not to remove respondent Wesley Hill from contact with students while its investigation into the underlying incident involving petitioner's child was pending.

2. The Berlin Borough Board of Education's investigation into the incident had concluded by the time of the hearing on the request for emergent relief, with the Board concluding that what occurred was an accident and therefore disciplinary action against Mr. Hill was unwarranted.

3. Since the petition involved only the school district's failure to suspend respondent Hill during the pendency of the investigation, and since the investigation has concluded, there are no remaining issues for the Office of Administrative Law to determine.

CONCLUSIONS OF LAW

Petitioner argued strenuously that because assault on a student is conduct unbecoming a teacher, it is therefore just cause for suspension. Although this is true, there is no precedent for a parent to compel such action when the local board refuses to act. Pursuant to N.J.S.A. 18A:25-6, teaching staff members may be suspended by the authority of the superintendent of schools, with the approval of the president of the

board employing him or her. Similarly, N.J.S.A. 18A:6-8.3 provides for the suspension with pay of any employee of a board of education pending any investigation, hearing or trial. This statute does not authorize a parent to compel the board to suspend pending an investigation if the board does not feel it is necessary and does not mandate that a board suspend an employee pending an investigation. In the present case, the investigation concluded with the board deciding that no action was necessary. Therefore, I **CONCLUDE** that petitioner's claim is now moot.

Further, because discipline of board employees is solely within the purview of the local board of education, there is no legal authority on which I can rely to suspend or ultimately terminate the employment of a teaching staff member separate from the process established by law for removal of tenured employees. N.J.S.A. 18A:6-10 et seq. I therefore **CONCLUDE** that there are no material facts in dispute and summary decision for both respondents should be granted as a matter of law.

ORDER

It is hereby **ORDERED** that summary decision is granted to respondents. G.J.'s petition is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

9/25/08

DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency:

September 26, 2008

Mailed to Parties:

SEP 30 2008

DATE

OFFICE OF ADMINISTRATIVE LAW

#426-08E

426-08

OAL DKT. NO. EDU 11588-08
AGENCY DKT. NO. 291-10/08

E.M., ~~ON~~ BEHALF OF MINOR CHILD, J.B., :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK AND BOARD OF TRUSTEES OF THE GREATER NEWARK CHARTER SCHOOL, ESSEX COUNTY, :

RESPONDENTS. :

COMMISSIONER OF EDUCATION

DECISION ON APPLICATION FOR EMERGENT RELIEF

The record of this emergent matter, which included an audiotape of the hearing conducted at the Office of Administrative Law on October 9, 2008, and the Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner determines to reject the order of the ALJ for the reasons which follow hereinafter, as she is persuaded that petitioner has satisfied the requisite standards for the granting of emergent relief pursuant to *Crowe v. DeGioia, 90 N.J.* 126 (1982). The Commissioner notes that harm is "irreparable" when there can be no adequate after-the-fact remedy in law or in equity. Furthermore – as pointed out in *Crowe, supra* – in certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief to maintain the *status quo* during the pendancy of the action. In the within matter, J.B. is threatened with loss of his placement at North Hudson Academy, a placement which Administrative Law Judge Leslie Celentano found "appropriate and in accordance with IDEA individualized education requirements" and where J.B. has been

attending since he was placed there in May 2007 by the Greater Newark Charter School. *E.M., on behalf of J.B. v. East Orange Board of Education*, EDS 12493-07, Agency Docket No. 2008-12948, decided June 26, 2008. The intangibles associated with the trauma of an unwarranted removal from an appropriate special education placement and consequent disruption to J.B.'s education program cannot be compensated adequately following the conclusion of the plenary hearing.

The charter school law which provides the underlying legal right for petitioner's claim in this matter is correctly summarized in Judge Celentano's opinion. It is clear that having attended the Greater Newark Charter School in the preceding year, J.B. was entitled to continue to attend. *N.J.S.A.* 18A:36A-8b. When petitioner moved from Newark to East Orange, she was required to first register J.B. in the East Orange district; however East Orange had no discretion to insist that J.B. attend the schools in the district but, rather, was required to process his registration in the charter school for the subsequent school year. *N.J.A.C.* 6A:23-9.5(a). Pursuant to *N.J.S.A.* 18A:36A-11, it is the charter school's responsibility to develop an I.E.P., including program and placement. Accordingly, J.B.'s legal right to continue to attend North Hudson Academy is settled as matter of law. Furthermore, the facts in this matter are not in dispute; they are clearly summarized in Judge Celentano's opinion. When the law is applied to those facts, as implied in Judge Celentano's opinion and as succinctly summarized by counsel for the Newark public schools in his letter brief submitted in regard to the instant emergent relief hearing, the probable conclusion following a hearing on the merits is that East Orange is the district responsible for J.B.'s free and appropriate education and related services at North Hudson Academy.

In considering the final test for granting of a preliminary injunction, i.e. balancing the relative hardship to the parties in granting or denying relief, the Commissioner is persuaded that J.B. would suffer greater harm from discontinuance of his legally selected placement than respondent East Orange would suffer from an order temporarily requiring it to pay for that placement pending a resolution of the issues in this case on the merits.

Finally, the Commissioner observes that although the present forum is the appropriate jurisdiction for challenging assignment of financial responsibility pursuant to the Charter School Program Act, it is the Commissioner's considered opinion that *N.J.S.A.* 18A:36A-11b required East Orange to commence an action with the Office of Special Education Programs if it wished to challenge the Greater Newark Charter School's determination that North Hudson Academy was an appropriate placement in the least restrictive environment. In this regard, the Commissioner disagrees with the conclusion reached by the ALJ in *Garfield Board of Education v. T.C. and D.C. and Bergen Arts and Science Charter School on behalf of J.C.* EDS 3508-08, final decision May 7, 2008 http://lawlibrary.rutgers.edu/oal/search.html, and relied upon by Judge Celentano. As previously explained on various occasions, neither the Commissioner nor the ALJ – in the context of a school law dispute heard pursuant to *N.J.S.A.*18A:6-9 – has the authority to reach conclusions regarding the appropriateness of an individualized education program or the manner in which it is implemented. See *Golden Door Charter School v. State-Operated School District of the City of Jersey City, Hudson County*, decided by the Commissioner March 15, 2007 and cases cited therein at footnote 11.

For all of the foregoing reasons, petitioner's request for emergent relief is granted and the East Orange Board of Education is hereby ordered to pay the costs for J.B.'s special education placement and related services, including transportation, effective September 4, 2007

and continuing as long as petitioner is a resident of East Orange or until further order of the Commissioner. Should it later be determined – either in the context of the within matter or another action commenced by East Orange – that another entity is responsible for some or all of the costs related to the period of time J.B. has attended North Hudson Academy, appropriate monetary adjustments can be made at that time. This matter shall be returned to OAL for a hearing on the merits.

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 10/24/08

Date of Mailing: 10/24/08

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c.36.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON APPLICATION FOR EMERGENT RELIEF

OAL DKT. NO. EDU 11588-08
AGENCY DKT. NO. 291-10/08

E.M. O/B/O MINOR CHILD, J.B.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK AND BOARD OF TRUSTEES OF THE GREATER NEWARK ESSEX COUNTY.

Respondent.

Esther Canty-Barnes, Esq., representing petitioner,

Andrew W. Li, Esq., for respondent, Board of Education of the City of East Orange (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Arsen Zartarian, Esq., for respondent, State Operated School District Of the City of Newark

Daryls Gutierrez, Esq., for respondent, Greater Newark Charter School (Adams, Stern, Gutierrez & Lattiboudere, attorneys)

BEFORE: **IMRE KARASZEGI, J.R.,** ALJ

Petitioners bring this action seeking emergency relief under N.J.A.C. 6A:3-1 et seq. to seek clarification regarding which school district is responsible for the placement and transportation costs for a non-resident student who was placed in a private school for the handicapped by a charter school. On October 1, 2008, the Commissioner of Education received Petitioner's application for emergent relief. On October 6, 2008, the Commissioner of Education transmitted the matter to the Office of Administrative Law where it was filed as a contested case. On October 9, 2008, I heard oral argument on the emergent relief application.

Legislation creating charter schools is clear and unequivocal with respect to both a charter school's independent obligation to educate handicapped students and the limited responsibility of the students' districts of residence for the additional costs of so doing:

A charter school shall comply with the provisions of chapter 46 of Title 18A of the New Jersey Statutes concerning the provision of services to handicapped students; except that the fiscal responsibility for any student currently enrolled in or determined to require a private day or residential school shall remain with the district of residence. N.J.S.A. 18A:36A-11b.

A district of residence, as defined in N.J.A.C. 6A:11-1.2 is defined as the school district in which a charter school facility is physically located; if a charter school is approved with a region of residence comprised of contiguous school districts, that region is the charter school's district of residence.

The standards for the granting of emergency relief are set forth in N.J.A.C. 6A:3-1.6(b). It may be granted if the judge determines from the proofs that:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;

2. The legal right underlying the petitioner's claim is settled;

3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

In the instant case, after hearing the arguments of counsel and any other documentation submitted, I find that petitioner is not entitled to emergent relief because the proofs submitted have failed to establish the necessary elements to grant emergency relief under N.J.A.C. 6A:3-1.6(b). Specifically, there has been no showing of irreparable harm by petitioner in the event petitioner would not attend North Hudson Academy by virtue of the denial of this emergent application. Petitioner's motion for emergent relief is therefore **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by the Commissioner of the Department of Education, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner of the Department of Education does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

October 9, 2008
Date:

IMRE KARASZEGI, JR., ALJ

#427-08

IN THE MATTER OF THE APPLICATION OF THE BOARD OF EDUCATION OF THE BOROUGH OF MILFORD, HUNTERDON COUNTY, FOR AN ORDER DIRECTING ISSUANCE OF BONDS PURSUANT TO *N.J.S.A.* 18A:7G-12.	:	COMMISSIONER OF EDUCATION DECISION

SYNOPSIS

Petitioning Board filed an appeal with the Commissioner seeking an order directing the issuance of bonds for a capital project pursuant to *N.J.S.A.* 18A:7G-12. The project seeks to address health and safety issues in the district's single building, built in 1923, and a gymnasium built in the 1950s. The Board issued three separate referenda over the past two years seeking to address building needs including, *inter alia,* electrical upgrades, installation of a fire alarm system, roof replacement, exit signs and emergency lighting, all of which have been defeated by voters.

Following hearing at the Office of Administrative Law, the ALJ found and concluded that the Board's facilities are in desperate need of repair to address core health, safety and security issues, and that the capital project for which it seeks issuance of school bonds is necessary in order to continue to provide its students with a thorough and efficient education. According, the ALJ ordered that the petition be granted, and that $800,000 in school bonds be issued for this required school facilities project.

The Commissioner concurred with the ALJ, and authorized the Board to prepare for issuance of bonds in the amount of $800,000 to fund the local share of the project. The Commissioner further directed that plans and specifications be submitted to the Office of School Facilities, so that the project will proceed as an Authority project pursuant to *N.J.S.A.* 18A:7G-12 and the applicable provisions of *N.J.A.C.* 6A:26.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

October 24, 2008

OAL DKT. NO. EDU 8320-08
AGENCY DKT. NO. 134-5/08

IN THE MATTER OF THE APPLICATION OF THE BOARD OF EDUCATION OF THE BOROUGH OF MILFORD, HUNTERDON COUNTY, FOR AN ORDER DIRECTING ISSUANCE OF BONDS PURSUANT TO *N.J.S.A.* 18A:7G-12.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter, and the Report and Recommendation of the Administrative Law Judge (ALJ) issued by the Office of Administrative Law following hearing pursuant to *N.J.S.A.* 52:14F-5(o), have been reviewed. No comments were filed by the Board of Education (Board) pursuant to *N.J.A.C.* 6A:26-3.7(i)3i.

Upon review, the Commissioner concurs with the ALJ that the Board has demonstrated the necessity of its proposed project for the provision of a thorough and efficient system of education in the district. The Commissioner, therefore, authorizes the Board to prepare for issuance of bonds in the amount of $800,000 to fund the local share of such project and directs that detailed plans and specifications be submitted to the Office of School Facilities, where the project shall proceed forthwith as an Authority project pursuant to *N.J.S.A.* 18A:7G-12 and the applicable provisions of *N.J.A.C.* 6A:26.

IT IS SO ORDERED.*

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 10/24/08
Date of Mailing: 10/24/08

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8320-08
AGENCY DKT. NO. 134-5/08

IN THE MATTER OF THE APPLICATION OF THE BOARD OF EDUCATION OF THE BOROUGH OF MILFORD, HUNTERDON COUNTY, FOR AN ORDER DIRECTING ISSUANCE OF BONDS PURSUANT TO N.J.S.A. 18A:7G-12.

Philip E. Stern, Esq., for petitioner, Milford Borough Board of Education, Hunterdon County (Adams, Stern, Gutierrez & Lattiboudere, attorneys)

Record Closed: October 2, 2008 Decided: October 10, 2008

BEFORE **DOUGLAS H. HURD,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, the Milford Borough Board of Education (Hunterdon County), filed a petition of appeal with the Commissioner of Education, dated May 13, 2008. The petition sought an Order directing the issuance of bonds for a capital project pursuant to N.J.S.A. 18A:7G-12.

On August 11, 2008, the Department of Education transmitted the petition to the Office of Administrative Law for an uncontested case hearing. The uncontested case hearing was properly noticed to the public, and the hearing was held on October 2, 2008 in the Hunterdon County Library in Flemington, New Jersey. At the hearing, the Board presented two witnesses and entered documents into evidence. No members of the public appeared at the hearing.

ANALYSIS

The statute governing this application is N.J.S.A. 18A:7G-12, which states as follows:

> A district, other than a district under full State intervention, that sought approval pursuant to section 11 of P.L.2000, c.72 (C.18A:7G-11) of a school facilities project without excess costs but failed to receive that approval, and within the three years prior to that, sought and failed to receive approval of that school facilities project with or without excess costs, may submit the project to the commissioner and request that the commissioner approve the project and authorize the issuance of school bonds for the local share of the project. Upon receipt of the request, the commissioner shall review the school facilities project and determine whether the project is necessary for the provision of a thorough and efficient system of education in the district. If the commissioner concludes that the project is necessary, the commissioner may approve the project without excess costs and authorize the issuance of school bonds to fund the local share. In addition to the amount of taxes determined by the legal voters of the district at the annual school election, the secretary of the board of education shall certify the amount required for the repayment of the interest and principal of the bonds required to fund the local share amount approved by the commissioner in the same manner required for interest and debt redemption charges pursuant to N.J.S.A. 18A:22-33, and the amount so certified shall be included in the taxes assessed, levied and collected in the municipality or municipalities comprising the school district for those purposes.
>
> Any school facilities project authorized pursuant to this section shall be undertaken by the development authority in accordance with an agreement between the development authority and the district. Nothing in this section shall preclude a school district under full State intervention from using the process established pursuant to section 2 of P.L.1991, c.139 (C.18A:7A-46.2) to obtain the approval of the commissioner to undertake a school facilities project.

In support of its application to meet the standards set forth in the statute, the District presented the testimony of Scott Mihalick, Architect, and Maggy Cully, Principal. The District also relied upon photographs of the school and the documents attached to the petition of appeal. The District also presented evidence that the hearing in this matter was announced and published in accordance with the Department's instructions in the transmittal letter.

The evidence presented shows that Milford is a non-abbott school district that serves a student population from preschool through eighth grade. For the past two years, the District has issued three separate referenda, all of which have not been approved. See Exhibits A, B and C.

The last referendum was issued on September 25, 2007 and consisted of two questions. The first question sought additional funding of $800,000 and included the following health and safety measures: electrical upgrades, electrical distribution upgrades, gymnasium roof replacement, installation of a fire alarm system, clock/intercom/security system upgrades and in the installation of exit signs and emergency lighting. The question received a tie vote from the taxpayers of 109 – 109. The second question on this referendum was defeated outright by the voters.

On May 12, 2008, the Board appealed the defeat of the first question of the September 25, 2007 referendum to the Commission of Education. The Board contends that this funding must be approved to address critical health, safety and security concerns.

The testimony offered by the Board's two witnesses demonstrated that the Board presented only the most critical health, safety and security concerns for funding approval. The testimony by both witnesses was credible and compelling with respect to all areas requested for funding. It is clear from the evidence that the funding requested in this application is for basic, core needs to keep the building operating.

The District is comprised of a single building that was built in 1923, and a gymnasium built in the 1950s. The testimony established that the electrical system is in serious need to be upgraded since the existing circuit panel is antiquated and does not provide sufficient power to the classrooms throughout the building. There is only a 400amp service and it does not have enough power to go around properly to the whole building. In certain classrooms when an overhead projector or computer is used, it causes problems in that classroom or nearby classrooms that are also using electrical service. The funding from the bond issuance would be used to provide 800amp service and better distribution to the building by upgrading the panels.

The evidence showed that the gymnasium roof is a flat roof from the 1950s. It leaks over the gym floor, causing water to be on the gym floor and compromising the floor. The school has to keep buckets on the gym floor when it rains to prevent damage. They currently have tarp draped over the skylights and surrounding areas to prevent further damage to the facility. P-2(a)(b) and (e). This is not a permanent solution, according to the witnesses.

The witnesses also described the communication system at the school. At this time, there is no public address system in the school. The witnesses consider this a security issue because they cannot get out school wide announcements to everyone when a lock-down occurs. There have been three lock-down incidents over the past few years and the principal has had to go around to each room to provide notice. If there was an intercom or public address system, the announcement could go to the whole school immediately.

The need to upgrade the fire alarm system is related to the need for a communications system. The witnesses' testimony articulated the need for an upgrade to the fire alarm system to include strobe lighting and alert sirens. The witnesses also addressed the need for Exit signs and emergency lighting.

In conclusion, it is clear that the District's facilities are in desperate need of repair to address core health, safety and security issues. The proofs overwhelmingly

demonstrate that the capital project for which it seeks issuance of school bonds is necessary for the Board to continue to provide its students with a thorough and efficient education.

ORDER

Based on the foregoing, it is hereby **ORDERED** that the petition of appeal filed by the Milford Borough Board of Education be **GRANTED**, and that $800,000 in school bonds be issued for the school facilities project that is the subject of this application.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

10-10-08

DATE

DOUGLAS H. HURD, ALJ

Date Received at Agency: 10-10-08

Mailed to Parties:

OCT 16 2008

DATE

OFFICE OF ADMINISTRATIVE LAW

/cs/lam

WITNESSES

Scott Mihalick, Architect

Maggy Culley, Principal

EXHIBITS

P-1 Petition of Appeal, along with attached Exhibits A – D

P-2 Five Photographs (A – E) of the School Building

428-08

428-08

OAL DKT. NO. EDU 1525-08
AGENCY DKT. NO. 386-12/07

V.W., ~~on~~ behalf of minor child, M.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT OLIVE, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter, the parties' proposed Settlement Agreement and Release, and the Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille T Day

COMMISSIONER OF EDUCATION

Date of Decision: 10/24/08

Date of Mailing: 10/27/08

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 01525-08
AGENCY DKT. NO. 386-12/07

V.W. O/B/O MINOR CHILD, M.W.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT OLIVE, MORRIS COUNTY,

Respondents

John P. Robertson, II, Esq., for petitioner (Hanlon, Dunn & Robertson, attorneys)

Marc H. Zitomer, Esq., for respondent (Schwartz, Simon, Edelstein, Celso, & Kessler, attorneys)

Record Closed: September 24, 2008 Decided: September 25, 2008

BEFORE **J. HOWARD SOLOMON,** ALJ:

This matter was transmitted to the Office of Administrative Law on January 29, 2008, for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

A hearing was scheduled for September 24, 2008. The parties appeared and agreed to settle this matter and have prepared the attached Settlement Agreement and Release indicating the terms of settlement.

I have reviewed the record and the settlement terms and I **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

9-25-08
DATE

J. HOWARD SOLOMON, ALJ

Receipt Acknowledged:

10-1-08
DEPARTMENT OF EDUCATION

DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OCT 1 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

pb

SCHWARTZ SIMON
EDELSTEIN CELSO & KESSLER LLC
44 Whippany Road, Suite 210
P.O. Box 2355
Morristown, NJ 07962
(973) 301-0001
Attorneys for Respondent

V.W. on behalf of M.W.,	:	BEFORE THE COMMISSIONER OF EDUCATION
Petitioner,	:	AGENCY DOCKET NO. 386-12/07 OAL DOCKET NO: EDUOS 01525-2008N
vs.	:	
MOUNT OLIVE BOARD OF EDUCATION,	:	**SETTLEMENT AGREEMENT AND RELEASE**
Respondent.	:	

WHEREAS, the Mt. Olive Board of Education ("the Board") is a body politic and corporate, organized and existing by virtue of the laws of the State of New Jersey, N.J.S.A. 18A:11-1, which is entrusted with maintaining and conducting the public schools of the Mount Olive School District; and

WHEREAS, M.W. is a fourteen year old pupil (D.O.B. 12/13/93) residing within the jurisdiction of the Board who previously attended school in the Mt. Olive School District; and

WHEREAS, on September 24, 2007, the Board held a Suspension/Expulsion hearing for M.W. as a result of M.W. being adjudicated delinquent in Morris County Superior Court Family Part for certain acts of aggravated sexual assault/contact, which he perpetrated off-school grounds against two other pupils; and

WHEREAS, following the Board hearing, the Board passed a resolution permanently removing M.W. from the regular education program and seeking to place him in an alternative education program at Board expense; and

WHEREAS, M.W. through legal counsel respectfully disagreed with and objected to the Board's action; and

Encl. J-1

WHEREAS, Petitioner V.W. is the mother of M.W.; and

WHEREAS, on or about December 21, 2007, Petitioner filed a Petition of Appeal with the Commissioner of Education challenging the Board's action; and

WHEREAS, on or about January 28, 2008, the Board filed an Answer and Affirmative Defenses; and

WHEREAS, on or about February 4, 2008, the Department of Education transmitted the matter to the Office of Administrative Law as a contested case, where it was assigned to Administrative Law Judge Howard J. Solomon; and

WHEREAS, M.W. has been accepted into and is currently enrolled in a vocational/academy school program (Morris County School of Technology) for the 2008-09 school year at Board expense; and

WHEREAS, the parties, wishing to resolve the within matter amicably without the need for litigation, while achieving the goals of both parties, hereby stipulate to settle same, subject to the terms and conditions set forth herein, upon approval by the Court and the Commissioner of Education;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the legal sufficiency of which is hereby acknowledged by the parties, they agree as follows:

1. Petitioner will withdraw the Petition of Appeal in this case with prejudice, upon the Board's approval of this Agreement (subject to approval by the Court and the Commissioner of Education).

2. By approving this Agreement, the Board hereby rescinds the action that it took at its September 24, 2007 meeting permanently removing M.W. from the regular education program such that his record shall not reflect or contain any reference to any suspension or expulsion or the permanent removal of M.W. from the regular education program in Mt. Olive.

3. Petitioner agrees that M.W. will not be educated in the Mt. Olive School District, including but not limited to the Mt. Olive High School, now and in perpetuity. Further, M.W. will not be permitted to participate in any school-sponsored events or activities. In addition, M.W. will not be permitted to attend any school-sponsored events or activities or to be on Board of Education property unless accompanied by a parent or guardian at all times and solely for purposes directly related to his sibling who is a pupil in the District.

4. In the event that M.W. elects not to continue his education in the program in which he is currently enrolled for the Fall of 2008, Petitioner understands that the Board will only pay tuition for a different school or program up to the annual per pupil tuition cost in the Mt. Olive School District at that time. Moreover, the District will only provide transportation for a school/program located in Morris County.

5. The parties acknowledge that the Board's obligation to educate M.W. will cease at the time he reaches the age of 20 or graduates.

6. The parties acknowledge that nothing in this settlement shall be construed as preventing the Board from discontinuing educational services to M.W. in accordance with the provisions of N.J.A.C. 6A:16-7.5 for any future disciplinary infractions or infractions of which it was unaware at the time this Agreement is executed. However, Petitioner is not waiving and hereby reserves the right to object to or contest any future Board action.

7. The parties acknowledge that in the event that M.W. commits any type of civil or criminal infraction in the future, that the Board reserves the right to rely upon his prior criminal adjudications, supra, in determining the appropriate penalty.

8. Petitioner agrees to indemnify and hold the Board, collectively and individually, its agents and its employees harmless in the event that M.W. commits any future civil or criminal infractions against anyone for which legal action is instituted against the Mt. Olive School District.

9. Petitioner hereby releases the Board, collectively and individually, its agents and its employees from any and all claims which could have been brought up until now arising out of M.W.'s education in the Mt. Olive School District.

10. Petitioner hereby acknowledges that she entered into this Agreement with a full understanding of her rights and that she was fully informed of the implications of this agreement by her counsel John P. Robertson II, Esq. Petitioner also enters into it without duress and of her own free will and volition.

11. Charles N. Wille is the father of M.W and husband of Petitioner. Although not a party to this action, Charles N. Wille agrees to be bound to its terms and acknowledges that he was also fully informed of the implications of this agreement by John P. Robertson II, Esq. and enters into it without duress and of his own free will and volition.

12. This Agreement represents the entire understanding of the parties and may be modified only in a subsequent written instrument, duly executed by the parties. No other representations of any kind shall be binding upon the parties.

13. This Agreement and all provisions hereof shall be governed by and construed under the laws of the State of New Jersey.

14. This Agreement shall not be construed as an admission of liability by either party and neither party shall be considered the prevailing party for any purpose.

15. The Board President is authorized to execute this Agreement on behalf of the Board of Education.

16. This Agreement is subject to approval by the Board.

IN WITNESS WHEREOF, the signatures and/or seals of the parties or their duly authorized representatives have been set forth on the dates indicated below:

Vicki Wille
Vicki L. Wille

Date: 9-18-08

WITNESS:

/s/ JOHN P. ROBERTSON II, ESQ.

Date: 9/18/08

Charles Wille
Charles N. Wille

Date: 9/18/08

WITNESS:

/s/ JOHN P. ROBERTSON II, ESQ.

Date: 9/18/08

FOR THE MOUNT OLIVE BOARD OF EDUCATION:

Mark Werner, BOARD PRESIDENT

Date: 9/22/08

ATTEST: _____ Date: 9/22/08

EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT OLIVE MORRIS COUNTY, N.J., AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the Township of Mount Olive in the County of Morris, New Jersey, convened in regular session on Monday, September 22, 2008 at 7:00 PM at the Mount Olive Middle School, 160 Wolfe Road, Budd Lake, New Jersey 07828.

The following members of the Board of Education were present:

Mark Werner, President	Anthony Giordano
Daniel Amianda	Robert Mania
Kathryn Criscuolo	William Robinson
Rene Gadelha	Anthony Strillacci

The following members of the Board of Education were absent:

Bruce Bott

The following resolution was offered by Mr. Werner, seconded by Mr. Strillacci, and adopted by the Board of Education by the following roll call vote:

TITLE OF RESOLUTION: **SETTLEMENT AGREEMENT AND RELEASE**

RESOLUTION: **Resolved,** that the Mt. Olive Township Board of Education hereby approves the Settlement Agreement and Release in the matter captioned *V.W. o/b/o M.W. v. Mount Olive Township Board of Education, OAL Docket No. EDUOS 01525-2008N* in accordance with the terms and conditions contained therein; and

Be it Further Resolved, that the Board President is authorized to execute this Agreement on behalf of the Board of Education.

ROLL CALL: AYES: Mr. Amianda, Mrs. Criscuolo, Mrs. Gadelha, Mr. Giordano, Mr. Mania, Mr. Robinson, Mr. Strillacci, and Mr. Werner

NOES: None

STATE OF NEW JERSEY }
}ss
COUNTY OF MORRIS }

I, Lynn Jones, Secretary to the Board of Education of the Township of Mount Olive, in the County of Morris, State of New Jersey, hereby certify that the foregoing extract from the Minutes of the meeting of the Board of Education of said district duly called and held on September 22, 2008 has been compared by me with the original Minutes as officially recorded in my office in the Minute Book of said Mount Olive Township Board of Education and is a true, complete copy thereof and of the whole of said original Minutes, so far as the same relates to the subject matter referred to in said Board of Education this 23rd day of September 2008.

Lynn Jones

Lynn Jones, Board Secretary

Encl. F-2

#431-08

IN THE MATTER OF THE TENURE	:	
HEARING OF ISAAC PITTS,	:	
STATE OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK,	:	DECISION
ESSEX COUNTY.	:	
	:	

SYNOPSIS

District brought tenure charges of conduct unbecoming and other just cause against respondent, a school social worker, seeking his dismissal on grounds that he inappropriately touched a twelfth-grade-female student on May 16, 2007. Respondent denied the allegations.

The ALJ recommended dismissal of the District's charges, finding that the District failed to meet its burden of proving them by a preponderance of the credible evidence. The ALJ held that the student in question was not a credible witness, and the District presented no testimony or evidence to corroborate the student's representations.

Following careful review and independent consideration of the record, including the hearing transcripts and exhibits, the Commissioner concurred with the ALJ's conclusions and ordered the charges dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

October 27, 2008

OAL DKT. NO. EDU 3335-08
AGENCY DKT. NO. 51-2/08

IN THE MATTER OF THE TENURE	:	
HEARING OF ISAAC PITTS,	:	
STATE OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK,	:	DECISION
ESSEX COUNTY.	:	
	:	

In this matter, tenure charges were brought against respondent as a result of allegations made by a student, M.B., who reported that respondent had used force against her to touch her improperly. After four days of hearing testimony in the Office of Administrative Law (OAL), the Administrative Law Judge (ALJ) recommended dismissal of the charges, finding that M.B. was not a credible witness and "[t]he District was unable to present any other testimony or produce other evidence to corroborate M.B.'s testimony." (Initial Decision at 11) Having carefully reviewed and independently considered the record, including the hearing transcripts and the exhibits which were entered into evidence in the course of the hearing,[1] the Commissioner agrees with the ALJ's conclusions.

Petitioner's case rests almost entirely upon M.B.'s accusations against respondent. The only evidence it presented – besides M.B.'s written statements and testimony – was the testimony of Pamela Hill, the school staff member to whom M.B. made the allegations, and

[1] Hearing in this matter was held on May 28, 29, 30, and June 12, 2008 (1T, 2T, 3T, and 4T, respectively). Neither party submitted exceptions.

Tracy Booton, a social worker who was called to the vice principal's office – where M.B. had been taken – shortly after M.B. reported the alleged incident. They could offer little more than accounts of what M.B. told them. They both testified that M.B. appeared upset,[2] but Booton recalled that when she arrived at the vice principal's office there were no marks or bruises on M.B., and neither M.B.'s hair nor her clothes were disheveled.[3]

In light of the foregoing, M.B.'s credibility is crucial to the disposition of this case. It is well settled that the Commissioner may not disturb the ALJ's determination that M.B. was not credible, unless a review of the record reveals that the ALJ's findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record. *N.J.S.A.* 52:14b-10(c); *see, also D.L. and Z.Y. on behalf of minor children T.L. and K.L. v. Board of Education of the Princeton Regional School District,* 366 *N.J. Super.* 269, 273 (App. Div. 2004). After examining the record, the Commissioner finds no basis to disturb the ALJ's assessment that M.B. lacked credibility.

As the ALJ stated in the Initial Decision, M.B. was evasive and combative during cross examination, responding to questions that she did not wish to answer by professing not to know or remember, challenging the relevance of questions or stating that they were a waste of her time. In addition, her testimony conflicted with the other evidence in the record and was inconsistent with her own earlier statements.

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[2] The record reveals that M.B. made the allegations against respondent immediately after leaving his room, where she had gone to telephone an individual named "Rachel" whom she hoped would help her get Social Security benefits (S.S.I.). That call was M.B.'s second unsuccessful attempt to reach Rachel on the day in question. Respondent testified that M.B. looked upset when she finished using his telephone. Neither Hill nor Booton were aware of M.B.'s thwarted attempts to get help with S.S.I. and would not, therefore, have considered it a possible explanation for any upset that M.B. may have shown.

[3] Booton also stated that in the course of working with respondent, she had observed that he was very professional and very good at what he did. She never saw him do anything inappropriate and he had a good rapport with students.

For example, the school security officer, Glenn Ross, carefully reviewed the security video tapes of M.B. leaving respondent's office on the afternoon in question. His testimony was that the video showed M.B., with whom he was familiar, walking in her normal gait with no signs of agitation or distress.

Further, as stated above, the district's witnesses indicated that directly after the alleged incident M.B.'s hair and clothes were tidy and there were no bruises or marks on her. In fact, M.B. herself so testified, and owned that she had not been hurt.[4] The police officer, Tytriyanta Hicks – who was dispatched to the school shortly after the incident – reported that M.B. did not appear upset and showed no sign of injury. And Detective Robin Robinson, who later took M.B.'s statement, testified similarly.[5] Such facts are inconsistent with M.B.'s allegations that she had been dragged by the neck to the floor, sat upon, wrestled, and forcibly lifted and dragged around furniture to a couch while struggling to get free.

There were other significant flaws in M.B.'s account of the alleged incident. For instance, her description of the location of the furniture and respondent's alleged use of it contemplated the normal configuration of respondent's office. On the afternoon in question, however, the furniture had been moved into the middle of the room in preparation of wall painting, according to the unrebutted testimony of respondent and a coworker, Shirley Andrews. The sofa upon which M.B. was allegedly placed was inaccessible.

The Commissioner also notes that M.B. described herself as an outspoken individual. She doesn't take "anything from anybody." (1T74-75) MB testified that she has a

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[4] Nor did respondent have any marks, scratches or bruises on the afternoon in question.

[5] Detective Robinson also testified at the hearing that to her knowledge no criminal charges were filed against respondent.

"messed-up attitude" and a smart mouth, and everyone knew it: "I stayed in trouble because of my mouth." . . . . "I stayed in trouble and . . . started getting kicked out of class." (1T73-76) If boys touched her inappropriately[6] she would "smack them," "curse them out," "scream," or go tell on them; she would want people to see or hear what they were doing.[7] (1T109) However, M.B. testified, incredulously, that during the alleged attack on her by respondent she did not try to punch, kick, slap or bite him – or even yell. She was just moving around and telling him to get off of her – in a normal speaking voice. (1T103-04) And when she left respondent's room and spoke to Hill about the alleged incident, she "wasn't all loud so people could hear [her]."

Numerous other inconsistencies can be found in the record of this matter. For example, the first accounts that M.B. gave of the incident – to Pamela Hill verbally and to Vice Principal Pinckney in writing – differed from later accounts in the descriptions of where and how M.B. was allegedly grabbed, which furniture was involved in the event, and whether or not respondent sat on her or lay on her. Also puzzling is M.B.'s assertion that respondent offered her $20 to touch her vagina – after he had allegedly already done so. M.B.'s statement that no students were in the hall when she left respondent's room conflicted with Hill's and Ross's testimony. M.B.'s allegation that respondent kept his room locked conflicted with respondent's testimony and the testimony of his colleagues about the function of the room – *i.e.*, a drop-in resource for students needing assistance or experiencing problems.

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[6] Witness H.M., a former friend of M.B., testified that she would engage in sexual touching with male students, and Shirley Andrews, the school's Health and Social Service coordinator, testified that she had had to speak to M.B. about such behavior.

[7] M.B.'s tendency toward loud and defiant behavior was corroborated in the testimony of Pamela Hill, H.M., and Shirley Andrews.

In summary, the Commissioner concurs with the ALJ that M.B. was not a credible witness and that her testimony was itself unconvincing. As petitioner was not able to present sufficient evidence to support its charges, the charges must be dismissed.

IT IS SO ORDERED. [8]

COMMISSIONER OF EDUCATION

Date of Decision: 10/27/08

Date of Mailing: 10/27/08

[8] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 03335-08
AGENCY DKT. NO. 51-2/08

IN THE MATTER OF THE TENURE HEARING OF ISAAC PITTS, STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK

Adam S. Herman, Esq., for petitioner (Senior Associate Counsel, State Operated School District of the City of Newark)

Eugene G. Liss, Esq., for respondent Isaac Pitts

Record Closed: July 31, 2008 Decided: September 11, 2008

BEFORE **JOANN LASALA CANDIDO**, ALJ:

STATEMENT OF THE CASE

Petitioner, School District of the City of Newark, Essex County (District), brought charges of conduct unbecoming and other just cause for dismissal against respondent, Isaac Pitts, a certificated and tenured employee holding the position of social worker within the District. N.J.S.A. 18A:6-10. The District

contended that respondent inappropriately touched M.B., a twelfth-grade-female student on May 16, 2007. Respondent denied the allegations.

PROCEDURAL HISTORY

On February 14, 2008, the District filed its written charges with the Commissioner of Education (Commissioner). Subsequently, the matter was referred by the Commissioner to the Office of Administrative Law (OAL) on March 3, 2008, for a hearing as a contested case pursuant to N.J.S.A. 18A:6-11 and N.J.S.A. 52:14B-2(b). Hearings were held on May 28, 29 and 30 and June 12, 2008. The record remained open for the submission of post-hearing briefs. Following receipt of the parties' briefs, the record closed on July 31, 2008.

FACTUAL DISCUSSION

M.B. testified in behalf of the District. M.B. was a student at the Newark Academy of Vocational Careers High School (AVC), a school operated by the City of Newark. She graduated in June 2007. Although she could not recall the date of the alleged incident, she claimed that she could recall its events. M.B. stated that she did not know respondent personally but did go to respondent's office during the morning of May 16, 2007, to use a telephone. When M.B. could not reach the other party, she went to class. After her sixth class period, she returned to respondent's office to make another telephone call. She knocked on respondent's door and asked to use the telephone. After respondent acquiesced, M.B. proceeded to his desk where the telephone was located and sat in his chair. While still sitting at his desk, M.B. claimed that respondent approached her from behind and placed his hands around her neck. She then stood up from the chair. Respondent then proceeded to wrap his hands around her neck, dragged her to the floor, and sat on her, facing her. He then grabbed her by the waist and dragged her to a three-seat sofa. Respondent then put his hand down the front and then the back of her pants. He offered her $20 if she let

him touch her. He then purportedly grabbed her arm as she was leaving the room and asked her where she was going. M.B. responded she was going to class and left.

M.B. then proceeded down the hall to Ms. Hill, a teacher, and told her what had just happened. They both went to the vice principal's office where M.B. again recounted the events. M.B. was instructed by the vice principal to write a statement of the incident. R-3. M.B.'s parents were notified and arrived at school. The police were also called. A police officer arrived and proceeded to take a statement from M.B. She then proceeded to the University of Medicine and Dentistry, New Jersey, for an examination.

M.B. described Pitts's office as follows: there were two sofas, a three-seat sofa to the back left of the room and a two-seat sofa at the entrance of the room; there was a desk and a fax machine in the middle of the room; on the right side of the room was a long table with two computer desks and two chairs and a cabinet door; there was a blackboard against the wall, a water cooler and a television placed on top of a box; respondent's desk was next to the three-seat sofa in the left corner of the room. J-1. She claimed that the door to respondent's office was covered completely as to prevent anyone from looking into the room from the hallway.

M.B. could not recall if respondent's office door was locked in the morning, but stated that it was in the afternoon. When she went there initially, she did not have a pass, although she was required to have one. She stated that she did not need a pass in the afternoon because she was between classes. M.B. claimed that she told the same story to Ms. Hill, Vice Principal Pinckney, Ms. Bruton, who was a social worker, and the police.

Pamela Hill also testified on behalf of the District. She is a special needs teacher at AVC. She taught M.B. English in her senior year during sixth period.

On May 16, 2007, M.B. approached her with tears in her eyes and told her she had an emergency. Hill stated that M.B. proceeded to tell her that respondent had his hands around her legs, wrestled her to the floor while she was in his office and then put her on a couch. She mentioned how respondent had offered her $20 if she would let him touch her vagina. Hill proceeded to take M.B. to Vice Principal Pinckney's office where M.B. reiterated the events to both the vice principal and Case Manager Bruton.

She also stated that on this date, M.B. walked very rapidly towards her and proceeded to tell her that respondent put his hands down her pants while she was on the telephone. Hill also testified that M.B. told her that respondent offered her money to be able to put his hands down her pants. Hill completed a written statement of what M.B. said to her. R-7.

Bruton testified on behalf of the District. She is on the Child Study Team with respondent. Bruton testified that M.B. described the events to her by saying respondent came from behind and put his hands around her waist and offered her money so that he could touch her. M.B. thought he was playing, but when he continued to touch her, M.B. knew that he was serious and she tried to break away. Bruton contacted DYFS and the police. M.B.'s parents were called. Bruton stayed with M.B. throughout the afternoon and counseled her. She wrote an incident report of what M.B. had told her. R-8. She stated that M.B. was calm and not crying, but she might have been crying before she saw her. M.B.'s clothing was not disheveled and her hair was not out of place. Bruton further testified that all the students liked respondent. She found him to be very professional.

Glenn Ross testified on behalf of respondent. Ross is a security officer at AVC and is employed by the Newark Board of Education. His duties include patrolling the school, preventing or breaking-up fights and taking care of other security issues. Ross explained that AVC has security cameras throughout the

hallways and in some stairwells, which are in operation twenty-four hours a day. There is a "camera room" where two monitors are located. There is also a monitor at the main desk on the first floor. One of the cameras is located about twenty feet from respondent's room.

On May 16, 2007, Ross was asked by the administration to view the images of respondent's office. In so doing, he observed M.B. leave respondent's office and head north toward the end of the building. He found her to have exited respondent's office calmly walking, did not appear to be distressed and observed her stopping to talk to Ms. Hill before going into her classroom. Ross then viewed Ms. Hill and M.B. exit the classroom about three minutes later.

Shirley Andrews also testified on behalf of respondent. She is employed by Newark Public Schools as the health and social services coordinator for AVC. She was M.B.'s class advisor in addition to her health and social service coordinator. Part of her duties included meeting with tardy students to determine the reason for their lateness. Andrews stated that she needed to meet with M.B. constantly for her lateness. She also had to counsel M.B. for her frequent cutting of classes as well as her behavior with boys, which was at times promiscuous in nature.

Andrews went to the police station on May 16, 2007, to drive respondent back to school to retrieve his car. The next day, she accompanied him to his office so that he could retrieve his personal belongings. Andrews testified that she noticed that the office furniture was arranged differently than usual. The furniture was all together, most of which was in the center of the room so that no one could sit because the room was being painted. R-4(g). Since she had been in his office practically daily, she was familiar how the furniture was usually arranged.

Tytriyanta Hicks also testified on behalf of respondent. She is a school resource officer with the Newark Police Department. Her duties include addressing and resolving conflicts between students or parents. She was dispatched to AVC on May 16, 2007, at approximately 2:15 p.m. where she proceeded to the vice principal's office. While there, she took M.B.'s statement. She noted that M.B. was not upset and did not have any signs of injury. Hicks then prepared an Incident Report based upon her interview. R-5(a), (b).

Det. Robin Robinson of the Newark Police Department also testified on behalf of respondent. She is assigned to the Special Victims Division and is contacted if there is an allegation of sexual assault. Robinson interviewed M.B. and also took her statement. R-6(a) thru (h). She did not observe any injuries to M.B. The Newark Police Department did not file charges. The matter was then referred to the County Prosecutor's Office. She was not aware of any action taken.

Gertha Kelly testified on behalf of respondent. She is the special education supervisor employed by petitioner, supervising twenty-five Child Study Team members. Kelly was the itinerant supervisor of respondent and it was her job to observe him and to review his case load as well as to make recommendations and prepare observation reports. R-9(c) thru (o). Kelly felt that respondent was always reliable and was available for students. He was also capable of defusing explosive situations involving both students and parents.

H.M., a former student at AVC, testified on behalf of respondent. He attended classes with M.B. during his sophomore and senior years. He felt that M.B. was disrespectful and that her language and conduct were sexually inappropriate.

Respondent testified on his own behalf. He has been employed as a Child Study Team social worker with the petitioner since 2001. The students at

AVC were classified with either a learning disability or as emotionally disturbed. Respondent and a colleague at AVC developed the "Personal Development Program for Emotionally Disturbed Children."[1] Respondent was provided an office with furniture chosen and supplied by the Office of Special Education.

He had the opportunity to observe M.B. in the classroom but he was not assigned to her as a social worker. She would be present in the classroom with students he had been assigned to observe and counsel. There were instances where the crisis team needed to be summoned regarding M.B.'s misconduct in order to defuse a situation.

On May 15, 2007, respondent was advised by the custodian supervisor that he needed to prepare his office for painting the next day. On May 16, 2007, respondent came to school to move his furniture out of the way. He began at approximately 9:00 a.m. by first removing "paintings and plaques and stuff off the walls." He proceeded to remove papers from the top of his desk and placed them in his desk. He then moved the copy machine that was on wheels away from the wall. This was completed at approximately 10:20 a.m. It was at that time that M.B. came into his room to use the telephone. M.B. proceeded to make a telephone call, but no one answered. She obtained permission from respondent to return later to try again. Respondent stated that he then escorted M.B. to her art class because she did not have a pass. He then returned to his office and began removing items from the sofa wall. After his lunch break, he moved the sofa, loveseat, bookshelf and chair towards the middle of the room. R-4(f).

At approximately 1:30 p.m., M.B. returned to his office and sat at his desk while making her telephone call. He was working in a different area of the office.

[1] This program was designed during the 2002/2003 school year to provide in-district support in order to keep the children at AVC rather than place them out-of-district. There were also programs available after school such as taking students to basketball games, baseball games, concerts and community parks.

He saw that M.B. appeared to be upset after the telephone call and he inquired if she was alright. She responded that she was and left the room. Respondent then watched her walk down the hall to Ms. Hill's classroom. He then returned to his office until he was called to the principal's office about fifteen minutes later. Respondent was permitted to return to his office, accompanied by Ms. Andrews so that he could retrieve his personal belongings. He testified that at no time was the view into his office blocked.

When facts are contested, the trier of fact must assess and weigh the credibility of the witnesses for purposes of making factual findings. Credibility is the value that a finder of fact gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality, its internal consistency, and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Based upon these principles, the testimony of respondent was deemed credible and compelling. He was clear and straightforward in recounting the events involved.

M.B., conversely, was considered lacking in credibility. She was evasive and combative on cross examination, often responding to relevant questions with "what does this have to do with anything" and stating that this was a "waste" of her time. In addition, she often responded to a question with "I don't know" apparently because she did not want to provide the answer.

FINDINGS OF FACT

Based upon consideration of the testimonial and documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following **FACTS**:

1. Respondent was a tenured Child Study Team social worker with the District, assigned to the AVC since September 2001.
2. M.B., a senior at AVC High School, went to respondent's office during the morning of May 16, 2007, to use the telephone. She was unable to reach her party and was escorted by respondent to her class because she did not have a pass to be in the hallways.
3. During the afternoon of May 16, 2007, M.B. returned to respondent's office after her sixth class period in order to use the telephone.
4. Respondent was preparing his office to be painted by moving the furniture towards the center of the room and removing all items from the walls.
5. M.B. sat at respondent's desk, made her call and exited the office after the call was completed.
6. M.B. proceeded to Ms. Hill's classroom after her telephone call was completed and complained of respondent touching her inappropriately.
7. The video camera showed M.B. walking calmly after exiting respondent's office and did not appear distressed.

LEGAL ANALYSIS AND CONCLUSION

The issue to be decided is whether the District had just cause to remove respondent, a tenured social worker.

In tenure matters, the District bears the burden of proving the charges upon which it relies by a preponderance of the competent, relevant and credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). A tenured New Jersey public school employee shall not be dismissed or reduced in compensation during good behavior except for, among other things, unbecoming conduct after a hearing by the Commissioner or the Commissioner's appointee upon written charges. N.J.S.A. 18A:6-10. Tenure protects educators from arbitrary dismissal for "unfounded, flimsy or political reasons." Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 73 (1982). It is designed to aid in the

establishment of "a competent and efficient school system" by affording to teachers a measure of security in the ranks they hold after years of service. Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215, 218 (App. Div. 1949). Accordingly, N.J.S.A. 18A:6-10 provides that no tenured person shall be dismissed or reduced in compensation "except for inefficiency, incapacity, unbecoming conduct, or other just cause."

One of the charges brought by the District was unbecoming conduct, which has been broadly defined to include any conduct "which has a tendency to destroy public respect for [government] employees and confidence in the operation of [public] services." Karins v. City of Atl. City, 152 N.J. 532, 554 (1998) (citation omitted). Conduct unbecoming a public employee has also been described as an "elastic" phrase that includes "'any conduct which adversely affects the morale or efficiency'" of the public entity or "'which has a tendency to destroy public respect for . . . [public] employees and confidence in the operation of . . . [public] services.'" In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960) (citation omitted). Behavior rising to the level of unbecoming conduct need not "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Emmons, supra, 63 N.J. Super. at 140). In the context of a school tenure case, "the touchstone is fitness to discharge the duties and functions of one's office or position." In re Grossman, 127 N.J. Super. 13, 29 (App. Div. 1974), certif. denied, 65 N.J. 292 (1974).

It is clear that, if proven, the charges against Mr. Pitts arise to the level of conduct unbecoming a teacher. The inappropriate and forced touching of a student cannot be tolerated in any situation, let alone when it is perpetrated by an authority figure whose responsibility is the education and emotional well-being of underage and/or emotionally-vulnerable youths. If the District demonstrated by a

preponderance of the credible evidence that respondent had committed the acts alleged by M.B., not only would those actions be considered conduct unbecoming but also should be considered severe enough to render respondent unsuitable for continuing in his position. See In re Herrmann, 192 N.J. 19, 28-29 (2007) (progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest).

The District must prove its charges by a preponderance of the competent and credible evidence. See Atkinson, supra, 37 N.J. 143. The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). Credibility must not only proceed from the mouth of a credible witness, but it must be credible in itself as well. Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954).

As stated above, M.B. was not a wholly credible witness. The District was unable to present any other testimony or produce other evidence to corroborate M.B.'s testimony. Although Ms. Hill and Ms. Bruton appeared to be both credible witnesses, they could only testify as to what M.B. told them. Glenn Ross, the only person to view the security tape at the time of the incident stated that M.B. did not look distressed or upset upon leaving respondent's office.

It was the District's burden to prove the charge against respondent. "[I]n tenure matters, the charging entity bears the burden of proving, by a preponderance-of the credible evidence, respondent's guilt on the charges. It is, likewise, clear that this burden is not satisfied where the evidence is in equipoise or

is such as to raise legitimate doubt as to the existence of essential facts." In re Miller, EDU 5812-01, Final Decision, Comm'r (April 8, 2002), <http://lawlibrary.rutgers.edu/oal/search.html>. Since M.B.'s credibility was in doubt, I **CONCLUDE** that the District has failed to meet its burden of proof.

ORDER

Based upon the foregoing, it is **ORDERED** that the charges of conduct unbecoming and other just cause against respondent be and is hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 11, 2008
DATE

JOANN LASALA CANDIDO, ALJ

Date Received at Agency: September 11, 2008

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SEP 15 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

ljb

APPENDIX

Witnesses

For Petitioner

M.B.

Pamela Hill

Tracy Bruton

For Respondent

Glenn Ross

Shirley Andrews

Tytriyanta Hicks

Robin Robinson

Gertha Kelly

H.M.

Isaac Pitts

Exhibits

Joint

J-1 Diagram of respondent's office prepared by M.B

J-2 Diagram of respondent's office prepared by respondent

For Petitioner

None

For Respondent

R-1 Report of Incident (two pages)

R-2 Report to Office of the State District Deputy Superintendent reporting call of Principal Previdi (two pages)

R-3 Handwritten statement of student M.B. dated May 16, 2007 (one page)

R-4 January 3, 2008, letter to Adam Herman, Esq., with Certificate of Isaac Pitts attached (seven pages)

R-5 Incident Report taken by Police Officer Tytriyanta Hicks, dated May 16, 2007 (three pages)

R-6 Report of Det. Robin Robinson, dated June 13, 2007, including statements of M.B. dated May 16, 2007 (seven pages)

R-7 Statement of Pamela Hill, dated May 16, 2007 (one page)

R-8 Incident Report of Tracy Bruton, dated May 17, 2007 (three pages)

R-9 Observations and Annual Evaluations of Isaac Pitts (fifteen pages)

R-10 Letters of Recommendation for Isaac Pitts (three pages)

R-11 Certificates received by Isaac Pitts (four pages)

R-12 June 24, 2004, communication from Anzella K. Nelms, assistant superintendent of schools to Isaac Pitts

R-13 Medical statement of coordinated heath regarding Isaac Pitts (three pages)

#441-08

ALBERT ZIEGLER,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner – formerly a tenured teacher in the district who previously challenged his termination and in 2005 prevailed on appeal to the State Board, subsequently being awarded back pay covering the 1998-1999 through 2002-2003 school years – now contends that he was entitled to employment within the scope of his certification for the 2003-2004 through 2007-08 school years based on a Teacher of the Handicapped endorsement obtained in February 2002 during the litigation process, and that this cause of action did not arise until the Commissioner issued a final decision in September 2007 on the matter of his entitlement to back pay as a result of the State Board's decision. *Albert Ziegler v. Board of Education of Bayonne,* Commissioner's Decision No. 360-07R, decided September 17, 2007. Respondent Board argued that the petition was time barred.

The ALJ found that: the petitioner had notice of his tenure rights as of July 2005, when the State Board decided that he had been wrongfully terminated in 1999; petitioner should have known of the 2003 reduction in force (RIF) no later than August 2007 when the Initial Decision on Remand regarding back pay was issued; petitioner knew or should have known at that time that his rights could have been violated after the 2003 RIF with regard to his Teacher of the Handicapped endorsement, and that he would have had until November 2007 to file his appeal; and the instant petition was filed in December 2007 and is therefore untimely. The ALJ granted the respondent Board's motion to dismiss the appeal.

The Commissioner adopted the Initial Decision of the OAL with modification, agreeing that the appeal must be dismissed as untimely filed, but finding that the petitioner had knowledge of the requisite facts to make his claim at the very latest by December 2006, when the respondent Board filed a brief in the prior proceeding on remand which clearly articulated its position that petitioner could not have been employed in the district after June 30, 2003 because all positions for which he was certified were either eliminated or held by more senior teachers.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

November 3, 2008

OAL DKT. NO. EDU 3007-08
AGENCY DKT. NO. 384-12/07

ALBERT ZIEGLER,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have petitioner's exceptions and the reply/cross-exception of the Board of Education (Board) filed pursuant to *N.J.A.C.* 1-18.4 and 1-18.8.

In his exceptions, petitioner contends that the Administrative Law Judge (ALJ) erred in dismissing his appeal, reiterating his arguments to the effect that he had no cause of action until he received from the Commissioner a "favorable ruling on the extent of his employment in the first case between the parties," any litigation prior to that time being groundless and purely speculative. (Petitioner's Exceptions at 2-4, quotation at 3; see also Brief in Response to the Board's Motion to Dismiss at 4–9) Petitioner also asserts that the Board is not alleging an inability to defend itself in this matter due to passage of time, and that the Board would suffer no more harm in being held liable for back salary at this point than it would have if petitioner's claim had been filed sooner. (*Ibid.* at 1) Finally, petitioner objects to the ALJ's failure to address the State Board of Education's decision in *Darren Ressler v. Board of Education of the Township of Saddle Brook, Bergen County*, Decision No. 66-96,

decided February 4, 1998, which, according to petitioner, supports his position by establishing that until it is determined that a teacher should have been employed at the time of receiving an additional endorsement, that teacher has no claim to employment based upon it. (*Ibid.* at 4-5)

In reply, the Board likewise reiterates its arguments before the ALJ, stressing the applicability of the 90-day rule, the customary strictness of its enforcement, and the fact that the Commissioner has already recognized, at page 5 of her September 17, 2007 decision, that petitioner could have made the present claim during the prior proceeding, but did not. (Board's Reply at 1-5) The Board additionally rejects petitioner's reliance on *Ressler, supra*, asserting that 1) the State Board's decision does not speak to whether the statute of limitations commences only upon issuance of the Commissioner's decision; and 2) the State Board has elsewhere held that notice is adequate for purposes of triggering a limitations period where a petitioner has been alerted to the existence of facts which he or she has a right to know and the respondent has a duty to communicate, and which may equate in law with a cause of action. (*Ibid.* at 4-5, citing *Board of Education of the Gloucester County Institute of Technology v. Board of Education of the Lenape Regional High School District, Burlington County*, State Board Decision No. 6-00, decided August 2, 2000, affirming in pertinent part Commissioner's Decision No. 416-99, decided December 16, 1999, relying upon *Kaprow v. Bd. of Ed. of Berkeley Township*, 131 *N.J.* 572, 589 (1993))

On cross-exception, the Board further contends that – although correctly dismissing the petition as untimely filed – the ALJ erred in finding that petitioner's cause of action arose with the Initial Decision in the prior matter. According to the Board, petitioner was obliged to file any claim for reemployment within 90 days of the Board's failure – based on its position that there was no currently available teaching assignment for which petitioner was

qualified – to reinstate him following the July 6, 2005 decision of the State Board of Education finding him entitled to reemployment; in November 2005, the Board asserts, petitioner certainly knew he was not being reemployed and understood that he had a potential claim under his second endorsement, since he asked – as part of discovery in the prior proceeding – about persons employed by the Board as Teachers of the Handicapped as well as Industrial Arts Teachers, and in January 2006 received written confirmation of the tenure and seniority status of all teaching staff members who were teaching industrial arts, skilled trades and vocational-technical courses." (Board's Reply at 5-8, citing *Berlinda Love v. Board of Education of the City of Trenton, Mercer County,* Commissioner's Decision No. 283-02, decided July 26, 2002)

Upon review, for the reasons and with the modification set forth below, the Commissioner concurs with the ALJ that petitioner's appeal must be dismissed as untimely filed.

Without question, petitioner became entitled to reinstatement and back pay upon issuance of the State Board of Education's July 6, 2005 decision finding that – notwithstanding the Commissioner's December 22, 2003 decision to the contrary – he had been improperly dismissed from his tenured employment in 1999. At the time of the State Board's ruling, such entitlement appeared limited to positions encompassed within the skilled trades endorsement held by petitioner at the time of his dismissal, since it is by now well established that the recall rights of tenured teaching staff members upon a reduction in force do not extend to endorsements acquired subsequent to the reduction – as is the case here with petitioner's endorsement as Teacher of the Handicapped, which he acquired in February 2002. During the proceedings on remand directed by the State Board to ascertain the amount of back pay due petitioner, however, the Board took the position that petitioner was entitled to no pay after the end of the 2002-03 school year, since he could not have remained employed by the Board following a reorganization

during which the courses to which he could have been assigned under his skilled trades endorsement were either eliminated or assigned to more senior teachers – in effect, contending that, had petitioner continued in his position as the State Board found he should have, he would have been subject to a subsequent reduction in force that ended his employment with the district. Because petitioner had, by the time of such reduction, acquired his additional endorsement as Teacher of the Handicapped – the acquisition of which the Board was by this time well aware – this position was tantamount to a denial of any entitlement under petitioner's second endorsement to positions held by nontenured teachers.

Under these circumstances, the Commissioner concurs with the ALJ that petitioner's obligation with respect to the filing of any claim for the 2003-04, 2004-05, 2005-06 or 2006-07 school years arose upon his awareness that the Board considered his entitlement to any type of employment in the district to have ended after 2002-03. Like the ALJ, the Commissioner sees no need for petitioner, in order to make such a claim, to have awaited final adjudication of the back pay matter or a specific determination by the Commissioner that petitioner's second endorsement could be implicated in vindicating the rights flowing from the State Board's July 6, 2005 decision finding him entitled to employment and/or preferred eligibility from February 1999 onward.[1]

However, the Commissioner does not agree with the ALJ's reckoning of petitioner's cause of action from the August 2, 2007 Initial Decision in the prior matter and finds instead that petitioner had knowledge of the requisite facts to make his claim at the very latest on December 8, 2006 – the filing date of the Board's brief in the prior proceeding on remand, which clearly and explicitly (at 16-18) articulated the Board's position based upon a factual and

[1] In this regard, the present matter is distinguishable from *Ressler, supra*, where the claimant had previously been found to have no entitlement to reemployment at all.

procedural record that was more than sufficient to give notice to petitioner that the Board might be violating his rights with respect to his second endorsement. Additionally, while the 2007-08 school year arguably presented petitioner with a new cause of action, the Board's failure to recall him for that year would have been apparent – quite apart from the Board's preceding actions and previously expressed position – well before the end of the 2006-07 school year. Thus, for all the years at issue in this matter, as ultimately concluded by the ALJ, an appeal filed on December 14, 2007 falls well beyond the 90-day limitation period established by rule.[2]

Accordingly, for the reasons set forth therein and above, the Commissioner adopts the Initial Decision of the OAL with modification, and dismisses the petition of appeal.

IT IS SO ORDERED.[3]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 11/03/08

Date of Mailing: 11/05/08

[2] In so holding, the Commissioner finds in this matter no exceptional circumstance, compelling reason or other sufficient basis that would warrant exercise of her authority to relax the 90-day rule pursuant to *N.J.A.C.* 6A:3-1.16. As noted in *Nancy T. Snow v. Board of Education of the Township of Moorestown, Burlington County,* Commissioner's Decision No. 144-07, decided April 20, 2007, such authority is rarely invoked unless strict adherence to the rule would be inappropriate or unnecessary or would result in injustice, or where the Commissioner finds the presence of a substantial constitutional issue or other issue of fundamental public interest beyond that of concern only to the parties themselves. (Citing *Pacio v. Lakeland Regional High School District*, 1989 *S.L.D.* 2060, 2064; *DeMaio v. New Providence Board of Education*, 96 *N.J.A.R.* 2d [EDU] 449, 453.)

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

STATE OF NEW JERSEY

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

GRANTING SUMMARY DECISION

OAL DKT. NO.: EDU 3007-08

AGENCY DKT. NO.: 384-12/07

ALBERT ZIEGLER

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,

Respondent

Gregory T. Syrek, Esq., for Zeigler (Bucceri and Pincus, attorneys)

Robert J. Merryman, Jr., Esq., for, respondent (Apruzzese, McDermott, Mastro & Murphy, attorney)

Record Closed: July 24, 2008 Decided: August 20, 2008

BEFORE **JEFFREY A. GERSON,** ALJ:

STATEMENT OF CASE AND PROCEDURAL HISTORY

Albert Ziegler, a tenured teacher with an instructional certificate in Skilled Trades – Employment Orientation, was employed by the Bayonne Board of Education from 1984 until 1999, at which time he was terminated when the Board was advised by the

NJDOE that the Employment Orientation certification did not authorize Zeigler to teach the industrial arts courses to which he was assigned. Zeigler challenged his termination. On appeal in 2005, he prevailed before the State Board of Education ("State Board"), which ruled that his authorization extended to carpentry – the experience on which his Skilled Trades certification had been issued – and that he was improperly terminated from his tenured employment during the 1998-99 school year. The State Board directed the Bayonne Board of Education to reinstate him with back pay, less mitigation. The matter was remanded to the OAL for a determination of the appropriate amount to be awarded.

I recommended that back pay be awarded in the amount of $187,762.24, covering the 1998-99 through 2005-06 school years.

On September 17, 2007, the Commissioner of Education ("Commissioner") adopted the Initial Decision with modification. Finding that the record supported the Board's representation that, after June 30, 2003, Zeigler could not have been employed in the district because no position within the scope of his certification was vacant or held by a less senior tenured staff member, the Commissioner concluded that Zeigler is due damages calculated only through the end of the 2002-03 school year. On March 19, 2008, the State Board affirmed the Commissioner's decision.

During the litigation process, in February 2002, Zeigler obtained his Teacher of the Handicapped endorsement. Based on the Commissioner's September 2007 decision, he contends that he was entitled to employment within the scope of his certification, now determined to include the additional endorsement, for 2003 – 2004 and subsequent school years. Bayonne filed a motion to dismiss the current petition.

DISCUSSION

The motion to dismiss is a dispute between the parties over the accrual date for the 90-day limitation period provided for by N.J.A.C. 6A:3-1.3(i). N.J.A.C. 6A:3-1.3(i) which provides that:

> The Zeigler shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing. This rule shall not apply in instances where a specific statute, regulation or court order provides for a period of limitation shorter than 90 days for the filing of a particular type of appeal.

Bayonne argues that Zeigler's case is time barred because the 90-day period began to run sometime in 2005 – either after the State Board's July 6, 2005 decision or in September 2005 when it was obvious that Zeigler would not be reinstated. Zeigler argues that the period began to run after the Commissioner's September 17, 2007 decision because he could not claim tenure rights under his Teacher of the Handicapped endorsement until the Commissioner declared him to have been entitled to employment from 1999 through 2002 – 2003.

The 90-day rule has been strictly followed, and applied almost without exception. For example, in Dreher v. Jersey City Bd. of Educ., EDU 2777-87, Initial Decision (December 18, 1987), adopted Comm'r (February 2, 1988), aff'd St. Bd. of Educ. (July 8, 1988) <http://lawlibrary.rutgers.edu/oal/search.html>, Zeigler filed his petition two days out of time, and the matter was dismissed as untimely. Regardless of whether the board complies with statutory or administrative requirements, the Zeigler is required to file the petition no later than 90 days after receipt of notice. Portee v. Newark Bd. of Educ., 94 N.J. Admin. 2d 381, 383. Here, Zeigler's appeal falls under the purview of N.J.A.C. 6A:3-1.3(i), and the 90-day rule must be applied.

The 90-day period commences when a teacher "knew or should have known" that he or she was not going to be offered a new contract for the following academic year. Nissman v. Board of Educ., 272 N.J. Super. 373, 379 (App. Div.) certif. den., 137 N.J. 315 (1994). Formal notice of the school board's action is not necessary to raise a claim. Indeed, the Commissioner has held that a letter from the local board secretary which provided clear and unambiguous notice of the local board's final action triggered

the 90-day limitation. Kaprow v. Board of Educ. of Berkeley Twp., 255 N.J. Super. 76 (App. Div. 1992), cert. granted, 130 N.J. 16, aff'd, 131 N.J. 572 (1993).

In the instant matter, Zeigler had notice of his tenure rights under his Teacher of the Handicapped endorsement as of July 6, 2005 – the date that the State Board decided that he was wrongfully terminated in 1999. However, Zeigler did not necessarily have notice that his rights under the endorsement were violated at that time. It can not be assumed that, in July 2005, Zeigler had notice of the either 2003 RIF, or that he may be entitled to a position under his 2002 endorsement. The exact date that he learned of this information remains a mystery. Nevertheless, it is clear that Zeigler knew or should have known of the 2003 RIF no later than August 2, 2007 – the date of the decision on remand regarding back pay. Not only does that decision clearly reference the 2003 RIF, but it is included in the stipulated facts. Consequently, Zeigler either knew or should have known at that time that his rights had been violated with regard to the Teacher of the Handicapped endorsement after the 2003 RIF. To that end, Zeigler would have had until November 2, 2007 to file his appeal. The appeal was actually filed on December 14, 2007, and is therefore untimely.

CONCLUSION

The 90-day limitations period prescribed by N.J.A.C. 6A:3-1.3(i) began to run no later than the August 2, 2007 decision. Zeigler had notice of his tenure rights under his Teacher of the Handicapped endorsement in July 2005 and learned that they were violated no later than August 2007 decision. His current appeal was filed on December 14, 2007, and is therefore untimely under the rule.

ORDER

Bayonne Board of Education's motion to dismiss Ziegler's appeal is **GRANTED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 20, 2008

DATE

JEFFREY A. GERSON, ALJ

Date Received at Agency: 8/20/08

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

sej

#442-08

OAL DKT. NO EDU 9471-05
AGENCY DKT. NO. 127-5/05

BEVERLY GUSLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, including the workers' compensation judge's order approving a settlement of petitioner's claims against respondent for work related injury, and the Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed.

Upon such review, it appears that in conjunction with the settlement of her workers' compensation claim, petitioner executed an affidavit acknowledging that her claims against respondent "will be closed forever and cannot be reopened." Accordingly, petitioner's counsel wrote to the OAL by letter dated September 18, 2008, withdrawing the above-captioned petition.

The Commissioner approves the withdrawal and dismisses the petition.

IT IS SO ORDERED.

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 11/06/08

Date of Mailing: 11/07/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9471-05

AGENCY DKT. NO. 127-5/05

BEVERLY GUSLER,

Petitioner,

v.

PATERSON BOARD OF EDUCATION,

Respondent.

Laurie W. Fielder, Esq., for petitioner (Fielder & Schepis, LLC, attorneys)

Joanne Butler, Esq. for respondent (Schenk, Price, Smith & King, attorneys)

Record Closed: September 23, 2008 Decided: September 24, 2008

BEFORE **JAMES A. GERAGHTY**, ALJ:

This matter was transmitted to the Office of Administrative Law on August 12, 2005 for hearing pursuant to N.J.S.A. 52:14B-1 to -13 and N.J.S.A. 52:14F1 to -15.

The parties have agreed to settle this matter and have prepared the attached agreement indicating the terms of settlement.

I have reviewed the record and the settlement terms and **FIND**:

1. The parties have agreed to settle this matter and have prepared the attached agreement indicating the terms of settlement.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement shall be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms and that it is further ordered that the proceedings in this matter hereby are **CONCLUDED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

9/24/'08
DATE

JAMES A. GERAGHTY, ALJ

Date Received at Agency: 9-29-08

Mailed to Parties:

SEP 29 2008
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

db

AFFIDAVIT

I, **Beverly Gussler** being duly sworn according to law hereby deposes and says:

1. I am the Petitioner in **Claim Petition No. 2005-15292,** which alleges that I sustained various injuries during the course of my employment with the **Paterson Public Schools on March 14, 2005.**

2. I understand that the insurance company for the **Paterson Public Schools** has offered to settle my claim for **$ 1,500.00 under N.J.S.A. 34:15-20.**

3. I understand that if I accept this settlement and the Court approves it the above claims against the **Paterson Public Schools** will be closed forever and cannot be reopened.

4. I understand I have a right to a full trial at which I could receive more, less or the same amount of money and that I am waiving my right to a trial in accepting this settlement and dismissing my claim.

5. I understand my case will be closed completely and that the **Paterson Public Schools** will have no responsibility to me for any future benefits.

6. I understand the Court will make the following allowances which will be deducted from my settlement:

Attorneys Fee.	**$**	**300.00**
Dr. Maio	**$**	**100.00**
Dr. Wong	**$**	**100.00**
Trial Preparation Expenses	**$**	**145.00***

***(To be reimbursed to my attorney).**

that Medicare has paid no benefits for any conditions alleged in this Claim Petition.

9. I will be unavailable to testify in court when my case is next listed and request the Court to accept this Affidavit in lieu of my appearance.

Beverly Gussler

Beverly Gussler

Sworn and Subscribed before me this 11th day of April, 2008

STACY COLE
NOTARY PUBLIC - ARIZONA
MARICOPA COUNTY
My Commission Expires
September 24, 2011

State of New Jersey
Department of Labor and Workforce Development
DIVISION OF WORKERS' COMPENSATION
WC(DO)-370 (R-6-07)

ORDER APPROVING SETTLEMENT WITH DISMISSAL
N.J.S.A. 34:15-20

CASE NO'S 2005- 15292

VICINAGE: Mt. Arlington

PETITIONER
NAME: Beverly Gussler
DATE OF BIRTH: 6/2/39
ADDRESS: 3660 E. Harrison St. Higley AZ 85236

vs

RESPONDENT
NAME: Paterson Public Schools
ADDRESS: 33 Church Street Paterson, NJ 07505

ATTORNEY FOR RESPONDENT
NAME: DeLuca, Hevesi, Imbert, Mak.
ADDRESS: 401 Hamburg Turnpike Ste 206 Wayne, NJ 07474
TELEPHONE NUMBER (AREA CODE): (973) 595-5300
APPEARING: Paul Gelonitis, Esq.

ATTORNEY FOR PETITIONER
TAX IDENTIFICATION NUMBER:
NAME: Fiedler & Schepis, LLC
ADDRESS: 504 Valley Rd. Wayne, NJ 07470
TELEPHONE NUMBER (AREA CODE): (973) 633-6510
APPEARING: Christopher Pitts, Esq.

INSURANCE CARRIER
NAME: CCMSI ☐ SELF-INSURED ☒ TPA
ADDRESS: 3535 Rt. 66 Neptune NJ 07753
CLAIM NUMBER:

This is a lump sum settlement between the parties in the amount of $ 1,500.00 pursuant to N.J.S.A. 34:15-20 which has the effect of a dismissal with prejudice, being final as to all rights and benefits of the petitioner and is a complete and absolute surrender and release of all rights arising out of this/these claim petition(s). The payment hereunder shall be recognized as a payment of workers' compensation benefits for insurance rating purposes only.

The parties agree that this settlement [☐ does (complete page 2) ☒ does not] contemplate a complete and absolute surrender and release of any and all rights by the petitioner's dependents as defined by N.J.S.A. 34:15-13 arising out of this/these claim petition(s).

☐ Order for Child Support Attached ☐ Addendum attached
☐ Further agreed:

ALLOWANCES	REIMBURSE	TAX IDENTIFICATION NUMBER	TOTAL AMT. ALLOWED	PAYABLE BY PETITIONER	PAYABLE BY RESPONDENT
MEDICAL FEE ALLOWED (report and/or testimony) Dr. Mao			100	100	—
Dr. Wong			100	100	—
INTERPRETER:					
ATTORNEY(S) FEE: Fiedler & Schepis			300	300	—
STENOGRAPHIC SERVICE: Wm C. O'Brien			85	—	85
MISCELLANEOUS FEE: Tr. of Preservation Expenses			145	145	—

Reason(s) for Section 20 (check all that apply)
Contested issues regarding ☐ JURISDICTION ☒ LIABILITY ☒ CAUSAL RELATIONSHIP ☐ DEPENDENCY

WE HEREBY CONSENT TO THE ENTRY AND FORM OF THIS ORDER AND ACKNOWLEDGE RECEIPT OF COPY:

PETITIONER'S ATTORNEY

See Affidavit
PETITIONER (where applicable)

RESPONDENT'S ATTORNEY

After considering the circumstances, I find this settlement fair and just.

JUDGE OF COMPENSATION — DATE 4/25/08

Honorable Salvatore Ingrassia
JUDGE'S NAME (Print or Type)

THE ORIGINAL OF THIS DOCUMENT, SIGNED BY THE JUDGE OF COMPENSATION, WILL BE MAINTAINED ON FILE IN THE DIVISION OF WORKERS' COMPENSATION, PURSUANT TO N.J.S.A. 34:15-121 et. seq.

PETITIONER'S ATTORNEY

#443-08

OAL DKT. NO. EDU 5188-08
AGENCY DKT. NO. 110-4/08

P.T. on behalf of minor child P.T.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY, BERGEN COUNTY,	:	DECISION
RESPONDENTS.	:	

The record of this matter, the proposed Stipulation of Settlement, and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon such review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 11/06/08

Date of Mailing: 11/07/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 5188-08

AGENCY DKT. NO. 110-4/08

P.T. ON BEHALF OF MINOR CHILD, P.T.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY, BERGEN COUNTY AND DR. MORTIMER SHERMAN, SUPERINTENDENT,

Respondents.

Glenn M. Finkel, Esq. for Petitioner (Schepisi & McLaughlin, attorneys)

James J. Plosia, Jr., Esq., for Respondent (Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: September 26, 2008 Decided: October 2, 2008

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

The parent appeals P.T.'s suspension from high school alleging violation of applicable rules governing short-term suspensions. This matter was transmitted to the Office of Administrative Law ("OAL") from the Department of Education as an Emergent Relief on April 16, 2008.

An oral argument was scheduled for April 18, 2008 at the OAL, 33 Washington Street, Newark, New Jersey. However, counsel for Respondent requested and was granted an adjournment due to a court conflict. The case was rescheduled to April 21, 2008. At the hearing, Petitioner withdrew the Emergent Relief issue.

Subsequently, the parties engaged in settlement discussions to resolve the entire matter. The parties have agreed to a settlement and have submitted a Stipulation of Settlement as well as the Board Resolution approving the settlement, which are attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless

such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

October 2, 2008
DATE

Maria M La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Date Received at Agency: 10-7-08

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OCT 7 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

APRUZZESE, McDERMOTT,
MASTRO & MURPHY P.C.
25 Independence Boulevard
P.O. Box 112
Liberty Corner, New Jersey 07938
(908) 580-1776
Attorneys for Tenafly Board of Education

2008 SEP 25 P 4:48
OFFICE OF ADMIN LAW

P.T. and E.T. o/b/o P.T.,	:	STATE OF NEW JERSEY
	:	OFFICE OF ADMINISTRATIVE LAW
Petitioners,	:	
	:	
v.	:	OAL Docket No.: EDS 5188-08
	:	Agency Ref. No.: 110-4/08
TENAFLY BOARD OF EDUCATION and MORTIMER SHERMAN,	:	
	:	**STIPULATION OF SETTLEMENT**
Respondents.	:	

The parties hereby agree to resolve all outstanding issues in the above-captioned matter as follows:

1. P.T. is reinstated as a student at Tenafly High School effective immediately.

2. P.T. shall be permitted to participate in any and all school functions and activities while he is a student at Tenafly High School.

3. The above-captioned matter is hereby dismissed with prejudice.

4. Petitioners waive any and all claims for damages and legal fees against the Respondents and any and all officers, employees, servants, and agents of the Tenafly School District.

5. The terms of this Stipulation, and the negotiations which resulted in the executio of this Stipulation, shall be confidential to degree permitted by law.

Law Offices
Apruzzese, McDermott,
Mastro & Murphy
A Professional Corporation
25 Independence Boulevard
P.O. Box 112
Liberty Corner, N.J. 07938
(908) 580-1776

Patricia Tesher

Dated: 9/11/08

Ed Tesher, by his authorized representative
Patricia Tesher

Dated: 9/11/08

TENAFLY BOARD OF EDUCATION

By: _____
Dr. Eugene Westlake, Interim Superintendent

Dated: 9/23/08

I hereby accept the foregoing Stipulation of Settlement having been voluntarily entered into by the parties, and shall forthwith issue the Stipulation of Settlement as a final decision and order in this matter.

Maria Mancini LaFiandra
Administrative Law Judge

Dated:

Law Offices
Apruzzese, McDermott,
Mastro & Murphy
A Professional Corporation
25 Independence Boulevard
P.O. Box 112
Liberty Corner, N.J. 07938
(908) 580-1776

Tenafly Public Schools
500 TENAFLY ROAD, TENAFLY, NEW JERSEY 07670-1795

OFFICE OF
BUSINESS ADMINISTRATOR/
BOARD SECRETARY

(201) 816-4505
FAX: (201) 568-9088
FAX: (201) 569-3711

2008 SEP 26 P 4:48
OFFICE OF ADMINISTRATOR

September 23, 2008

To Whom it May Concern:

A motion was made by Ms. Sharon F. Strompf and seconded by Ms. Phyllis Perskie-Kesslen to approve Resolution B-1.

BOARD

RESOLUTION B-1 APPROVAL OF STIPULATION OF SETTLEMENT

WHEREAS, there is currently pending a matter before the Office of Administrative Law, P.T and E.T. o/b/o P.T., OAL Docket No. EDS-5188-08, Agency Reference No. 110-4/08; and

WHEREAS, a proposed Stipulation of Settlement has been negotiated between counsel for the Tenafly Board of Education and counsel for the parents that would fully resolve all outstanding claims, issues and disputes involving the parties; and

WHEREAS, the proposed Stipulation of Settlement would avoid a significant expenditure of time and resources on the part of the Board and its officials that would be necessary for the continuation of the pending litigation;

NOW, THEREFORE BE IT RESOLVED that the Board approves the Stipulation of Settlement and authorizes Dr. Eugene Westlake to execute the written Stipulation of Settlement.

Certified to be a true copy of a motion
passed by the Tenafly Board of Education,
excerpted from the official Board minutes,
on September 22, 2008.

Barbara Francisco

Ms. Barbara Francisco
Business Administrator/Board Secretary

#449-08

MOHAMED EL-HEWIE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BERGEN COUNTY VOCATIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

This case consolidates two appeals filed by petitioner subsequent to an April 2008 Commissioner decision dismissing an earlier appeal in which Mohamed El-Hewie contested the non-renewal of his employment as an alternate route provisional teacher of mathematics at the end of his 10 month, non-tenured contract for the 2005-06 school year, claiming that the respondent Board violated laws and regulations governing provisional teachers, and discriminated against him. The instant petition alleges that respondents colluded to commit fraud to terminate his employment, conspired to deprive petitioner of his rights as a provisional teacher, and failed to properly administer the provisional teacher mentoring program; the instant petition is one of many actions that petitioner has filed against the Board, Board members, and staff. Respondents filed a motion for summary judgment requesting dismissal based on the doctrines of collateral estoppel and res judicata.

The ALJ found, *inter alia,* that: the facts raised by petitioner in the instant petition simply re-argue his earlier position of improper renewal and deprivation of civil rights; the merits of his argument are neither new nor different than those raised in the appeal that was dismissed in April 2008; petitioner does not have the right to file a new petition based on the same facts because his initial appeal on those facts was dismissed without prejudice; and petitioner has already availed himself of the only proper procedural mechanism available to him – *ie,* an appeal to the Appellate Division of the New Jersey Superior Court, which was filed August 21, 2008. The ALJ concluded that the issues in the instant case are identical to – or arise entirely out of – those in the petitioner's earlier appeal and, therefore, the principles underlying the doctrines of res judicata, collateral estoppel, and the entire controversy doctrine apply. The ALJ granted the respondents' motion to dismiss, and ordered the consolidated appeal dismissed with prejudice.

Upon careful and independent review of the record, the Commissioner concurred with the ALJ and adopted the Initial Decision of the OAL as the final decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

November 13, 2008

OAL DKT. NOS. EDU 5251-08 AND EDU 7507-08
AGENCY DKT. NOS. 84-3/08 AND 105-2/08
(CONSOLIDATED)

MOHAMED EL-HEWIE,	:	
PETITIONER,	:	
V.	:	
ROBERT ALOIA, THOMAS KLEMM AND JACK DRAKEFORD,	:	
RESPONDENTS.	:	
AND	:	COMMISSIONER OF EDUCATION
MOHAMED EL-HEWIE,	:	DECISION
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE BERGEN COUNTY VOCATIONAL SCHOOL DISTRICT, BERGEN COUNTY, ET AL.	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon a full review of the record, the Commissioner fully concurs with the Administrative Law Judge that these consolidated matters are appropriately dismissed pursuant to the principles of res judicata, collateral estoppel, and the entire controversy doctrine.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter for the reasons comprehensively presented therein and the instant petitions of appeal are hereby dismissed with prejudice.

IT IS SO ORDERED*

COMMISSIONER OF EDUCATION

Date of Decision: 11/13/08

Date of Mailing: 11/13/08

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008. *c.* 36

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION-DISMISSAL
(CONSOLIDATED)

MOHAMED EL-HEWIE,
Petitioner,
v.
ROBERT ALOIA, THOMAS KLEMM & JACK DRAKEFORD,
Respondents.

OAL DOCKET NO EDU 05251-08
AGENCY DKT. NO. 84-3/08

MOHAMED EL-HEWIE,
Petitioner,
v.
BERGEN COUNTY VOCATIONAL SCHOOL DISTRICT,
Respondent.

OAL DOCKET NO. EDU 07507-08
AGENCY DKT. NO. 105-2/08

Mohamed El-Hewie, pro se

William C. Soukas, Esq., on behalf of respondents (Nowell, Amoroso, Klein, Bierman, attorneys)

Record Closed: September 12, 2008 Decided: October 14, 2008

BEFORE **WALTER M. BRASWELL**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This Order addresses the issues contained in two petitions filed by Mohamed F. El-Hewie, the responses to those petitions, and the motions of the respondents to dismiss, with prejudice, both petitions.

In response to a written request from the petitioner dated July 2, 2008, the undersigned, by Order dated August 12, 2008, granted the petitioner's request to consolidate the above referenced petitions.

The essential **FACTS** in this matter can be summarized as follows:

Beginning in November 2005 and continuing through the end of the 2005-2006 school year, the petitioner was employed as a provisional teacher by the Board of Education of the Bergen County Vocational and Technical Schools. At the conclusion of the school year, the Board did not renew the petitioner's contract of employment.

On or about June 22, 2006, the petitioner filed a petition with the Commissioner of Education challenging the Board's non-renewal of his employment. Among other things, the petitioner alleged that the Board defrauded him, violated its contract of employment with him, violated the laws and regulations governing provisional teachers and discriminated against him.

On or about July 14, 2006, the Board filed an answer to the petition. The Department of Education transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case. A full plenary hearing was held over the course of six days before Administrative Law Judge Monaco.

On February 27, 2008, ALJ Monaco issued an Initial Decision concluding that:

(1) The Board's non-renewal decision was neither arbitrary, capricious nor otherwise improper; and

(2) The petitioner failed to establish any claim of discrimination.

Also during the first day of hearings, on the Board's motion, ALJ Monaco rejected petitioner's alleged claims of fraud.

On April 10, 2008, the Commissioner issued a Final Decision affirming the Initial Decision in its entirety. Specifically, the Commissioner affirmed ALJ Monaco's findings and stated as follows:

> After comprehensive consideration of the entire record - including hearing transcripts and all evidentiary proofs - and exercising the requisite deference to the ALJ's assessment of the credibility of the witnesses, the Commissioner concurs with the ALJ that petitioner has failed to sustain his burden of establishing that the Board's non-renewal of his employment for the 2006-2007 school year was arbitrary, capricious, unreasonable, or otherwise improper. The Commissioner further agrees that petitioner has failed to meet his burden of proof with respect to any claim of discrimination against him by the Board.
>
> Accordingly, the recommended decision of the OAL is adopted for the reasons comprehensively presented therein and the instant petition of appeal is hereby dismissed.

Thereafter, on or about April 15, 2008, plaintiff filed a notice of appeal with the New Jersey State Board of Education appealing the Commissioner's decision.

By petition dated March 19, 2008, (hereinafter referred to as El-Hewie II and El-Hewie III) the petitioner filed the first of the two petitions addressed in this matter. El-Hewie II names as defendants the following school officials: Superintendent of Schools Robert J. Aloia; Human Resources Director Thomas Klemm; and Board President Jack Drakeford.

The claims alleged in El-Hewie II are essentially the same as those rejected by the Commissioner in El-Hewie I. Those claims are the improper administrations of the provisional training program/mentoring program and the improper non-renewal of petitioner's employment. Each of the respondents in El-Hewie II was called as a witness in El-Hewie I and, with the exception of Mr. Drakeford, testified during that proceeding. It should also be noted that in a motion to accelerate the El-Hewie II proceeding the petitioner, in his filings, acknowledged that this action "has its genesis" in El-Hewie I.

The petitioner also attempts to raise a new cause of action in El-Hewie II based upon the re-assignment of Patricia Cosgrove, the former principal of the Bergen County Academies, claiming that her "omission" by the respondents constitutes a miscarriage of justice. However this issue was already brought before the State Board of Education by the petitioner in the course of his appeal. The State Board advised the petitioner that it would consider the argument together with the merits of the appeal.

In El-Hewie III, by petition dated April 4, 2008, and transmitted to the OAL on April 17, 2008, petitioner once again addresses the merits of the Board's non-renewal. The petition names the following as respondents: Bergen County Vocational School District of Bergen County; BCTS Board Member and Bergen County Superintendent Aaron R. Graham; BCTS Board Vice President Berni Lynn Koch; BCTS Board Member Lazaro Carvajal; BCTS Board Member Angela Taylor; Supervisor Raymond J. Volpe; Principal Patricia Cosgrove; Vice Principal Russell Davis; Supervisor Richard Pannacucci; Supervisor Dennis Montone; Teacher Joseph Holbrook; Teacher Linda Eickmeyer; and Manager Linda Theos. More particularly, the petitioner questions the alleged inconsistencies in the testimony of the witnesses during the hearing in El-Hewie I. The petitioner also alleges that the respondents colluded to commit fraud to terminate his employment, that the respondents conspired to deprive provisional-teacher rights, and that the respondents failed to properly administer the mentoring program. El-Hewie

III is one of many actions that the petitioner has filed against the Board, the Board members and staff[1].

It is petitioner's contention that "since his petition in El-Hewie I was dismissed without prejudice," petitioner is permitted to re-argue his claims of improper non-renewal of employment by respondents. In an attempt to re-litigate this matter the petitioner attempts to challenge the alleged inconsistencies in the witnesses' testimony given at the El-Hewie I hearing, and the petition in El-Hewie III includes a claim that the Board's actions violated petitioner's civil rights. However, the actual facts raised by petitioner are neither new nor different then those raised in El-Hewie I.

On July 28, 2008, the respondents filed a motion for summary judgment requesting dismissal of El-Hewie II and El-Hewie III based on the doctrines of collateral estoppel and res judicata. Petitioner responded to the motion on August 28, 2008, wherein he re-alleges facts that were already addressed in El-Hewie I. The respondent replied to petitioner's response on September 5, 2008, maintaining that this matter should be dismissed. By motion dated September 12, 2008, respondent Aaron R. Graham, Executive County Superintendent of Bergen County and Deputy Attorney General Melissa Dutton also filed a motion to dismiss El-Hewie II and El-Hewie III pursuant to the principles of res judicata.

LEGAL DISCUSSION

Res Judicata is a principle of law that precludes a party from re-litigating issues which were previously fairly and finally litigated and determined. See Lubliner v. Paterson Bd. of Alcoholic Beverage Control, 33 N.J. 428, 435 (1960).

[1]These include the following: 1. The appeal of the Commissioner's ruling, 2. A motion for emergent relief, 3. No fewer than four motions to the State Board to supplement the record, 4. A Federal lawsuit naming the attorney for the Board and various others as defendants, 5. An ethics grievance against the Board's attorney, 6. The two petitions presently addressed in El-Hewie II and El-Hewie III, and 7. Complaints to the State Board of Examiners seeking the revocation of the teaching/administrative certifications of Robert J. Aloia, Patricia Cosgrove, and Richard Pannacucci.

The laws of this state favor the avoidance of piecemeal litigation and, in cases such as this, the handling and disposition of all issues as to all parties simultaneously. In the current matter, it is evident that the petitioner's dissatisfaction with the adverse rulings from ALJ Monaco and the Commissioner of Education is manifested in the various superfluous pleadings and petitions filed by petitioner. These pleadings and petitions constitute harassment and abuse of the legal system. Contrary to the petitioner's assertions a dismissal without prejudice does not afford him the opportunity to file a new petition based on the same facts disposed of in El-Hewie I simply because the relief sought was denied. In this matter, by petition dated August 21, 2008, the petitioner has already availed himself of the only proper procedural mechanism available to him: that being an appeal of the Commissioner's ruling to the Appellate Division of the New Jersey Superior Court.

El-Hewie I is based entirely on the same issues presented in the instant matter. That being the non-renewal of petitioner's employment and the factual circumstances surrounding that non-renewal. Those issues were fully addressed, adjudicated and dismissed by ALJ Monaco following six-hearing dates in which the petitioner called over twenty witnesses. Judge Monaco's Initial Decision was adopted by the Commissioner of Education on April 10, 2008.

The preclusive effect of a final judgment on the merits such as the Commissioner's decision was explained by our Supreme Court in Hennessey v. Winslow Township, 183 N.J. 593 (2005). There, the Court explained that:

> The doctrine of collateral estoppel operates to foreclose relitigation of an issue when the party asserting the bar . . . show[s] that (1) the issue to be precluded is identical to the issue decided in the prior proceeding, see Pittman v. LaFontaine, 756 F. Supp. 834, 841 (D.N.J. 1991) (stating that for an issue to be precluded subsequent action must involve substantially similar or identical issues); (2) the issue was actually litigated in the prior proceeding, see Ibid. (stating that 'the litigant against whom issue preclusion is invoked must have had a full and fair opportunity to litigate

> the issue in the previous tribunal'); (3) the court in the prior proceeding issued a final judgment on the merits, see State v. Redinger, 64 N.J. 41, 45, 312 A.2d 129 (1973) (stating that collateral estoppel applies when 'issue of ultimate fact has []been determined by a valid and final judgment . . .); (4) the determination of the issue was essential to the prior judgment, see Warren Township v. Suffness, 225 N.J. Super. 399, 408, 542 A.2d 931 (App. Div.), certif. denied, 113 N.J. 640, 552 A.2d 166 (1988); (stating that '[c]ollateral estoppel applies . . . to those [matters and facts] necessary to support the judgment rendered in the prior action') and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding. See Wunschel v. City of Jersey City, 96 N.J. 651, 658, 477 A.2d 329 (1984) (stating, 'Central to the application of the doctrine [of collateral estoppel] is that the party against whom the doctrine is to be invoked must have been party to or privy to the prior proceedings.').
>
> [Id. at 599 (citing In re Dawson, 136 N.J. 1, 20-21 (1994).]

In this instance, each of the elements of collateral estoppel are met. The issues in the current petitions are the same as those litigated before and adjudicated by the Commissioner in El-Hewie I. A final judgment was not only issued on the merits but also was appealed by the petitioner. The prior adjudication focuses on the non-renewal of the petitioner's employment and all issues that the petitioner currently seeks to re-litigate. The law does not permit the petitioner to enjoy a "second bite at the apple."

In El-Hewie I, the Commissioner considered the entire record and concurred with ALJ Monaco that petitioner "failed to sustain his burden of establishing that the Board's non-renewal of his employment was arbitrary, capricious, unreasonable or otherwise improper." The Commissioner confirmed that ALJ Monaco's findings were well supported by credible evidence and that Judge Monaco carefully weighed all of the evidence before her. A Final Judgment on the merits existed when the Commissioner rendered her decision. See Mancuso v. N. Arlington, 203 N.J. Super. 427, 432-433 (Law Div. 1985) (Commissioner's adoption of ALJ decision is final judgment on merits which precludes subsequent litigation of same issues in Law Division).

The parties currently named are all in privity with the respondent in El-Hewie I. All parties named are either administrators, staff employed by the Board or members serving on the Board. The vast majority, if not all, were called to testify as witnesses during the hearing in El-Hewie I. The petitioner's attempts to classify his claims in different terms or to name different individuals as respondents are contrived and should be rejected.

In fulfilling their quasi-judicial responsibilities, State agencies look to judicial principals for guidance. Hackensack v. Winner, 82 N.J. 1, 28-30 (1980). In Winner, our Supreme Court stated that "court-fashioned doctrines for the handling of litigation do in fact have some genuine utility and relevance in administrative proceedings." Id. at 29. Our Supreme Court has also noted that:

> Although an administrative agency, such as the OAL, is not a "court" in the true or literal sense of the term, many principles and rules that govern judicial proceedings and determinations can be applied to an agency's quasi-judicial or adjudicative function. Judicial rules of procedure and practice are transferable to administrative agencies when these are conducive to ensuring fairness, independence, integrity, and efficiency in administrative adjudications.
>
> [In re Onorevole, 103 N.J. 548, 554-55 (1986) (citation omitted).]

Therefore, "it is consistent with constitutional philosophy to apply to administrative agencies, in appropriate situations, judicial rules conducive to the ends of intergovernmental compatibility and harmony, such as res judicata, collateral estoppel, the single-controversy doctrine and the like." Winner, supra, 82 N.J. at 32-33. "Decisions 'have stressed that the policy considerations which support these judicial doctrines - namely, finality and repose; prevention of needless litigation; avoidance of duplication; reduction of unnecessary burdens of time and expenses; elimination of conflicts, confusion and uncertainty; and basic fairness - have an important place in the administrative field." Ibid.

I **FIND** that in El-Hewie II and III petitioner merely re-argues his earlier position of improper non-renewal and deprivation of civil rights. Regardless of how petitioner raises his complaints in El-Hewie II and III, the underlying allegations and relief sought are all the same. Since El-Hewie II and III are based upon the identical issues and parties as the controversy adjudicated in El-Hewie I, they are barred by the doctrines of res judicata and collateral estoppel.

Additionally, petitioner's claims arise entirely out of El-Hewie I. As set forth in Winner, supra, the entire controversy doctrine considers "whether the common issue could have been fairly, competently and fully tried and adjudicated together with and as a constituent part of all other issues in the case before one agency so that fragmented and repetitious actions would be avoided, all relevant concerns addressed and the entire controversy concluded in a single proceeding." Id. at 34.

CONCLUSION AND ORDER

Accordingly I **CONCLUDE** that for reasons stated herein the issues in El-Hewie II and III are either identical to those previously before this agency, or arise entirely out of El-Hewie I, which was adjudicated by ALJ Monaco and adopted by the Commissioner of Education. Therefore, for the principles underlying the doctrines of res judicata, collateral estoppel and the entire controversy doctrine, namely, the prevention of needless litigation, avoidance of duplication, reduction of unnecessary burdens of time and expenses, and basic fairness to the respondents, I hereby **ORDER** that the respondent's motion to dismiss this matter be **GRANTED**.

It is further **ORDERED** that the petitions described herein as El-Hewie II and III are hereby **DISMISSED WITH PREJUDICE**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 14, 2008
DATE

Walter M. Braswell
WALTER M. BRASWELL, ALJ

Date Received at Agency: Oct. 14, 2008

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OCT 15 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

ljb

453-08

#453-08R

OAL DKT. NO. EDU 7750-08
(EDU 12531-07 AND EDU 3969-07 ON REMAND)
AGENCY DKT. NO. 93-3/07

IN THE MATTER OF THE TENURE	:	
HEARING OF ELBERT WINSTON,	:	
SCHOOL DISTRICT OF THE CITY	:	COMMISSIONER OF EDUCATION
OF ELIZABETH, UNION COUNTY.	:	DECISION
	:	

The record of this matter, the parties' Settlement Agreement and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon such review, the Commissioner concurs with the Administrative Law Judge that the proposed settlement is consistent with established standards governing settlement of tenure matters. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846.

Accordingly, the settlement is hereby approved and the tenure matter dismissed, subject to compliance with the terms of the settlement. A copy of this decision shall be forwarded to the State Board of Examiners.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 11/18/08
Date of Mailing: 11/19/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 07750-08

AGENCY DKT. NO. 93-3/07

IN THE MATTER OF THE TENURE HEARING OF ELBERT WINSTON, SCHOOL DISTRICT OF THE CITY OF ELIZABETH, UNION COUNTY

Karen A. Murray, Esq., for petitioner (The Murray Law Firm, attorneys)

Sheldon H. Pincus, Esq., for respondent (Bucceri and Pincus, attorneys)

Record Closed: October 23, 2008 Decided: October 27, 2008

BEFORE **J. HOWARD SOLOMON**, ALJ:

This matter involves tenure charges of conduct unbecoming, certified by the State-Operated School District of Elizabeth (District) against Elbert Winston (Winston or respondent) under the Tenure Employees' Hearing Law, N.J.S.A. 18A:6-10 to -18.1.

Winston, a tenured teaching staff member employed by the District, was accused of striking T.G., a student, on her face on May 12, 2004, and on May 26, 2005 of striking I.S., a student, upon the face with his elbow.

On March 30, 2007, the District filed its written charges with the Commissioner of Education (Commissioner). Winston filed his answer on April 12, 2007. Subsequently, the matter was referred by the Commissioner to the Office of Administrative Law (OAL) where it was received on April 23, 2007 for a hearing as a contested case.

An action was also brought by the Department of Children and Families (DCF)/Institutional Abuse Investigation Unit, under OAL docket number HDY 05208-07/agency docket number AHU# 07-154, against respondent for the acts alleging physical abuse upon T.G., a minor student, on May 12, 2004. The DCF was not involved with the charge alleging violent physical contact upon I.S., a minor student, on May 26, 2005.

Winston denied the allegations and appealed. By Order of the undersigned dated May 18, 2007, the matters were consolidated for hearing and the DCF was vested with the predominant interest in the conduct and outcome of this consolidated proceeding.

By letter dated July 31, 2007, Keri Ann Eglentowicz, Deputy Attorney General, in behalf of the DCF, notified all parties and the undersigned that the DCF had modified its finding of substantiated abuse against respondent to "not substantiated" and removed his name from its Central Registry. Accordingly, DCF withdrew from these proceedings. In light of its withdrawal, there was no longer a basis to follow the predominant interest order requiring that this initial decision be submitted to DCF before submission to the Commissioner.

On September 5, 2007, a date scheduled for hearing, both parties agreed to, and submitted, a proposed written settlement agreement, subject to approval by the Commissioner. In accordance with the decision of the State Board of Education in In re Cardonick, State Board decision of April 6, 1983 [1990 School Law Decisions (S.L.D.) 842] and as codified by N.J.A.C. 6A:3-5.6, the record of any proposed settlement must include:

> . . . the nature of the charges, the length of the teacher's employment, circumstances justifying the settlement, consent or authorization by the

> Board of Education and the teacher to the proposed agreement, the administrative law judge's finding that the teacher entered into the agreement with a full understanding of his or her rights and [a finding] that the agreement is consistent with the public interest.

On September 5, 2007, the undersigned held a public hearing on the issue of whether or not the proposed settlement agreement should be accepted. Counsel for both parties set forth on the record the reasons why settlement would be in the public interest. Winston testified that he fully understood and voluntarily agreed to the terms of the settlement. Thereafter, on September 20, 2007, the Elizabeth Board of Education (Board) approved the settlement as evidenced by its resolution which was received by the OAL on September 27, 2007.

Upon additional review of the proposed settlement agreement in preparation for the Initial Decision, the undersigned had reservations about the requirement that the agreement was consistent with the public interest and accordingly notified counsel for the respondent and the Board of its intent to disapprove the agreement. Of particular note, was the continuation of salary, less State and Federal income tax deductions and pension contributions, until November 1, 2009 when respondent was to tender his resignation. During this period, the agreement provided that respondent would be on an administrative leave.

At the request of the parties, the undersigned scheduled oral argument for October 25, 2007 on the issue of the public interest. The District produced Harold Kennedy, Jr., the Business Administrator-Secretary to the Board. As represented by both counsel for respondent and the District at the time of oral argument, and as confirmed by the sworn testimony of Mr. Kennedy, the respondent had accrued more than 240 days of leave time over a twenty-three year teaching career, although such leave time was not initially provided for in the agreement. Based upon the further representations of respondent's counsel and counsel for the District, respondent agreed not to seek payment for this unused leave time as part of the settlement. Additionally, counsel for the District and Mr. Kennedy both expressed their concerns of further legal fees and costs in the event this matter were to continue.

After the undersigned prepared an Initial Decision dated October 26, 2007 approving the settlement primarily upon the testimony of Mr. Kennedy, the file along with the settlement agreement and Initial Decision were referred back to the Commissioner for her approval. By decision of the Commissioner dated December 14, 2007, the proposed settlement was rejected on the grounds that it did not meet the established standard for settlement of tenure matters as set forth in Cardonick, supra. The Commissioner, therefore, remanded the matter back to the OAL "for further expansion of the record and revision of the Settlement Agreement, consistent with concerns set forth [in her decision]. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing on the merits." (See decision of Commissioner dated December 14, 2007.) Upon receipt of the Commissioner's decision, the undersigned scheduled peremptory hearing dates for April 7, 8, 9, 11 and, 14, 2008, which was confirmed by letter of the undersigned dated January 7, 2008.[1]

On Friday, April 4, 2008, the undersigned received a telephone conference call from Ms. Murray and her adversary wherein Ms. Murray requested an adjournment of the peremptory hearing scheduled to start on April 7 because one of her witnesses, T.G. had, since the original hearing date, moved to the State of Georgia. She advised that there were no authorized District funds to provide transportation for T.G., and presumably a relative to accompany her back to New Jersey, and provide a hotel room, if needed and wanted time to request these funds from the Commissioner, or in the alternative, request that the Commissioner revisit the settlement agreement. She stated, however, that the other student, I.S., was available to testify. Her adjournment request was denied since this hearing was made peremptory in January 2008.

On April 7, 2008, the first scheduled hearing date, Ms. Murray and Kirk Nelson, Esq., general counsel to the Elizabeth Board of Education, and counsel for respondent appeared before the undersigned. Ms. Murray advised that I.S. and his mother were

[1] Both counsel requested later dates since they were both involved in an ongoing and protracted tenure hearing before the Honorable Ken Springer, ALAJ and because of other scheduling conflicts.

attending a local funeral scheduled for 10:00 a.m. that morning. Accordingly, the undersigned rescheduled the matter for 1:30 p.m.

Upon his return to the OAL in the afternoon, Mr. Nelson, advised the undersigned that I.S. and his mother, after making several attempts at communicating with them, now refused to appear. The matter was then placed on the record where Mr. Nelson stated that I.S. and his mother were no longer willing to appear in this matter, and since the District was unable to produce either eyewitness, he represented that the District was unable to proceed and dismissed the tenure charges, subject to the Commissioner's approval. The Initial Decision of the undersigned dated April 14, 2008, dismissed the charges and referred the matter back to the Commissioner for her consideration.

The Commissioner, in her decision dated April 25, 2008, again remanded the matter back to the OAL directing the District to proceed with its case and, if necessary, utilize subpoena power to compel the attendance of necessary witnesses. In an extensive footnote on page two of her decision, the Commissioner noted that she was supplied with a transcript of the proceedings which took place on October 25, 2007 where Mr. Kennedy provided a full explication that respondent would be entitled to full payment for 240 accumulated leave days, which respondent was waiving, and that the settlement agreement is now "approvable." (See footnote in Decision of Commissioner dated June 25, 2008.)

Based upon the remand, the matter was again scheduled peremptorily for hearing on October 3, 2008. Counsel for the parties and respondent appeared on that date along with a settlement agreement, which is attached to and fully incorporated in this decision. The agreement, which is subject to the approval of the Commissioner, is essentially the same as the one presented on September 5, 2007, except that it now contains a provision of waiver of sick leave.[2]

[2] See paragraph five of the agreement.

On October 3, 2008, the undersigned held a public hearing on the issue of whether or not the proposed settlement agreement should be accepted. Respondent testified that he fully understood and voluntarily agreed to the terms of the settlement. On September 18, 2008, the Elizabeth Board of Education (Board) approved the settlement, as evidenced by the attached resolution. The record closed on October 23, 2008 when, at the direction of the undersigned, a certification of Mr. Kennedy was submitted certifying that respondent had accumulated a total of 240 sick days, confirming the representations contained in paragraph five of the agreement.[3]

Based upon my review of the record, the testimony of respondent, I **FIND** that the proposed settlement is consistent with the public interest for the following reasons:

1. Respondent has been employed as a teacher in the Elizabeth school system for the past twenty three years.

2. It is anticipated that a hearing in this matter, if the District's witnesses were produced, would be protracted and costly.

3. The decision of the DCF to modify its previous finding of "substantiated" child abuse against respondent to "not substantiated" may impair the ability of the District to prove its case.

4. Litigation of the charges would likely lead to the disruption of the District's educational program due to the amount of time lost by administrators, other personnel and any student who would be required to testify to the occurrences which led to the filing of the tenure charges.

5. If the tenure matter proceeds to hearing, both parties would incur costs of paying their attorneys for a hearing and any appeals involved.

6. Respondent has agreed to resign irrevocably from the District on November 1, 2009.

[3] The record in the past referred to "leave days" in general. The agreement now submitted, however, addresses only "sick leave." Therefore, the undersigned required confirmation from the District that respondent had at least 240 sick leave days which were being waived. Accordingly, the enclosed certification of Mr. Kennedy was submitted confirming the total sick days left.

7. According to the settlement agreement, respondent waives any claim for payment of accrued sick leave time, which is a substantial amount.

8. Before entering into this agreement, respondent fully understood his rights and had adequate opportunity to consult with legal counsel.

9. In particular, respondent acknowledged his understanding that the Commissioner is required under N.J.A.C. 6A:9-17.4 to refer this matter to the State Board of Examiners for whatever action it deems appropriate.

10. The settlement fully disposes of all issues in controversy.

Based upon the foregoing, I **CONCLUDE** that the terms of settlement are in the public interest.

It is **ORDERED** that the parties comply with the terms of settlement and that these proceedings are hereby concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless

such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

10-27-08
DATE

J. HOWARD SOLOMON, ALJ

Date Received at Agency:

10-29-08

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OCT 29 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the counsel for the Elizabeth Board of Education and Elbert Winston negotiated a resolution of the following case: In the Matter of the Tenure Hearing of Elbert Winston, School District of the City of Elizabeth, Agency Dkt. No. 93-3/07, OAL Dkt. No. EDU 03969-07, and DCF v. E.W., Agency Dkt. No. AHU 07-154, OAL Dkt. No. HDY 05208-07; and

WHEREAS, in the interest of cost efficiency and judicial economy, and in lieu of a hearing, the parties have agreed to resolve the above-referenced case, with prejudice; and

WHEREAS, after a lengthy legal process involving the Commissioner's review of the Settlement, the Commissioner of Education has indicated that she would reconsider her position and approve the Settlement.

NOW, THEREFORE, BE IT RESOLVED, that the Board hereby approves a revised Confidential Settlement Agreement on file with the Board Secretary.

Elizabeth, New Jersey

08-53

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD SEPTEMBER 18, 2008

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary

SETTLEMENT AGREEMENT

This Agreement is made this 25th day of August, 2008, by and between Elbert Winston (hereinafter "Winston"), who resides at 930 Prospect Avenue, Plainfield, New Jersey 07060, and the Board of Education, with its principal offices located at 500 North Broad Street, Elizabeth, New Jersey 07207 (hereinafter the "Board").

WITNESSETH:

WHEREAS, Winston is currently employed as a tenured teaching staff member; and,

WHEREAS, Winston and the Board are parties to two (2) proceedings that were consolidated for hearings and which bear captions and docket numbers as follows: (a) In the Matter of the Tenure Hearing of Elbert Winston, School District of Elizabeth, Agency Dkt. No. 93-3/07, O.A.L. Dkt. No. EDU 03969-07; and DCF v E.W., Agency Dkt. No. AHU #07-154, O.A.L. Dkt. No. HDY 05208-07,

WHEREAS, on July 31, 2007, The Department of Children and Families (DCF) determined to modify its finding of substantiated abused against Winston to "not substantiated" thereby mooting the appeal in DCF v E.W., supra,

WHEREAS in light of the aforesaid determination by DCF, and in view of the costs of litigation for an Abbott District, the Board is agreeable to the dismissal of the tenure charges, subject to the conditions set forth in this Agreement;

WHEREAS, both the Board and Winston desire to enter into a Settlement Agreement stipulating the terms of his separation from all employment with the Board, together with the release of all his tenure and seniority rights as an employee of the Board, as well as providing for the exchange of General Releases of any and all claims

which the parties may have against the other arising from Winston's employment or otherwise;

WHEREAS, the terms of settlement take into account the public interest, as well as the fact that the litigation of these two (2) actions, and anticipated appeals thereafter, have caused and will continue to cause disruption to the educational program in the Elizabeth School District due to the absence of administrators, teachers and students who have or will hereafter have to testify at hearings, and that the Board and Winston have incurred and will continue to incur substantial financial costs to continue the litigation;

NOW, THEREFORE, in consideration of the mutual promises of the parties and in exchange for the consideration more particularly noted below, it is hereby agreed:

1. The Board agrees that the Tenure Charges in this matter bearing Agency Dkt. No. 93-3/07, O.A.L. Dkt. No. EDU 03969-07 shall be dismissed, with prejudice, subject to the approval of this Agreement by the Office of Administrative Law and the Commissioner of Education.

2. The Board shall pay to Winston the amount of salary that it withheld from Winston pursuant to N.J.S.A. 18A: 6-14, which sum is stipulated to be Twenty Four Thousand, Four Hundred Forty Seven Dollars and Thirty Six Cents ($24,447.36). The aforesaid amount shall be paid net of normal payroll deductions for State and Federal income taxes and pension contribution. Additionally, this sum of $24,447.36 shall be paid to Winston within thirty (30) days of the approval of this Agreement by the Office of Administrative Law and the New Jersey Commissioner of Education.

3. Winston agrees to sign an irrevocable letter of resignation from all employment with the Board effective at the close of business on November 1, 2009. The resignation letter shall be in the form annexed hereto as Exhibit A and shall be expressly conditioned upon the Board's compliance with this Separation of Employment Agreement. The letter of resignation shall be null and void if the terms of the Separation of Employment Agreement are not met. The resignation is otherwise irrevocable. The Board waives all statutory or contractual claims for notification of Winston's resignation.

4. The Board will publicly approve and accept the resignation of Winston at its next regularly scheduled meeting, effective the close of business on November 1, 2009.

5. The Board shall approve the continuation of an administrative leave for Winston through and until the close of business on November 1, 2009. As additional consideration for the granting of this administrative leave, Winston waives all rights that he has under the collective negotiations agreement and/or Board policy for a separate, but full payment of approximately 240 days of accumulated sick leave that he has to his credit incident to his separation from employment in the district.

6. The Board shall restore the salary, adjustment and longevity increment(s) that it withheld from Winston for the 2006-2007 school year, which sum is stipulated to be One Thousand Eight Hundred Fifty Four Dollars ($ 1854.00). The sum of $1854.00 shall be paid to Winston as and for the increment amount that was to have been paid to him in the 2006-2007 school year. The aforesaid amount shall be paid net of normal payroll deductions for State and Federal income taxes and pension contribution. Additionally, this sum of $ 1854.00 shall be paid to Winston within thirty (30) days of the approval of this Agreement by the New Jersey Commissioner of Education. The Board shall further undertake to amend its payroll records and pension reports to the N.J. Division of Pensions so that Winston's salary for the 2006-2007 school year is established to be Seventy Three Thousand Eight Dollars ($73,008.00), plus longevity in

the amount of Seven Hundred Fifty Dollars ($750.00) for a total salary of Seventy Three Thousand Seven Hundred Fifty Eight Dollars ($73,758.00).

7. The Board shall restore the salary, adjustment and longevity increment(s) that it withheld from Winston for the 2007-2008 school year, which sum is stipulated to be One Thousand Six Hundred Dollars ($1600.00). Subject to the terms of Paragraphs 6 and 8, the Board shall further undertake to amend its payroll records and pension reports to the N.J. Division of Pensions so that Winston's salary for the 2007-2008 school year is established to be Seventy Four Thousand Six Hundred Eight Dollars ($74,608.00), plus longevity in the amount of Seven Hundred Fifty Dollar ($750.00) for a total salary of Seventy Five Thousand, Three Hundred Fifty Eight Dollars ($75,358.00).

8. Upon Winston providing the Board with proof of the satisfactory attainment of a Masters Degree, the Board agrees that he shall be granted lateral movement on the salary guide and that his 2007-2008 salary shall be adjusted to Seventy Eight Thousand, Eight Hundred Eighty Four Dollars ($78,884.00), plus longevity in the amount of Seven Hundred Fifty Dollars ($750.00) for a total salary of Seventy Nine Thousand Six Hundred Thirty Four Dollars ($79,634.00). The Board shall then further undertake to amend its payroll records and pension reports to the N.J. Division of Pensions so that Winston's salary for the 2007-2008 school year is established to be Seventy Eight Thousand, Eight Hundred Eighty Four Dollars ($78,884.00), plus longevity in the amount of Seven Hundred Fifty Dollars ($750.00) for a total salary of Seventy Nine Thousand Six Hundred Thirty Four Dollars ($79,634.00).

9. Subject to effectuation of the adjustments to salary set forth in Paragraphs 6-8, and for the period through and until November 1, 2009, Winston shall be paid at the applicable salaries set forth in the collective negotiations agreement with the Elizabeth Education Association for the 2007-2008, 2008-2009 and 2009-2010 school years, inclusive of all salary, adjustment and longevity increments. The parties stipulate and agree that Winston's salary shall be $ 79,634.00 for the 2007-2008 school year, $81,434.00 for the 2008-2009 school year and the salary to be determined through

collective negotiations at the MA Max step of the applicable salary guide for the 2009-2010 school year. Such salary shall be paid to Winston in the normal course of business, net of normal payroll deductions for State and Federal income taxes and pension contribution.

10. Through and until November 1 2009, the Board shall continue to provide Winston all of the insurance coverage(s) that it is presently providing to Winston under the plan(s) applicable to teaching staff members employed by the Board.

11. Upon the termination of Winston's employment on November 1, 2009 and consistent with his rights under the Consolidated Omnibus Reconciliation Act of 1986 ("COBRA"), Winston shall be able to purchase, at his own cost and expense, the insurance coverage presently provided to other teaching staff members employed by the Board.

12. In the event that Winston is unable to find alternative employment, the Board agrees that it will not contest, or oppose any claim for unemployment compensation that may be filed by Winston after November 1, 2009.

13. Winston's entry into this Settlement Agreement shall not constitute nor shall it be interpreted as an admission of wrongdoing or guilt, or liability in any manner on his part.

14. Winston waives any and all rights to tenure, seniority, recall or reinstatement as of the effective date of his resignation. It is understood and agreed that Winston shall not, as of the effective date of his resignation, receive any other compensation or benefits or emoluments of employment except as otherwise provided in this Settlement Agreement.

15. In consideration of the above, Winston agrees for himself and his heirs, successors and assigns, to release irrevocably and unconditionally, and discharges the

Board, its members past, present and future; welfare and/or pension plans; trustees, officers, supervisors, employees, students, and agents of the Board ("Releasees"), past, present and future; of and from any debts, obligations, claims, demands, judgments, claims for attorneys' fees, claims seeking employment or reemployment with the Board, claims for contributions and/or in tort, contract, by statute, or on any other basis, whether in law or in equity, which he, or his estate, might otherwise have or have had. This release includes but is not limited to claims under Title VII of the Civil Rights Act of 1964, The Civil Rights Act of 1866, The Civil Rights Act of 1991, The Age Discrimination in Employment Act of 1967, The Americans With Disabilities Act of 1990, The Employment Retirement Income Security Act of 1974, The Vietnam Era Veterans Readjustment Assistance Act of 1974, The New Jersey Law Against Discrimination, The New Jersey Conscientious Employee Protection Act, the New Jersey Employer-Employee Relations Act, and all Federal, State, and Local law claims, whether statutory or common law, for defamation, libel, tortious interference, wrongful discharge, harassment, or for discrimination on the basis of race, color, sex, religion, national origin, age, handicap or disability, sexual orientation, veteran's status, or marital status or on any other prohibited basis, or any other claim arising out of or related to his employment or his termination from employment with the Board.

Notwithstanding the signing of the release by Winston, the Board shall remain obligated to indemnify Winston against claims of third parties arising on or prior to November 1, 2009 pursuant to N.J.S.A. 18A: 16-6 and 6.1.

16. The Board, its members, agents, servants and employees ("Releasees"), agree to release irrevocably and unconditionally, and discharge Winston from any and all claims which it may have against Winston. It specifically releases Winston from any and all claims arising out of the employment relationship, including but not limited to any cause of action pursuable before any state or federal court or agency (including the filing and/or certification of tenure charges under the N.J. Tenure Employees' Hearing Law), or any other federal or state statutory provision, administrative regulation, collective negotiations agreement or other act that has the force and effect of law; as well as any

claims for counsel fees, or any statutory or common law claim or cause of action for defamation, libel, tortious interference, breach of duty or loyalty, harassment, or for discrimination on the basis of race, color, sex, religion, national origin, age, handicap or disability, sexual orientation, veteran's status, or marital status or on any other prohibited basis.

17. The parties agree that, subsequent to the date of this Agreement, any inquiries from potential employers regarding Winston shall be channeled solely to the then current Assistant Superintendent for Human Resources. Responses to such inquiries shall be limited to providing the dates of Winston's employment, his position, his salary, and that he left the district voluntarily to pursue other career opportunities. Nothing in this Settlement Agreement shall prohibit Winston from seeking other employment after the date of this Agreement.

18. The Board and Winston agree that Winston shall be provided a mutually convenient opportunity to obtain whatever personal belongings of his remain within the school district, as well as to return any district materials that Winston has in his possession.

19. The parties acknowledge that this Settlement Agreement shall be submitted to the Office of Administrative Law and to the Commissioner of Education for review and approval, and that the terms of the Agreement are expressly made subject to and contingent upon such review and approval by each of said agencies. In the event that either the Office of Administrative Law and/or Commissioner of Education disapproves and/or rejects any of the terms contained herein, this Settlement Agreement shall be null and void and shall not be evidential or used by any party in any proceeding involving any party to this Settlement Agreement. In addition, each of the parties shall return to the same position(s) which they held prior to this Settlement Agreement, and all rights are reserved in that event.

20. Winston acknowledges that, notwithstanding the parties entry into this Settlement Agreement, he has been made aware that the Commissioner of Education may nonetheless refer the matter to the New Jersey State Board of Examiners for such action regarding his teaching certificates as it deems appropriate.

21. In the event that the State Board of Examiners determines to initiate proceedings that results in a final determination for the suspension or revocation of Winston's teaching certificates, the Board agrees that it will nonetheless remain obligated to pay to Winston the full amount of salary, benefits and/or other consideration required under this Settlement Agreement. Any salary or benefits that would have been due to be paid to Winston between the effective date of any such final decision suspending or revoking Winston's teaching certificates and the effective date of Winston's resignation shall thereafter be paid to Winston by the Board in lump sum.

22. Nothing in this Settlement Agreement or the Releases set forth above shall preclude either party from bringing an action to enforce performance of any term of this Agreement should there be a default in performance.

23. The parties expressly agree that they shall act in good faith to ensure implementation of this Settlement Agreement. The parties mutually agree to refrain from retaliation, in any manner, against the other party (or, their families, members, agents and employees). The parties further mutually agree not to make any derogatory comments, statements or misrepresentations about the other (or, their families, members, agents and employees).

24. The parties acknowledge that each has had the opportunity to consult with an attorney or a representative of their own choosing prior to signing this Settlement Agreement and that each signs this Settlement Agreement freely and voluntarily and without coercion or duress. The parties further acknowledge that they fully understand the duties and obligations enumerated herein and has been informed of their legal rights and obligations.

25. This Settlement Agreement shall be subject to the laws of the State of New Jersey.

26. The undersigned representatives of the Board hereby acknowledge that they have been duly authorized by the Board to sign this Settlement Agreement and bind the Board to its terms. Upon ratification of this Agreement, the Board authorizes its President and Secretary to execute the same on its behalf.

27. All terms of this Settlement Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

28. This Separation of Employment Agreement incorporates and settles all claims and disputes which may exist between Winston and the Board arising from his employment or otherwise. Further, this Settlement Agreement incorporates the complete financial obligation of the Board with regard to its employment relationship with Winston and Winston's separation from employment.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

Witness

Elbert Winston

Dated: 5/21/18

Board Secretary/Business Administrator

Harold Kennedy

Board President

Amanda Da Silva

Dated:

Exhibit A

ELBERT WINSTON

930 Prospect Avenue
Plainfield, New Jersey 07060

August 25, 2008

Armando Da Silva, Board President
Elizabeth Board of Education
500 North Broad Street
Elizabeth, New Jersey 07207

Re: Letter of Resignation

Dear Mr. DaSilva :

Pursuant to the terms of the Settlement Agreement between the Elizabeth Board of Education and myself, I hereby submit my irrevocable resignation from the position of Teacher, effective the close of business on November 1, 2009. This resignation is expressly conditioned upon the Board's compliance with the terms of the parties' Settlement Agreement and the general releases contained therein; and, is of no force and effect, even if accepted, unless said Settlement Agreement and the general releases contained therein which I have executed are fully performed by the Board.

Sincerely,

Elbert Winston

Elbert Winston

THE MURRAY LAW FIRM, LLC
149 Avenue at the Common, Suite 201
Shrewsbury, New Jersey 07702
(732) 389-1010
Attorneys for Petitioner, the Elizabeth Board of Education

IN THE MATTER OF THE TENURE HEARING OF ELBERT WINSTON, CITY OF ELIZABETH, UNION COUNTY	**BEFORE THE OFFICE OF ADMINISTRATIVE LAW** **OAL DOCKET NO. EDUTH 07750-2008N** **CERTIFICATION OF HAROLD E. KENNEDY, JR.**

I, Harold E. Kennedy, Jr., certify as follows:

1. I am the School Business Administrator/Board Secretary for the Elizabeth Board of Education (the "Board"). As such, unless otherwise noted, I have personal knowledge of the following information which is based o n Board records. I support this Certification in support of the Board's position in this matter.

2. Elbert Winston is a teacher in the Elizabeth School District who is currently on paid suspension due to pending tenure charges.

3. I reviewed the District's records of accumulated leave time for Mr. Winston. As of October 23, 2008, he has accumulated a total of 240 sick days and 2 personal days, for a total of 242 accrued and accumulated days. Mr. Winston is entitled to use and/or be paid for the accumulated days as a member of the teachers' bargaining unit.

I certify that the foregoing statements made by me are true. I am aware that if the foregoing statements are willfully false, I am subject to punishment.

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary

Dated:

#455-08R

455-08

CARTERET EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF CARTERET, MIDDLESEX COUNTY AND NILKANTH PATEL,	:	DECISION
RESPONDENTS.	:	
	:	

SYNOPSIS

This case originated in an appeal in which petitioning education association challenged preferential treatment allegedly accorded the school business administrator/board secretary (SBA) with respect to payment for accumulated sick leave, in violation of statute and district policy. Respondent board denied the allegations; asserted that petitioner failed to comply with the 90-day rule of limitation set forth at *N.J.A.C.* 6A:3-1.3(i); and filed motion for summary judgment. The ALJ dismissed petitioner's appeal for untimeliness, but the Commissioner rejected the initial decision of the OAL and remanded the matter for a hearing on its merits.

On remand, the ALJ notes that the respondent board removed the 128 days of accumulated sick leave at issue from the SBA's sick leave bank in November 2007, and that the respondents' had subsequently filed an unopposed motion to dismiss the petition as moot. The ALJ found that the controversy between the parties no longer exists, and granted respondents' motion to dismiss the petition.

After review of the record, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

November 19, 2008

#455-08R

OAL DKT. NO. EDU 2602-07
(EDU 2998-05 on remand)
AGENCY DKT. NO. 81-3/05

CARTERET EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF CARTERET, MIDDLESEX COUNTY AND NILKANTH PATEL,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision have been reviewed. No exceptions were filed by the parties. For the reasons set forth therein, the Commissioner adopts the Initial Decision of the Office of Administrative Law as the final decision in this case.

IT IS SO ORDERED.*

Lucille E. Davy
COMMISSIONER OF EDUCATION

Date of Decision: 11/19/08

Date of Mailing: 11/19/08

* This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. EDU 2602-07
(ON REMAND EDU 2998-05)
AGENCY REF NO. 81-3/05

CARTERET EDUCATION ASSOCIATION,

Petitioner,

v.

BOROUGH OF CARTERET BOARD OF EDUCATION AND NILKANTH PATEL,

Respondents.

Stephen E. Klausner, Esq., for petitioner

Mary H. Smith, Esq., for respondents (Wilentz, Goldman & Spitzer, attorneys)

Record Closed: April 10, 2008 Decided: October 8, 2008

BEFORE **ANA C. VISCOMI**, ALJ:

This is an Initial Decision granting the respondents' unopposed motion to dismiss the petition as moot as no justiciable issue remains pending in this case. The following facts are undisputed. This is a remand of EDU 2998-05. I had

previously dismissed that case on motion addressing the timeliness of the petition. On May 25, 2006, the Commissioner of Education issued a decision reversing that dismissal and remanding the case to the Office of Administrative Law (OAL) for a hearing as a contested case. On June 27, 2006, the respondents filed an appeal with the Legal Committee of the State Board of Education. On November 1, 2006, the State Board of Education affirmed the decision of the Commission of Education. The matter was remanded to the OAL on April 23, 2007.

Respondent Carteret BOE appointed respondent Patel as Business Administrator/Board Secretary in 2003-2004. When it approved the 2003-2004 contract the BOE permitted respondent Patel to carry-over 128 accumulated sick days from his previous public school employment. Petitioner contended in its appeal that the BOE entered into what was tantamount to a private contract by not disclosing the purchase of the accumulated sick days.

Following the remand of this matter, respondent advised that on November 29, 2007, Assistant Superintendent Kathleen Skobo directed her assistant, Kristine Christie, to remove 128 days from respondent Patel's sick leave bank.[1] Petitioner's counsel requested an opportunity to discuss the matter with his client for purposes of considering a voluntary dismissal of this matter. After that opportunity expired, the respondents filed the within motion of February 19, 2008. On March 18, 2008, petitioner's counsel requested an extension of time to file opposition due to his health concerns. An extension was granted. No opposition has been submitted.

In their motion to dismiss, respondents certify to the following. Since they entered into the initial contract in 2003-2004, they have entered into four additional employment contracts. Each contract has provided respondent Patel

[1] See Skobo Certification submitted with the February 19, 2008, motion to dismiss.

with 12 sick days and 3 personal days annually. Patel's attendance records, which are attached, reflect that he has not utilized any of the 128 accumulated sick days at issue herein. As indicated previously within this Initial Decision, those accumulated sick days were removed from respondent's leave bank on November 29, 2007, and the remaining balance of 30 sick days reflects the accumulated sick days earned while serving as the district BOE Business Administrator/Board Secretary.

In the motion to dismiss, respondents assert that as the only issue challenged by petitioner has been resolved by removing the 128 accumulated sick days from Patel's sick leave bank, the petition is moot. Relying on the well settled premise that once a disputed issue has been resolved, the case is moot, respondents seek dismissal of the petition.

In this matter the controversy between the parties no longer exists. An issue is considered "moot" when a determination is sought on a matter, which, when rendered, cannot have any practical effect on the existing controversy and where the conflict, such as herein, has become merely hypothetical. In Re Conroy, 190 N.J. Super. 453, 458 (App. Div. 1983).

Based on the foregoing, the respondents' motion to dismiss is hereby **GRANTED** and this appeal is **DISMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within

forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 8, 2008
DATE

Ana C. Viscomi
ANA C. VISCOMI, ALJ

10-14-08
Date Received at Agency:

Mailed to Parties:

OCT 10 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

/lam/cs

EXHIBITS

For Petitioner:

None

For Respondent:

February 19, 2008, motion and supporting certification

470-08

OAL DKT. NOS. EDU 6956-00, EDU 8646-00, EDU 4834-01, EDU 4607-03, EDU 4608-03, and EDU 427-06
AGENCY DKT. NOS. 271-7/00, 381-10/00, 227-8/99, 392-12/02, 216-5/03, and 57-2/06

(CONSOLIDATED)

ARCHWAY PROGRAMS, INC.

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

RESPONDENT.

and

BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY

PETITIONER,

V.

ARCHWAY PROGRAMS, INC.,

RESPONDENT.

and

ARCHWAY PROGRAMS, INC.

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

The petitioner, Archway Programs (Archway) is a non-profit corporation which operates a private school for the handicapped (PSH) authorized to educate handicapped public school students pursuant to *N.J.S.A.* 18A:46-14(g), and receives tuition from sending districts commensurate with its actual cost per pupil as determined by a certified audit. Pursuant to governing regulations, certain specified

items may not be included in the computation of a tuition rate chargeable to the sending districts. The controversy herein involves the audits conducted by the respondent Department on Archway's accounts for the school years from 1994-95 through 1998-99, in which the Department disallowed approximately $9 million in non-allowable costs and expenses and ordered these tuition overcharges returned to the sending districts. Archway appealed this conclusion.

The ALJ found, *inter alia*, that: the Department, pursuant to the doctrine of substantial compliance, should not have disallowed teacher salaries for individuals who worked for a period of time without certification, and the Department should not have disallowed maximum salary caps; however, in all other areas of dispute, Archway did not meet its burden of proving that the Department's disallowances were arbitrary, capricious, or unreasonable. The ALJ further determined that the calculation of all of the disallowances, as well as the final decision as to the amounts to be returned by Archway to the sending districts, should be done by the Commissioner as part of the final agency decision.

Upon a thorough and independent review of the record, the Commissioner adopted the Initial Decision as the final decision, with the exception of its conclusion that the Commissioner should calculate – without benefit of OAL recommendations after the parties have been heard – all schedules based on the determinations herein and establish a recommended final amount that Archway is obligated to return to its sending districts. The Commissioner, finding such a conclusion violative of *N.J.S.A.* 52:14B-10(c) and concepts of fundamental fairness, remanded the matter to the OAL for such further proceedings as are necessary to allow the ALJ to conclude these consolidated cases by making the requisite calculations and recommended determination of monies due and owing.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

December 4, 2008

OAL DKT. NOS. EDU 6956-00, EDU 8646-00, EDU 4834-01, EDU 4607-03, EDU 4608-03, and EDU 427-06
AGENCY DKT. NOS. 271-7/00, 381-10/00, 227-8/99, 392-12/02, 216-5/03, and 57-2/06

(CONSOLIDATED)

ARCHWAY PROGRAMS, INC. PETITIONER, V. NEW JERSEY STATE DEPARTMENT OF EDUCATION, RESPONDENT. and BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY PETITIONER, V. ARCHWAY PROGRAMS, INC., RESPONDENT. and ARCHWAY PROGRAMS, INC. PETITIONER, V. BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Archway Programs, Inc. (hereinafter "Archway") and the New Jersey Department of Education (hereinafter "Department") jointly sought extensions of time

within which to file exceptions and reply exceptions to the Initial Decision. These submissions – filed in accordance with the extended timelines – were fully considered by the Commissioner in reaching her determinations herein.[1]

Briefly stated, the essence of the instant controversy is as follows: The petitioner in this matter, Archway, is a non-profit corporation which provides educational and human service programs for individuals with special needs. This matter, however, is solely concerned with its programs at its private school for the handicapped (PSH), which is authorized – pursuant to *N.J.S.A.* 18A:46-14(g) – to educate handicapped public school students. Archway is allowed to charge the public school districts in which the handicapped students reside (sending districts) tuition commensurate with its actual cost per pupil pursuant to a certified audit. There are, however, certain specified items which – pursuant to the governing regulations – may not be included in the computation of a tuition rate chargeable to the sending districts (codified during the time period at issue here at *N.J.A.C.* 6:20-4.4). As a consequence of audits conducted by the Department on Archway's accounts for the 1994-95, 1995-96, 1996-97, 1997-98 and 1998-99 school years, the Department concluded that approximately $9 million included in Archway's calculated tuition rate represented non-allowable costs and expenses and ordered that these tuition overcharges be returned to the sending districts. Archway is appealing this conclusion.

The parties' exception submissions essentially recast and reiterate arguments contained in their post-hearing submissions and various motions made during the course of the hearing – which are comprehensively summarized by the Administrative Law Judge (ALJ) in her

[1] It is noted that on August 13, 2007 the Administrative Law Judge (ALJ) executed two separate Orders Granting Partial Summary Decision wherein she accepted settlement agreements between Archway and the Board of Education of Ewing Township (Initial Decision, Attachment V) and Archway and the Pemberton Township Board of Education (Initial Decision, Attachment VI). Upon review, the Commissioner approves the parties' settlements and adopts the ALJ's Orders as the final decision as to these portions of this consolidated matter. Accordingly, EDU 427-06, Agency Dkt. No. 57-2/06 and EDU 4608-03, Agency Dkt. No. 216-5/03 are hereby dismissed, subject to the parties' compliance with the terms of their settlements.

Initial Decision As such, these will be presented only to the extent necessary to convey the essence of their positions on the controverted issues.

Archway's Exceptions and Department's Reply

1) The ALJ incorrectly refused to dismiss the Department's 1997-98 and 1998-99 fiscal year audits on the basis of equitable estoppel. Archway argues that the 1994-95 audit took more than three years to complete; during this period the auditors refused to disclose to Archway any of the miscalculations it had discovered despite numerous requests; as a consequence Archway was prevented from making any counteractive changes for these subsequent two audit years. "Fairness and justice estop the DOE from pursuing the disallowances for the 1997-1998 and 1998-1999 fiscal years, which were fully correctible but for the DOE's delay and silence on the 1994-1995 audit." (Archway's Exceptions at 1-17, quote at 12)

In reply, the Department points out that this identical argument was previously raised by way of two motions to dismiss below and denied both times by the ALJ. (Interlocutory Order dated September 21, 2006 and Letter Order dated November 21, 2006) The Department avers that no new evidence which might operate to change the outcome of these previous motions has been presented here. As pointed out by the ALJ below – it argues – in order to prevail on a motion to dismiss based on equitable estoppel "Archway had to establish that the Department made a voluntary and intentional misrepresentation through its conduct, and that Archway reasonably relied upon that misrepresentation." It charges that Archway has not satisfied this burden. (Department's Reply Exceptions at 2)

2) In light of the Department's clear admission that its 1994-95 audit was improperly calculated, recognizing that rolling calculations will have a carryover effect from year to year, and based on the fact that the Department has failed to present its own revised monetary

calculations for the ALJ's consideration, the entire matter here should be dismissed. Archway takes the position that as part of her decision the ALJ had the responsibility to determine the precise amount of money, if any, that Archway is obligated to return to the districts. It advances – "Archway did not institute this litigation seeking a declaratory judgment merely settling legal issues concerning methodologies and allowable costs. Rather, it sought to invalidate the DOE's determination that it had to refund $9 million to the sending districts." (Archway's Exceptions at 18-22)

The Department asserts that it was under no obligation to present alternate figures for the ALJ's consideration. It maintains that the ALJ correctly determined that the Commissioner's decision should compute and present the final mathematical calculations as to all disallowances subsequent to her resolution of the numerous disputed issues in this matter. (Department's Reply Exceptions at 7-9)

3) In the alternative to outright dismissal of this matter, Archway urges that the ALJ had only one other alternative – to accept the revised calculations presented in its expert's report (Rosenfarb Report). Therein, Archway's expert recalculated the relevant schedules in the 1994-95 audit – using what the Department now concedes was the correct methodology – and adjusted the remaining calculations of that audit and the four succeeding audits accordingly, resulting in a revised total disallowance figure of $5.7 million, significantly less than the $9 million it asserts the Department had previously erroneously determined. Given that the Department's monetary determinations have been removed from consideration by virtue of the conceded invalidity of its audits, the only figures remaining in the record were those introduced by Archway's expert. Archway reemphasizes its position that the ALJ here was responsible to decide the *entire* case, which includes calculation of the monetary consequences. Her inexplicable abdication of this

responsibility by allowing the Commissioner to make the final decision as to the calculations of all of the disallowances is wholly arbitrary, capricious and unreasonable as it gives the Department another bite at the apple through a new round of audits. Moreover, in light of the fact that Archway is entitled to challenge the Department's new numbers, the ALJ's bifurcation of this matter only serves to unnecessarily prolong the litigation of this already extenuated case as the parties are placed right back where they started. (Archway' Exceptions at 22-24)

Responding, the Department presents the following argument:

> [At] this stage in the proceedings, the purpose of this exercise is to determine whether the Department properly applied the governing tuition regulations in determining which costs Archway could include in its tuition rates for the years in dispute. In this respect the sweeping "winner-take-all" approach that Archway advocates is defective. It ignores the fact that the specific refund amount is a secondary and mathematical result, that will be dictated by the law and the facts adduced during the hearing. The ALJ's role in these proceedings was to determine whether the overcharges that the Department identified in its audits were proper, and not, as Archway contends, perform mathematical computations. Archway's depiction of this proceeding as a contest in which one set of calculations must prevail over another simply distorts the purpose of these proceedings. As stated, the propriety of the Department's audits is a determination that turns o[n] issue[s] of law and facts. Thus, the ALJ's finding that her role was limited to that of rendering recommendations in resolving disputed issues of law and facts was proper, and should be upheld. (Department's Reply Exceptions at 9-10)

4) The ALJ's rulings in favor of the Department should be rejected because all of these are conclusory and unsupported by sufficient factual findings or legal analysis. (Archway's Exceptions at 24-27)

The Department submits that any brevity which might be found in the ALJ's analysis and findings in these categories is wholly attributable not to her failure to consider the evidence before her, but, rather, to Archway's failure to present evidence sufficient to satisfy its burden of proof. (Department's Reply Exceptions at 10)

5) The ALJ erred in upholding disallowances of salaries of individuals misclassified in Archway's records as holding positions for which they were not properly certified. Archway claims the disallowed salaries in this category were merely "bookkeeping errors" and – in all other respects – were allowable expenses. It charges that that the ALJ improperly disregarded the unrefuted credible testimony of its witness, Mr. Otto, which Archway claims established "that many of those disallowed educational staff members were actually serving in positions for which they either (1) were properly certified or (2) did not require certification." Archway charges that the ALJ had no factual or legal support for her expressed disbelief that the miscalculations were bookkeeping errors and "[h]er oblique statement that she was 'not...persuaded by Archway's presentation." (Archway's Exceptions at 27-33, quotes at 30 and 32, respectively)

In response, the Department contends that Archway has again failed to recognize that it bears the burden of proof in this matter, which it has failed to satisfy. With regard to the ALJ's failure to credit the testimony of Mr. Otto, upon which Archway relied exclusively to support its allegations that the disallowed salaries were no more than clerical errors, the Department points out that rejection or modification of the ALJ's findings of fact or conclusions of law with respect to the credibility of witness testimony are significantly circumscribed by the New Jersey Administrative Procedure Act, *N.J.S.A.* 52:14B-10(c). Moreover, it avers, on cross examination Mr. Otto conceded that he neither had first hand knowledge of the duties performed by any of the individuals whose salary was in dispute here nor was he even employed by Archway prior to June 1998. (Department's Reply Exceptions at 10-12)

6) Archway proposes that the ALJ's affirmance of disallowances of various non-salary expenses (travel allowances, entertainment, marketing expenses and interest paid on three loans to Archway), on Schedule C of the five audits – in the amount of $113,744 – was

conclusory and not supported by the record. It argues that its expert's report concluded – based on discussions with Archway and a review of documents concerning the nature and purpose of the expenditures – that the Department's disallowances in these areas should be reduced to $34,000. (Archway's Exceptions at 33-35)

In retort, the Department advances that any perceived brevity of the ALJ's analysis of the Schedule C expenses was occasioned by Archway's failure to advance any legally competent evidence at hearing in support of its assertions that such expenses were allowable pursuant to the requirements of the applicable regulations. (Department's Reply Exceptions at 12-15)

7) The ALJ erred in not accepting Archway's expert's calculation of $406,000 for fringe benefit costs – which are a function of allowable salaries – based on the Department's stipulation that certain teachers salaries were improperly disallowed in Schedules F (1994-95) and K (1995-99). Absent a revised set of calculations from the Department, it argues, the only ones in the record are those of Archway's expert and these should have been accepted by the ALJ. (Archway's Exceptions at 35-36)

Responding, the Department concedes that the amount of money disallowed in this category will need to be recalculated. Logic dictates, it avers, that such calculation be made in the Commissioner's decision subsequent to resolution of the myriad of methodology issues. (Department's Reply Exceptions at 15-17)

8) Finally, merely recasting and reiterating arguments advanced below, Archway objects to the ALJ's summary affirmance of the disallowances in the Organizational Overhead category. (Archway's Exceptions at 36-40)

In reply, the Department again emphasizes that Archway has failed to meet its burden of proof in connection with its claims regarding these charges; rather, it offers no more than

self-reinforced statements in support of its assertions that the expenses in this category should have been allowed, and the report of its expert – who has no direct knowledge regarding these expenses – accepted. (Department's Reply Exceptions at 17)

Department's Exceptions and Archway's Reply

1) The Department contests the ALJ's conclusion that it should not have disallowed salary payments – in Schedule A of the five challenged audits – to personnel who worked for a period of time without an emergency certification or full certification. The Department claims that the ALJ made this determination based solely on the equitable doctrine of substantial compliance as articulated by the Appellate Division in *Berstein v. Board of Trustees*, 151 *N.J. Super.* 71 (App. Div. 1977) and the Commissioner's decision in *Search Day Program, Inc. v. New Jersey Department of Education* (Search Day II), decided by the Commissioner June 2, 2006. The Department claims that reliance on these authorities was misplaced as application of the doctrine of substantial compliance in this instance "fails to accord proper weight to the monetary prejudice to the sending districts," and fails to recognize that the unique set of facts which supported the outcome in *Search Day* is not present in this matter. In contrast to the factual pattern in *Search Day*, it asserts, Archway failed to establish: 1) that any delay in processing the applications of these individuals is attributable to the Department; and 2) that all of the individuals had submitted their properly completed applications along with all of the requisite fees and supporting documents in a timely manner. Additionally, the Department avers that the scope of *Search Day* was limited to emergency certifications. It contends that a number of the individuals whose salary was deemed allowable by the ALJ were employees who did not have their standard certification for a period of time. The Department maintains that "[t]he ALJ's interpretation of the Commissioner's decision in

Search Day as providing a blanket allowance of salaries in cases where the Petitioning PS[H] alleges a certification delay is inappropriate, and must be rejected." (Department's Exceptions at 2-7)

Responding, Archway contends that the ALJ's allowance of these individuals' salaries – pursuant to the equitable doctrine of substantial compliance and under the circumstances existing here – was entirely appropriate. Citing *Bernstein, supra.* it avers that this doctrine is applicable where there is "(1) a lack of prejudice to the defending party; (2) a series of steps were taken to comply with the regulation; (3) general compliance with the purpose of the statute or regulation exists; (4) reasonable notice of petitioner's claim; and (5) a reasonable expectation why there was not a strict compliance with the statute." *Bernstein* at 76-77. (Archway Reply Exceptions at 6) Archway contends that it "presented comprehensive, uncontradicted testimony and documentary evidence that the individuals disallowed in the 'delay' category: (1) submitted timely, complete applications for certification or renewal prior to the start of their employment; (2) that these individuals ultimately received the proper certification or renewal after lengthy processing delays, sometimes several months long, by DOE; (3) that but for DOE's processing delays, these individuals would have received their certifications on time and their salaries would have been allowable; (4) that Archway was forced to allow these individuals to teach while their certifications were pending approval in order to comply with the students' IEPs; and (5) that the sending school districts suffered no prejudice, because the students received the education for which they were paying tuition." (*Id.* at 11) As a consequence, Archway posits, the ALJ's conclusion that it substantially complied with certification requirements and, therefore, the salaries in this category are allowable costs, is entirely appropriate.

2) The Department objects to the ALJ's allowances of expenses on Schedule I (1994-95 audit) and Schedule E (subsequent year audits), *i.e.*, travel allowances and maximum salaries. With respect to travel allowances, the Department advances that these were disallowed because Archway could not provide documentary proof of such charges – in contravention of *N.J.A.C.* 6:20-4.3(a)(20) – which provides that a PSH "shall maintain all pertinent financial record(s) for seven years." (Department's Exceptions at 7). As to the second category of expenses identified on these schedules – maximum salaries – the Department advances that Archway is a multi-purpose organization with locations in a number of counties throughout the state. It is undisputed that the services provided by the two employees involved here benefited all of Archway's programs. The issue to be resolved is the determination of the allowable portion of salaries paid to these two individuals in light of the maximum salary requirements contained in *N.J.A.C.* 6:20-4.1(1). Although conceding that applicable regulations did not provide a mechanism or formula for calculating maximum salaries when an individual works in more than one county, the Department proposes that given that the ultimate purpose of the tuition regulations is to ensure that sending districts pay no more than the actual cost per student and to ensure that those costs are reasonable – the Department's auditor determined that proration of the salaries of these individuals based on the revenue generated by the specific PSH program was appropriate. It maintains that such a determination was reasonable and is also consistent with tuition rate procedures which allocate costs in other areas, specifically indirect costs, on the basis of revenue. (Department's Exceptions at 8-9)

Responding, Archway maintains that the ALJ properly reversed these salary disallowances as they "were based on an allocation methodology contrived by DOE's auditor and neither supported nor authorized by the regulations." (Archways Reply Exceptions at 12) Archway

explains that the two individuals whose salaries are at issue here are based at Archway's main campus in Atco, Camden County, but oversaw maintenance and program services duties throughout Archway's multi-county operation. In both cases, Archway's allocation to the PSH program for the services of these individuals was less than the Department approved maximums for their positions. However,

> because Archway had facilities located in both Camden and Gloucester Counties, and because the employees identified in these schedules had responsibilities in both, [the Department's auditor] decided that their maximum salaries should be prorated between the counties, rather than based on the approved maximum salary for Camden County. The regulations, however, neither require such a proration nor provide a method for doing so. See *N.J.A.C.* 6:20-4.4(a)7; *N.J.A.C.* 6:20-4.1(L).
>
> ...[The auditor], by his own admission, made one up. Simply stated, [the auditor's] methodology took the approved maximum salaries for Camden and Gloucester Counties, reduced them by the percentage of Archway's revenue attributable to both counties, and added the result to come up with his new maximum salary that was less than half of the DOE-approved maximum salary for either county.
> (*Ibid.*) (citations to Exhibits and transcripts omitted)

To the extent the Department attempts to provide some justification for the use of this unauthorized allocation methodology by virtue of the second sentence of *N.J.A.C.* 6:20-4(a)(7), which provides that "[p]art-time or split time positions shall be prorated," Archway claims that it clearly misreads this provision:

> By its terms, *N.J.A.C.* 6:20-4.4(a)(7) refers not to a proration based on *geography*, but a proration based on an employee's *status*. It requires that the salaries of employees who work less than full-time for a PSH program (part-time), or whose duties include both PSH and non-PSH activities (split-time) be prorated based on the amount of time they spend working for the PSH program. Once that allocation is performed, the amount to be charged to the PSH program gets compared to the approved maximum for their positions. If the amount charged exceeds the approved maximum, the excess is a non-allowable cost. (Archway's Reply Exceptions at 14-15)

Archway further contends that it performed the allocation prescribed by this regulatory provision for each of the audit years at issue herein, allocating to the PSH program the percentage of the employee's base salary which reflected his PSH work, resulting in a salary allocation which was less than the approved maximum for each of their positions. As such, it argues, the ALJ correctly determined that these salaries were allowable costs. (*Id.* at 15)

3) The Department charges that – in her May 2, 2007 interim decision – the ALJ incorrectly determined to reverse the Department's disallowance of the mid-year salary increase that Archway gave its employees during the 1999-2000 school year, which the Department alleges is contrary to prior case law and contravenes public policy. In support of this contention, the Department advances: 1) although a 3% payment for staff members was proposed at Archway's May 25, 1999 board meeting, letters of employment given to staff at the start of the 1999-2000 school year made no mention of the proposed salary increase; 2) staff did not receive payments until nearly nine months later (February, 2000) after confirmation of a budget surplus; 3) in reaching her determination, the ALJ failed to properly apply relevant case law, *i.e., Y.A.L.E. School, Inc. v. State of New Jersey, Department of Education, 92 N.J.A.R.* 2d (EDU) 571 and *Search Day Program, Inc. v. New Jersey State Department of Education*, decided by the Commissioner November 12, 2003 (Search Day I). Rather, it argues, the ALJ found that Archway's salary payments "were paid from 'anticipated revenue' which she differentiated from surplus income," without providing an explanation of how these terms differ or the practical relevance of any difference between them in the regulations. The Department claims the ALJ's distinction between these two terms is illusory, and her decision essentially allows Archway to circumvent the applicable regulations based only on semantics. It claims that acceptance of the ALJ's decision in this regard "would allow a PS[H] to use its mere consideration of a salary increase as a basis for

issuing mid-year bonuses upon confirmation of the existence of surplus income," leading to an unfair result for sending districts and their taxpayers. (Department's Exceptions at 1-14, citations at 11 and 13, respectively)

Responding, Archway maintains the ALJ's reversal of the Department's disallowance of a salary increase paid to its employees in fiscal year 1999-2000 was entirely proper. This raise, it proffers, was a budgeted item – payable out of designated rather than surplus revenues – and, therefore, not prohibited by the applicable governing regulations. Additionally, since it was not a pretext intended to exhaust surplus funds, the case law and regulations governing merit-based and contingent pay increases were not applicable. Archway charges that the "DOE disallowed the pay increase, not because of *how* it was paid, but because of *when* it was paid." Archway proposes the delay in payment of these moneys to its employees was solely attributable to the fact that at the beginning of the 1999-2000 school year it was facing severe financial and operational uncertainties. The board delayed payment of the increases until mid-year when it became clear that it had generated sufficient revenue to support the cost. Citing to the testimony of the Department's witness, Mr. Verner, Archway points out that had it acted in a fiscally imprudent manner and paid the salary increase at the beginning of the year, the increase would not have been denied. (Archway's Reply Exceptions at 15-30, quote at 16)

The Commissioner has conducted an independent and exhaustive review of the voluminous record in this matter, including transcripts of the hearing conducted at the OAL,[2] bearing in mind that the burden of proof rests exclusively with the petitioner – Archway – which must establish, by the preponderance of the relevant, credible evidence, that the determinations

[2] Hearing dates were July 14, August 1, August 4, August 7, August 11, August 14, September 6, October 18, November 3 and November 13, 2006.

arrived at by the Department were improper. Additionally, the Commissioner is cognizant of the deference to be accorded the ALJ's credibility assessments and resultant fact finding.[3]

With these parameters firmly in mind, the Commissioner first turns to review of the as yet unaddressed remaining interim orders of the ALJ issued in this matter. Initially, the Commissioner adopts the ALJ's two decisions denying Archway's motions to dismiss the Department's 1997-98 and 1998-99 audits on the basis of equitable estoppel (September 21, 2006 (Initial Decision, Attachment I) and November 21, 2006 (Initial Decision, Attachment III), as she concurs that Archway has failed to establish the essential elements of this doctrine, *i.e.*, "a knowing and intentional misrepresentation by the party sought to be estopped under circumstances in which the misrepresentation would probably induce reliance, and reliance by the party seeking estoppel to his or her detriment." (*O'Malley v. Dep't of Energy*, 109 *N.J.* 309, 317 (1987)) Notwithstanding, application of this doctrine is also contraindicated as it would result in harm to the districts which sent students to Archway during these school years and were required to pay an increased tuition rate based on Archway's inclusion of non-allowable expenses in its tuition rate for this period, as they would be deprived of any ability to recoup the overcharges.

The Commissioner next adopts the ALJ's dismissal of Archway's appeal of the non-allowable costs set forth in the Department's fiscal monitor's report for the 1998-99 school year (Thomas Report). (Initial Decision, Attachment II). The Department acknowledged that the 1998-99 formal audit superseded this report in its entirety and therefore, it did not intend to pursue the findings of this report; as such, Archway withdrew its appeal in this regard. Accordingly, EDU 8646-00, Agency Dkt. #381-10/00 is hereby dismissed with prejudice.

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[3] The applicable standard of review in this regard is clear and unequivocal – the Commissioner "may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent and credible evidence in the record." (*N.J.S.A.* 52:14B-10(c))

Upon consideration of the last remaining interim order, the Commissioner determines to adopt the ALJ's May 2, 2007 Order Granting Partial Summary Decision to Archway on the issue of the salary increase it gave to staff during the 1999-2000 school year (Initial Decision, Attachment IV) for the reasons presented in her decision, which the Commissioner finds well-grounded in the record. Most notably: 1) the 3% salary increase for all staff members was included in Archway's 1999-2000 school year budget, which was adopted May 25, 1999; 2) as Archway's income is largely based on tuition receipts, in light of fiscal problems and adverse publicity as a consequence of the actions of its former CEO, Archway maintains it was uncertain whether there might be a drastic reduction in enrollment – thereby preventing it from generating enough tuition revenue to support payment of the increases – and, therefore, it determined to delay the increases until it could be assured of its financial situation; 3) the Department's Supervising Auditor testified that Archway's intent as to the salary increases would not have been an issue had it begun paying the increase at the beginning of the school year; 4) the facts of this matter are clearly distinguishable from the Commissioner's decisions in *Y.A.L.E. School, Inc.* and *Search Day I, supra*, as the increases were not bonuses but, rather, were paid to all staff members and these individuals were not required to do anything to get them; and they were not paid from surplus but, rather, from revenue which was anticipated provided that there was no substantial reduction in the number of students sent to Archway's PSH program.

Turning now to the ALJ's determinations on the various disputed non-allowable costs at issue for the five audit years under consideration here – again remaining fully aware of the applicable burden of proof in this matter and exercising the requisite deference to the ALJ's credibility assessments and resultant fact finding – the Commissioner finds as follows:

Schedule A – Teacher Salary Disallowances (Initial Decision at pp. 33-80). The Commissioner concurs with the ALJ's determination – for the reasons summarized on pp. 74-77 of her decision as well as those additionally presented in Archway's exception arguments – that, pursuant to the doctrine of substantial compliance, the Department should not have disallowed charges for salary payments to individuals who worked for a period of time without certification.[4] As to the second category of individuals covered in this schedule – those who were listed in Archway's records as holding positions requiring certification but who did not have such certification (Initial Decision at pp. 77-78), the Commissioner agrees with the ALJ that Archway has failed to sustain its burden of establishing that the Department's disallowances for this category of individuals was arbitrary, capricious or unreasonable and, therefore, the disallowances must be sustained. The Commissioner further agrees that the disallowances with respect to the three ledger items (1995-96 school year) – four employees in 1997-98, seven employees in 1998-99 and the 1996-97 salary of Sharon Block – must similarly be sustained as a result of Archway's failure to present any argument in opposition to their disallowance. As a consequence of these determinations, the Commissioner agrees that: for the 1994-95 School Year, of the total salaries of $123,353 remaining in dispute, $94,217 should not have been disallowed; for the 1995-96 School Year, of the $388,494 remaining in dispute (salaries and three ledger items), $69,124 should have not been disallowed; for the 1996-97 School Year, of the total salaries of $211,416 remaining in dispute, $65,451 should not have been disallowed; for the 1997-98 School Year, of the total salaries of $305,501 remaining in dispute, $43,417 should not have been disallowed; and for the 1998-99

[4] In this regard, the Commissioner specifically rejects the Department's exception contention that, in making her determination on this issue, the ALJ relied on *Search Day II, supra* which had a wholly distinguishable fact pattern. The Commissioner finds and determines that rather than placing decision-making reliance on this case, the ALJ presented it as illustrative of the precept that there are instances where the concept of equity dictates that strict adherence to regulatory dictates is counterindicated. The Commissioner finds that such is the case here.

School Year, of the total salaries of $192,859 remaining in dispute, $51,812 should not have been disallowed.

Schedule C – Non Salary Expenses Charged to PSH Schools (Initial Decision at 81-83) For the reasons presented by the ALJ in her decision, the Commissioner agrees that Archway has not met its burden of proof with regard to the items covered in this schedule and, therefore, the Department's disallowances totaling $289,634 must be sustained.

Schedules D,E,F,G,H for the 1994-95 audit and Schedule D for the other audits – Maintenance/Transportation/Depreciation (Initial Decision at 83-86) It is noted that the parties are in agreement that the Department's auditor applied improper calculation methodologies in computing allowable/non-allowable costs on this schedule, and that these must be recalculated – along with the dependent rolling calculations which have a carry over effect from year to year – using the now agreed upon methodology. Although the Commissioner concurs that the ALJ properly rejected utilizing the calculations submitted by Archway's expert in this regard, she specifically disagrees with the ALJ's determination that the Commissioner's final decision here is the appropriate vehicle for the calculation of these and other necessary recalculations necessitated in this matter, along with the presentation of the specific amounts of money that Archway is required to return to its sending districts. Rather, the Commissioner finds that – given the nature of Archway's petitions of appeal in this matter, and the dictates of the Administrative Procedure Act which require that a recommended decision shall be filed "in such form that it may be adopted as the decision in the case" (*N.J.S.A.* 52:14B-10(c)) – the decision of the OAL in this regard should result in recommendations which resolve the entire contested case, *i.e.*, the adjudication of the involved rights, entitlements *and obligations* of Archway. Furthermore, the Commissioner finds and concludes that the ultimate equitable resolution of this matter and the interests of the parties and

the sending districts are optimally furthered by the Commissioner's ability to review calculations recommended by the ALJ subsequent to the parties' ability to be heard at the OAL and on exception with respect to application of the Commissioner's substantive findings here.

Schedule I for the 1994-95 audit and Schedule E for the other audits – Maximum Salary Caps (Initial Decision at 86-89). The Commissioner concurs with the ALJ – for the reasons presented in her decision and those contained in Archway's exception submission – that the Department's disallowances on this schedule be reversed.

Schedule K for 1994-95 audit and Schedule F for the other audits – Fringe Benefit Costs (Initial Decision at 90-91) The Commissioner agrees that the findings of allowed salaries in this decision will necessitate a recalculation of this schedule. However, as previously stated, the Commissioner disagrees that such recalculations should be accomplished here but, rather should be computed at the OAL consistent with *N.J.S.A.* 52:14B-10(c).

Schedules M,O,P,Q, and R for the 1994-95 audit and Schedules G,H,I,J for the other audits – Organizational Overhead (Initial Decision at 91-94) The Commissioner concurs with the ALJ that the Department's disallowances totaling $2.1 million in these schedules must be upheld as Archway has failed to sustain its burden of establishing that such disallowances were arbitrary, capricious or otherwise improper.

Schedule T for the 1994-95 audit and Schedule L for the other audits – Working Capital (Initial Decision at 95) As the calculations in this category are a function of actual allowable costs in each of the disputed categories for each of the audit years, the numbers currently contained in this schedule are incorrect and will have to be recalculated at the OAL on remand.

In summary, with respect to each of the Schedules at issue for the included audit years, the Commissioner adopts the findings and conclusions of the ALJ reflecting the following:

Schedule A
(Teacher Salaries)

1994-95 The amount of disallowances remaining in dispute, $123,352, is reduced to $29,136.

1995-96 The amount of disallowances remaining in dispute, $388,494, is reduced to $319, 370.

1996-97 The amount of disallowances remaining in dispute, $211,416, is reduced to $145,965.

1997-98 The amount of disallowances remaining in dispute, $305,501, is reduced to $262,084.

1998-99 The amount of disallowances remaining in dispute, $192,859, is reduced to $141,047.

Schedule B
(Non-Teacher Salary Disallowance)

1994-95 Non-disputed disallowances are $386,436.

1995-96 Non-disputed disallowances are $261,191

1996-97 Non-disputed disallowances are $176,479.

1997-98 Non-disputed disallowances are $ 3,923.

1998-99 Non-disputed disallowances are $ 34,058.

Schedule C (including C1 and C2 for the 1994-95 audit)
(Non-Salary Expenses Charged to PSH Schools)

1994-95 Department's disallowances of $110,812 are affirmed.

1995-96 Department's disallowances of $ 67,264 are affirmed.

1996-97 Department's disallowances of $ 81,809 are affirmed.

1997-97 Department's disallowances of $ 10,425 are affirmed.

1998-99 Department's disallowances of $ 19,324 are affirmed.

Schedules D,E,F,G,H for the 1994-95 audit and Schedule D for the other audits
(Maintenance/Transportation/Depreciation)

Calculation of allowable expenses to be based on the revenue-based allocation and the disallowances to be calculated at the OAL on remand.

Schedule I for the 1994-95 audit and Schedule E for the other audits
(Maximum Salary Caps)

1994-95 Archway's allowances of $37,470 are affirmed.

1995-96 Archway's allowances of $43,945 are affirmed.

1996-97 Archway's allowances of $54,415 are affirmed.

1997-98 Archway's allowances of $74,900 are affirmed.

1998-99 Archway's allowances of $55,819 are affirmed.

Schedule J
(Food/Entertainment Expenses)

1994-95 Non-disputed disallowances $2,072

Schedule K for the 1994-95 audit and Schedule F for the other audits
(Fringe Benefit Costs)

Amount of disallowances to be calculated at the OAL on remand.

Schedule L
(Food Services Costs)

1994-95 Non-disputed disallowances $84,293.

Schedules M,O,P,Q,and R for 1994-95 audits and Schedules G,H,I,J for the other audits
(Organizational Overhead)

The Department's disallowances with respect to these schedules, in the amount of $2.1 million, are affirmed.

Schedule T for the 1994-95 audit and Schedule L for the other audits
(Working Capital)

Amounts to be calculated at the OAL on remand.

Schedule N for the 1994-95 audit and Schedule S for the other audits
(Tuition Waivers)

Non-disputed disallowances totaling $87,076.

Accordingly, for the reasons expressed therein and above, the recommended decision of the OAL is adopted as the final decision in this matter, with the exception of its conclusion that the Commissioner should calculate – without benefit of OAL recommendations after the parties have been heard – all schedules based on the determinations herein and establish a recommended final amount that Archway is obligated to return to its sending districts. Consequently, this matter is remanded to the OAL for such further proceedings as are necessary to allow the ALJ to conclude these consolidated cases by making the requisite calculations and recommended determination of monies due and owing.

IT IS SO ORDERED.[5]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 12/04/08
Date of Mailing: 12/05/08

[5] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

458-08

#458-08

CHRISTOPHER PARSHELUNIS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF CRIMINAL HISTORY REVIEW,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, a licensed substitute teacher, appealed the Department's determination disqualifying him from school employment pursuant to *N.J.S.A.* 18A:6-7.1(c) following his guilty plea to assault by auto or vessel (*N.J.S.A.* 2C:12-1(c)(2)).

The ALJ found that: the crime petitioner was charged with – and pled guilty to – was not a 3rd degree crime under *N.J.S.A.* 2C:12-1(c)(2), which involves serious bodily injury; the disqualification statute enumerates a series of crimes representative of those the Legislature determined involved the use of force or threat of force that are automatic disqualifiers, which includes aggravated assault, stalking, kidnapping, arson and manslaughter; a 4th degree crime of assault by auto involving drunk driving and a resulting injury cannot be deemed to approach the level of crimes that are enumerated as automatic disqualifiers; there is no indication that the petitioner intended to use force or threat of force; and the facts in this case do not represent a sufficiently flagrant incident that warrants disqualification of petitioner's substitute teaching certificate. Accordingly, the ALJ recommended reversal of petitioner's disqualification and reinstatement of his substitute certificate.

The Commissioner adopted the Initial Decision as the final decision in this matter, except that the Commissioner deems the ALJ's reference to petitioner's lack of prior criminal offenses to be irrelevant to the application of *N.J.S.A.* 18A:6-7.1(c) (1) to the present matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

November 25, 2008

OAL DKT. NO. EDU 10282-07
AGENCY DKT. NO. 340-11/07

CHRISTOPHER PARSHELUNIS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF CRIMINAL HISTORY REVIEW,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law (OAL) have been reviewed. The Criminal History Review Unit of the Department of Education (the Department) filed timely exceptions pursuant to the applicable provisions of *N.J.A.C.* 1:1-18.4 , and the respondent filed timely reply exceptions thereto.

At issue is the determination by the Administrative Law Judge (ALJ) that petitioner's conviction[1] of "Assault by Auto/Vessel in violation of R.S. 39:4-50[2]" (*N.J.S.A.* 2C:12-1(c)(2)) does not constitute grounds, under *N.J.S.A.* 18A: 6-7.1, for disqualification of petitioner Christopher Parshelunis from employment by New Jersey school districts. There appears to be no disagreement that the applicability *vel non* of section (c)(1) of *N.J.S.A.* 18A: 6-7.1 to petitioner's conviction is the issue placed before the Commissioner.

[1] Petitioner's conviction was by way of guilty plea. *See, e.g. State v. Gonzalez*, 142 *N.J.* 618, 630 (1995) ("It is unthinkable that the Legislature would intend that judgments of conviction should be treated differently depending on whether they resulted from guilty pleas or trials.") *See also* petitioner's hearing exhibit, P-1, a copy of petitioner's "Judgment of Conviction" – arrived at via a guilty plea.

[2] *N.J.S.A.* 39:4-50, prohibits driving while intoxicated. It is not a crime but is, rather, a serious traffic offense. *State v. Cusick,* 110 *N.J. Super.* 149 (App. Div. 1970) No *mens rea* is required as an element of the offense. *State v. Fogarty,* 128 *N.J.* 59 (1992).

The statute petitioner admitted to violating provides, in pertinent part, as follows:

> A person is guilty of assault by auto or vessel when the person drives a vehicle or vessel recklessly and causes either serious bodily injury or bodily injury to another. Assault by auto or vessel is a crime of the fourth degree if serious bodily injury results and is a disorderly persons offense if bodily injury results. *N.J.S.A.* 2C:12-1(c)(1).
>
> Assault by auto or vessel is a crime of the third degree if the person drives the vehicle while in violation of R.S. 39:4-50 . . . and serious bodily injury results and is a crime of the fourth degree if the person drives the vehicle while in violation of R.S. 39:4-50 . . . and bodily injury results. *N.J.S.A.* 2C:12-1(c)(2).

Thus, the elements of the fourth degree crime with which petitioner was charged were 1) driving a vehicle recklessly, 2) driving while intoxicated, and 3) causing bodily injury to another.

The pertinent language in the statute which sets forth the criteria for disqualification from school employment, *i.e., N.J.S.A.* 18A: 6-7.1 (c)(1), is:

> An individual . . . . shall be permanently disqualified from employment or service under this act if the individual's criminal history record check reveals a record of conviction for any crime . . . . involving the use of force or the threat of force <u>to or upon a person or property</u> including, but not limited to, robbery, aggravated assault, stalking, kidnapping, arson, manslaughter and murder . . . .
>
> (Emphasis added.)

The facts in the record of this case do not suggest the kind of *mens rea* and certain connection between the act and injury that appears to be contemplated by *N.J.S.A.* 18A:6-7.1(c)(1) – as evidenced by the words "use of force or the threat of force <u>to or upon</u> a person or property," and by the choice of examples provided in the statutory provision, *i.e.* robbery, <u>aggravated</u> assault, stalking, kidnapping, arson, manslaughter, murder. These are all acts in which the actor affirmatively directs (or threatens) force upon a specific person or property. By way of contrast, and as mentioned above, petitioner was convicted of an offense,

the elements of which were driving recklessly while intoxicated and, in the course of so doing, causing injury.

In light of the foregoing, the Commissioner agrees with the ALJ that petitioner's conviction did not fall within the purview of *N.J.S.A.* 18A:6-7.1(c) (1). Nor can the Commissioner assume that the single offense with which petitioner was charged necessarily signifies, in and of itself, that petitioner cannot perform effectively as a classroom teacher. Finally, the Commissioner agrees with the ALJ – for the reasons set forth in the Initial Decision – that *In the Matter of the Certificate of Bryan Scalzo,* State Board of Examiners Dkt. No. 607-104, March 29, 2007, cannot be dispositive of the issues in this case.[3]

The Initial Decision is adopted, and petitioner's teaching credential shall be reinstated.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 11/25/08

Date of Mailing: 11/25/08

[3] The Commissioner will not reach the ALJ's comment about petitioner's lack of prior criminal history, as it has no bearing on the issues to be decided in this matter or the relevant statutes.

[4] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. EDU 10282-07
AGENCY REF. NO. 340-11/07

CHRISTOPHER PARSHELUNIS,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF CRIMINAL HISTORY REVIEW,
Respondent.

William B. Gallagher, Jr., Esq., for petitioner, (Klitzman & Gallagher, attorneys)

Jennifer L. Campbell, Deputy Attorney General, for respondent (Anne Milgram, Attorney General of New Jersey, attorney)

Record Closed: August 28, 2008 Decided: October 14, 2008

BEFORE **ANA C. VISCOMI**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appeals from a determination that his guilty plea to driving while intoxicated (N.J.S.A. 39:40-50) and assault by auto, pursuant to N.J.S.A. 2C:12-1c(2), constitutes a disqualification from school employment pursuant to N.J.S.A.

18A:6-7.1(c). The matter was transmitted to the Office of Administrative Law (OAL) on December 10, 2007, for a hearing as a contested case, in accordance with N.J.S.A. 52:14F-1 to -13 and N.J.S.A. 52:14B-1 to -15. The petitioner requested the opportunity to testify rather than submitting the case on motion only, and the matter was heard on May 14, 2008.[1] The record remained upon until receipt and review of the post hearing summations.

FACTUAL DISCUSSION

The facts are not in dispute.

Petitioner was a licensed substitute schoolteacher employed by the Jackson Township Board of Education. On December 9, 2006, he was involved in a drunk driving incident causing injury to his passenger. On July 11, 2007, the Department of Education determined that petitioner was disqualified from employment as a substitute teacher based upon his plea on June 18, 2007, to the 4th degree crime of assault with auto. (R-6). He was sentenced to two years probation; substance abuse counseling, testing and treatment; and fines, on October 12, 2007. (P-1). The Judgment of Conviction reflects that petitioner pled guilty to a 4th degree crime, pursuant to N.J.S.A. 2C:12-1c(2). At the hearing before me, petitioner testified that he was aware that alcohol could impair his judgment and can cause an accident that can cause injuries. He testified that

[1] As a result of the petitioner's request to testify, the respondent produced a witness, Carl Carabelli, Manager of the NJ Department of Education Criminal History Review Unit. He has conducted background checks for the DOE for the past 20 years. Prior to his employment with the DOE, Mr. Carabelli was employed as a detective for 26 years with the New Jersey State Police. He testified specifically with regard to the procedures he is required to follow in order to assure that all school employees and applicants undergo criminal background checks and his responsibilities with regard to the process of disqualification. His testimony is not discussed herein because there is no contention that he failed to follow appropriate procedures. All of the documents introduced during his testimony documenting the process he utilized in this case were admitted into evidence. (R-1 through R-10). Petitioner's contention with Mr. Carabelli's determination to issue the July 11, 2007, disqualification notice is with his interpretation of N.J.S.A. 18A:6-7.1 and N.J.S.A. 2C:12-1c(2).

his blood alcohol level was .186 and that his passenger sustained an ankle injury. [2]

LEGAL ANALYSIS

The resolution of the within matter rests upon the interpretation of N.J.S.A 2C:12-1c(2) as applied to N.J.S.A. 18A:6-7.1, the Criminal History Review statute.

In issuing the disqualification after the petitioner pled guilty to drunk driving and assault by auto, respondent relies upon the broad powers of the New Jersey Department of Education, State Board of Examiners, pursuant to N.J.S.A. 18A:6-7.1, to protect public school students from contact with individuals whom are deemed a danger to them. Although petitioner pled guilty to a 4th degree crime of assault by auto, the respondent contends that it is "self evident" that this crime involves the use of force or threat of force to or upon a person or property within the meaning of the Criminal History Review statute. Respondent asserts that petitioner's blood alcohol level, in conjunction with the speed[3] and the weight of the vehicle he was driving in a residential area exerted actual force causing "serious" injury and property damage and as such, is a disqualifying offense pursuant to the Criminal History Review statute. Respondent also asserts that the facts in this case are the same as those in In the Matter of the Certificate of Bryan Scalzo, Dkt. No 0607-104 (Order of Revocation, March 29, 2007), in which the Examiners found that a "conviction of a crime such as assault by auto falls squarely within" the meaning of a disqualifying offense.

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[2] Petitioner also testified with regard to his educational background and the circumstances behind the incident that occurred on December 6, 2006, but that is not discussed herein as it is irrelevant.

[3] Although the speed of the vehicle has been argued by the parties in their respective post-hearing briefs, no evidence with regard to the speed was introduced into evidence before me. Regardless, that would not change my opinion in this matter because there was neither testimony nor evidence of intent by the petitioner to cause the one car accident and the resulting injury.

Petitioner asserts that the Bryan Scalzo matter is distinguishable from the facts herein because the Scalzo case was uncontested and it cannot be determined from the opinion whether Scalzo pled guilty to a 3rd degree crime or 4th degree crime. Additionally, petitioner asserts that his substitute teaching certificate should be reinstated because the respondent erred in disqualifying him from holding a certificate since N.J.S.A. 18A:6-7.1 does not address the crime for which he pled guilty to, i.e. the 4th degree crime of assault by auto, N.J.S.A. 2C:12-1c(2). Section C.1 of the controlling statute speaks of aggravated assault, which is not 2C:12-1c(2). A review of the cases decided pursuant to N.J.S.A. 18A:6-7.1, petitioner contends, indicates that the Legislature was concerned about drug abuse, sexual involvement with students and other crimes of moral turpitude. Finally, petitioner concedes that if his responsibilities towards students were that of a bus driver, his offense would have more significance; but the 4th degree crime of assault by auto has no bearing on his ability to be a substitute teacher.

N.J.S.A. 18A:6-7.1, the Criminal History Review statute, provides in pertinent part, that an individual shall be permanently disqualified if the criminal history background check reveals a conviction for "a crime involving the use of force or threat of force to or upon a person or property including, but not limited to, robbery, aggravated assault, stalking, kidnapping, arson, manslaughter and murder." Petitioner pled guilty to N.J.S.A. 2C:12-1c(2) which provides that:

> assault by auto is a crime of the 4th degree if the person drives the vehicle while in violation of R.S. 39:4-50 ... and bodily injury results.

This is an important distinction, because petitioner was not charged nor pled guilty to the 3rd degree crime under 2C:12-1c(2) which involves, by definition, "serious" bodily injury. The disqualification statute enumerates a series of crimes representative of those the Legislature determined involved the use of force or threat of force that are automatic disqualifiers – robbery,

aggravated assault, stalking, kidnapping, arson and manslaughter. Although this is not an exhaustive list pursuant to the Statute, these crimes represent the type of serious crimes the Legislature contemplated should act as automatic disqualifiers. A 4th degree crime of assault by auto involving drunk driving and a resulting injury can not be deemed to approach the level as the crimes enumerated as representative of those that are automatic disqualifiers. These crimes also clearly involve the use of force or threat of force. There is no indication in this case that the petitioner intended to use force or threat of force. The Examiners decision in Scalzo is not dispositive of the case herein because the facts of that case are not completely known. It is certainly true, as the Examiners noted in Scalzo, that a teacher's behavior outside the classroom may be relevant in determining that person's qualifications and fitness to retain a certificate and that one incident, if sufficiently flagrant, is enough to demonstrate unfitness to hold a position in a school system. Scalzo, supra, citing In Re Grossman, 127 N.J.Super 13, 30 (Sup. Ct. 1943), *aff'd,* 131 N.J.L 326(E & A 1944), Redcay v State Bd. Of Educ., 130 N.J.L. 369,371 (Sup. Ct. 1943), *aff'd,* 131 N.J.L. 326 (E &A 1944). While not excusing the conduct of the petitioner, the facts in this case do not represent a sufficiently flagrant incident that warrants a disqualification of his substitute teacher's license. The Judgment of Conviction notes as a mitigating factor the fact that the petitioner has either no history of prior criminal activity or has led a law-abiding life for a substantial period of time before the commission of the offense at issue. (P-1). That was also borne out herein by the results of the criminal background check. (R-6).

DECISION AND ORDER

Based on the foregoing, the disqualification of petitioner's substitute teaching certificate is hereby **REVERSED** and I **ORDER** that the petitioner's substitute teaching certificate be reinstated.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 14, 2008

DATE

Ana C. Viscomi

ANA C. VISCOMI, ALJ

Date Received at Agency:

OCT 16 2008

DATE

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

/lam/cs

APPENDIX

LIST OF WITNESSES

For petitioner:

Christopher Parshelunis

For the respondent:

Carl Carabelli

LIST OF EXHIBITS

For the petitioner:

P-1 Judgment of Conviction

For the respondent:

R-1 NJ State Police Arrest Notification

R-2 June 5, 2007, Notification

R-3 June 5, 2007, Notification to Jackson Township Board of Ed

R-4 June 5, 2007, memo to Robert Higgins, Acting Director

R-5 June 7, 2007, correspondence from Jackson Township School District

R-6 July 11, 2007, disqualification notification

R-7 July 11, 2007, notification to Bd of Ed

R-8 July 11, 2007, notification to Robert Higgins, Director

R-9 July 31, 2007, request for hearing

R-10 August 7, 2007, reply to attorney letter

ARCHWAY PROB. INC.
V. NJ DEPT. OF EDUC.
ET AL.

TARGET 10-3-08 DUE 10-20-08

Ext 12/4

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

9 Quakerbridge Plaza
P.O. Box 049
Trenton, New Jersey 08625-0049
(609) 588-6584

A copy of the administrative law judge's decision is enclosed.

This decision was mailed to the parties on SEP 3 2008.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NOS. EDU 6956-00, 8646-00, 4834-01, 4607-03, 4608-03 and 427-06

AGENCY DKT. NOS. 271-7/00, 381-10/00, 227-8/99, 392-12/02, 216-5/03 and 57-2/06

(CONSOLIDATED)

ARCHWAY PROGRAMS, INC.,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION,

Respondent,

and

PEMBERTON TOWNSHIP BOARD OF EDUCATION,

Petitioner,

v.

ARCHWAY PROGRAMS, INC.,

Respondent,

and

ARCHWAY PROGRAMS, INC.,

Petitioner,

v.

EWING TOWNSHIP BOARD OF EDUCATION, MERCER COUNTY

Respondent,

Steven D. Weinstein and **Anthony Merlino**, Esqs., for Archway Programs, Inc. (Blank, Rome, Comisky and McCauley, attorneys)

Soakie Bae, Deputy Attorney General, for New Jersey Department of Education (Anne M. Milgram, Attorney General of State of New Jersey, attorney)

Frederick W. Hardt, Esq., for Pemberton Township Board of Education

Jeffrey Belz, Esq., for Ewing Township Board of Education

Record Closed: April 17, 2008 Decided: September 2, 2008

BEFORE **BEATRICE S. TYLUTKI**, ALJ t/a:

This matter concerns the four Archway Programs, Inc. v. New Jersey Department of Education cases (EDU 6956-00, 8646-00, 4834-01 and 4607-03) (Archway cases), the Pemberton Township Board of Education v. Archway Programs, Inc. case (EDU 4608-03) and the Archway Programs, Inc. v. Ewing Township Board of Education case (EDU 427-06). At various times, the cases were transmitted to the Office of Administrative Law (OAL) for disposition pursuant to N.J.S.A. 52:14B-1 through -15 and N.J.S.A. 52:14F-1 through -13. They were initially assigned to various administrative law judges. Since all of the cases deal with the audits and report of the Department of Education (DOE) regarding the accounts of Archway Programs, Inc. (Archway) for its private school for the handicapped (PSH), they have been consolidated for hearing.

Briefly the consolidated case involves:

EDU 6956-00 – the disallowance by the DOE of the 3% staff salary increase given by Archway as shown in the 1999-2000 school budget. (Exh. A-4). This matter was referred to the OAL on October 3, 2000.

EDU 8646-00 – Archway's objections to the non-allowable costs set forth in DOE's fiscal monitor's report for the 1998-99 school year (Thomas report). (Exh. A-3). This report determined that there was a total of $768,199 in non-allowable costs for this school year. This matter was referred to the OAL on November 28, 2000.

EDU 4834-01 – Archway's objections to the non-allowable costs set forth in DOE's fiscal monitoring report for the 1994-95 school year (1994-95 audit) (Exh. A-1). This audit stated that Archway should return approximately 2.5 million dollars to its sending public school districts. This matter was referred to the OAL on August 17, 2001.

EDU 4607-03 – Archway's objections to the non-allowable costs set forth in DOE's limited fiscal reviews for the 1995-96, 1996-97, 1997-98 and 1998-99 school years. (Exh. A-2). The matter was referred to the OAL on July 14, 2003. These audits determined that there was a total of 6.1 million dollars non-allowable costs.

EDU 4608-03 – Pemberton Township Board of Education (Pemberton) seeks a set-off against its tuition payments to Archway based on the DOE's audits. This matter was referred to the OAL on July 14, 2003.

EDU 427-06 – Archway sues for tuition payments from Ewing Township Board of Education (Ewing), and Ewing alleges it is entitled to a set-off based on the DOE's audits. This matter was referred to the OAL on February 8, 2006.

Except for the Pemberton case (EDU 4608-03), the burden of proof is on Archway to establish that DOE acted arbitrarily, unreasonably, or improperly when it

disallowed certain expenses and costs in its five audits and in the Thomas report, and ordered Archway to return the money to the sending public school districts.

I – PROCEDURAL HISTORY

There were extensive settlement negotiations as to the Archway cases, initially before Administrative Law Judge Robert Miller. After Judge Miller retired, the cases were reassigned to me on February 17, 2004. I also attempted to settle the matters.

Archway hired Rosenforb Winters, LLC to do an independent review of Archway's records for the 1994-95, 1995-96, 1996-97, 1997-98 and 1998-99 school years (Exh. A-12). The company agreed with a number of non-allowable costs and expenses contained in the DOE's audits in its report (RW report). Archway accepted the recommendations in the R.W. report. Settlement discussions continued after this report was received but were unsuccessful.

In preparation for the hearing, Archway and DOE filed the following joint statement of issues to be tried:

I. Audit Years

Category	DOE Schedule '94-'95	DOE Schedule '95-'96 to '98-'99	Issues To Be Tried
Teachers and other Personnel	A	A	Teachers and other personnel which the DOE deemed required certifications and which DOE disallowed due to lack of certification. Archway maintains the teachers were improperly disallowed, were qualified for certification, obtained their certification, and delays were the result of the DOE not acting in a reasonable time frame. Archway also contests additional

			employees which were not originally classified in the correct expense category and which the DOE refused to allow to be reclassified.
Non-Salary Expenses	C	C	DOE disallowed certain expenses which Archway believes was an incorrect non-allowance.
Petting Zoo/Janitorial and Pool Expenses	D		DOE utilized a billable days ratio for both the petting zoo/janitorial and the pool to determine allowable expenses. Archway believes that these activities fall under Subsection 4.1(d) of the Regulations requiring a revenue ratio.
Pupil Transportation	E	D	DOE disallowed expenses based on a mileage ratio. Archway bases its allocation upon a revenue ratio under Subsection 4.1(d),
Construction Labor	F		DOE disallowed certain expenses based first upon an improvement ratio applied to a billable days ratio. Archway calculates allowable costs in this category based upon a revenue ratio.
Landscaping/ Maintenance/ Security and Seasonal Expenses	G	D	DOE utilized a revenue ratio. Archway also utilizes a revenue ratio, but because of adjustments to other schedules, the base of the revenue ratio differs.
Depreciation	H	D	DOE disallowed certain expenses as non-allowable utilizing first a square footage ratio for each campus applied against a billable day/usage of facilities ratio. Archway applies a revenue ration under Subsection 4.1(d).
Maximum Salary Cap	I	E	DOE disallowed portions of certain salaries it deemed in excess of the maximum allowable

			salary based on pro rating the salary cap between counties, whereas Archway argues that the maximum salaries should be based on the county in which the employee is housed.
Fringe Benefit Costs	K	F	DOE recalculated allowable fringe benefit costs based upon its calculation on allowable salary costs charged directly to PSH. Archway's difference in this category relates to the differences in each of the individual schedules on what is an allowable salary cost.
Direct Costs Reallocated To Overhead	M		Archway disagrees with DOE's reclassification from direct charges to organizational overhead.
Salary Costs And Expenses Charged To Overhead	O		DOE disallowed certain salary and other costs charged to organizational overhead. Archway believes an appropriate percentage of such costs should have been permitted.
Fringe Benefit Costs Charged To Overhead	Q		The differences here reflect the different positions of DOE and Archway with regard to Schedules M and O.
Organizational Overhead	R	J	The differences between DOE and Archway relate primarily to a series of differences on various schedules of specific costs and based upon different cost ratios.
Working Capital	T	L	The working capital fund allocation permitted under the Regulations is based upon allowable costs. The differences between DOE and Archway relate to the different views of the specific allowable costs on which the base is built.

II. Wayne Thomas Interim Report – 1998-1999

Pursuant to an Interim Settlement Order, Wayne Thomas was appointed by the DOE as a Fiscal Monitor. He reviewed Archway operations during the fiscal year 1998-99 (after the disclosure of the '94-'95 audit) and made certain observations which he reported to the Department determining at that time approximately $786,000 in non-allowable expenses. This report was issued before the Department did its fiscal audit for the '98-'99 year. Archway's position is that once the more formal fiscal audit was conducted by the DOE, the informal report from Wayne Thomas, which is largely duplicative, should not be considered separately from the '98-'99 DOE audit.

III. Salary Appeal

The DOE disallowed payments Archway intended as an across the board percentage increase to Archway's employees. Archway's board minutes of May 25, 1999 reflect a three percent salary increase, but Archway chose to defer this increase until after PSH enrollment had stabilized. When the salary increase was issued in mid-year, the DOE determined that it was not an allowable expense because it did not satisfy the requirements of either a contingent increase or a merit increase. Archway argues that it did not intend for it to be either and argues that it was a permissible and properly budgeted increase.

On June 28, 2006, I received a stipulation of facts jointly prepared by Archway and DOE as to EDU 4834-01 and part of EDU 4607-03. (Exh. J-1). This stipulation provides:

1. Archway is a not-for-profit human services organization that provides various educational, social, psychological, and residential services for developmentally disabled and mentally and physically challenged adults and children.

2. Archway operates a Private School for the Handicapped ("PSH") program that provides special education services to public school children ages three to twenty-one with special needs. The students enrolled in the PSH program may be developmentally disabled, socially maladjusted, neurologically impaired, or communications handicapped. Archway provides these services to children from public school districts in New Jersey.

3. The PSH program operates on two campuses, one located in Atco, Camden County, and the other located in Washington Township, Gloucester County. The Atco Campus hosts a Lower School and Upper School, each of which provides a 10-month school program [and] an extended school year program. During the time period relevant to the

instant litigation, the Atco Campus additionally hosted a "Challenge" program designed for severely challenged students. The Atco Campus also hosts a non-PSH summer camp program. The Washington Township Campus conducts a pre-school through eighth grade program.

1994-1995 AUDIT (EDU 4834-01)

4. In September 1995, the Department commenced a Fiscal Monitoring Review of the business services and tuition charges of Archway's PSH program for the 1994-95 school year.

5. On or about November 6, 1998, the Department issued Archway its findings entitled, "Report of Examination, Fiscal Monitoring Review, July 1, 1994 – June 30, 1995," in which it identified approximately $2,211,658 in non-allowable costs that Archway had included in calculating its 1994-95 PSH tuition rates. After accounting for tuition waiver adjustments and the working capital fund computation, the Department determined that Archway should refund approximately $2,533,402 to its sending public school districts.

6. On or about November 9, 1998, the Department issued a letter revoking Archway's approved status and filed and emergent petition seeking the appointment of a fiscal monitor.

7. On or about November 30, 1998, Archway filed an appeal of the Department's findings and an emergent application to stay the revocation of Archway's approved status.

8. On or about December 18, 1998, the Hon. Solomon A. Metzger, ALJ, conducted a hearing on the emergent petitions respectively filed by Archway and the Department. The ALJ denied the relief sought by the Department and granted Archway's request for a stay in revocation.

9. In February 1999, the parties entered into an interim settlement agreement, which provided for an internal appeal of the Department's 1994-95 Fiscal Monitoring Review.

10. As a result of Archway's internal appeal, the Department concluded that approximately $173,843 had been properly allowed in Archway's tuition rate. Therefore, the Department reduced the amount to be refunded by Archway to its sending public school districts from $2,533,402 to approximately $2,359,559.

11. On or about May 7, 1999, the Department issued a Notice of Determination memorializing the findings outlined in stipulation 10.

12. On or about August 5, 1999, Archway filed a Petition appealing the findings set forth in the Department's Notice of Determination.

Schedules A/B

13. Out of the $2,211,658 in non-allowable costs identified in the initial November 6, 1998 Fiscal Monitoring Review, approximately $646,871 subtotaled in Schedules A and B of the report consists of disallowed salaries paid to the following thirty-eight professional staff members employed by Archway during the 1994-95 year:

Table 1

Employee	Salary
Alldred, Jennifer	$ 1,258
Anderson, Kimberly	$ 50
Belum, Frank	$ 4,173
Bohl (Goetschius), Susan	$ 17,025
Brothman, Camille	$ 3,300
Clements, Thomas	$ 45
Cobb, Eunice	$ 1,747
Cotey, Gus	$ 5,000
Dreby, Timothy	$ 16,501
Dugan, Kelly	$ 21,250
Gizelback, Deborah	$ 5,000
Hall, Robert	$ 23,540
Heenan, Maureen	$ 14,423
Howarth, Dean	$ 2,608
Hummell, David	$ 8,654
Huster, Tracy	$ 2,193
Ilconich, Christopher	$ 4,666
Johnson, Lavonne	$ 43,766
Keyes, Thomas	$ 3,080
Mason, Julie	$ 29,529
Millenhauer, Barbara	$ 52,053
Moore, Anthony	$ 11,129
Murphy, Kathleen	$ 27,295
Nicolino, Anthony	$ 9,809
Novick, Phyllis	$ 2,952
Phillips, Ronald	$ 962
Raymond, Diane	$ 11,999
Reed (Walker), Nancy	$ 17,310
Robbins, Helene	$ 26,642
Rosen, Steve	$ 53,350
Shipley, Jill	$ 8,125
Snyder, Judith	$ 35,298
Yarchuck, Sally	$ 66,007
Wall, Christopher	$ 5,373
Wenner, Barbara	$ 4,226
Whittaker, Chester	$101,767

Wood, Mark	$ 150
Ziemba, Lawrence	$ 4,616

14. Of the $646,871 identified in Table 1, approximately $29,498 represents salaries paid to Frank Belum, Susan Bohl, Camille Brothman and Gus Cotey, Jr. For ease of reference, they are restated below in Table 2.

Table 2

Employee	Salary
Belum, Frank	$ 4,173
Bohl, Susan	$17,025
Brothman, Camille	$ 3,300
Cotey, Gus Jr.	$ 5,000

15. In its Notice of Determination, the Department found that the $29,498 in salaries identified in Table 2 had been properly included in Archway's 1994-95 tuition rate. These salaries are therefore no longer in dispute.

16. Of the total $646, 871 in disallowed salaries identified in Table 1, approximately $16,320 represents the sum of amounts paid to Eunice Cobb, Maureen Heenan, and Mark Wood.

Table 3

Employee	Salary
Cobb, Eunice	$ 1,747
Heenan, Maureen	$14,423
Wood, Mark	$ 150

17. Archway did not challenge the salaries identified in Table 3 in its Petition appealing the 1994-95 Fiscal Monitoring Review. These disallowed salaries are therefore not in dispute.

18. Approximately $477,700 of the total $646,871 in disallowed salaries identified in Table 1 represents salaries paid to the following seventeen professional staff members employed by Archway during the 1994-1995 school year:

Table 4

Employee	Salary
Anderson, Kimberly	$ 50
Clements, Thomas	$ 45

Dreby, Timothy	$ 16,501
Gizelback, Deborah	$ 5,000
Hall, Robert	$ 23,540
Howarth, Dean	$ 2,608
Ilconich, Christopher	$ 4,666
Johnson, Lavonne	$ 43,766
Mason, Julie	$ 29,529
Millenhauer, Barbara	$ 52,053
Murphy, Kathleen	$ 27,295
Raymond, Diane	$ 11,999
Rosen, Steve	$ 53,350
Snyder, Judith	$ 35,298
Tyarchuck, Sally	$ 66,007
Wenner, Barbara	$ 4,226
Whittaker, Chester	$101,767

19. Archway no longer contest the disallowed salaries identified in Table 4 (see Petition ¶¶ 11-12).

20. The parties summarize stipulations 13 through 19 as follows: Out of the approximately $646,871 in disallowed salaries identified in Table 1, the sum of approximately $29,498 is allowable; the sum of approximately $16, 320 was not challenged by Archway; and Archway no longer contests the sum of approximately $477,700. The sum of approximately $123,353 remains in dispute (see Petition ¶¶ 11-12).

21. The disputed $123,353 identified in stipulation 20 consists of salaries paid to fourteen staff members employed by Archway in the 1994-1995 school year, identified in Table 1. For ease of reference, these disputed disallowances are restated in Table 5 below:

Table 5

Employee	Salary
Alldred, Jennifer	$ 1,258
Dugan, Kelly	$21,250
Hummell, David	$ 8,654
Huster, Tracy	$ 2,193
Keyes, Thomas	$ 3,080
Moore, Anthony	$11,129
Nicolino, Anthony	$ 9,809
Novick, Phyllis	$ 2,952
Phillips, Ronald	$ 962
Reed (Walker), Nancy	$17,310
Robbins, Helene	$26,642
Shipley, Jill	$ 8,125
Wall, Christopher	$ 5,373

Ziemba, Lawrence	$ 4,616

Schedule J

22. Archway no longer contests the approximately $2,072 in disallowed food and entertainment expenses identified in Schedule J of the Notice of Determination (see Petition ¶ 20).

Schedule L

23. Archway no longer contest the $84,293 in disallowed food service expenses identified in Schedule L of the notice of Determination (see Petition ¶ 21).

LIMITED FISCAL REVIEWS OF SCHOOL YEARS
1995-96, 1996-97, 1997-98, & 1998-99 (EDU 4607-03)

24. On or about October 16, 2002, the Department submitted to Archway four separate reports entitled "Report of Examination, Limited Fiscal Review" for each of the school years 1995-96, 1996-97, 1997-98 and 1998-99.

25. On or about December 2, 2002, Archway filed a Petition appealing the findings set forth in each of the Limited Fiscal Reviews.

1995-1996 Limited Fiscal Review

26. Based on the findings set forth in the 1995-96 Limited Fiscal Review, the Department identified approximately $2,016,603 in non-allowable costs that Archway had included in calculating its 1995-1996 PSH tuition rates. After accounting for tuition waiver adjustments and the working capital fund computation, the Department determined that Archway should refund approximately $2,083,763 to its sending public school districts.

Schedules A/B

27. Our of the $2,016,603 in non-allowable costs identified in the 1995-96 Limited Fiscal Review, approximately $945,104 subtotaled in Schedules A and B represents salary-related entries and salaries paid to forty-five professional staff members employed by Archway during the 1995-96 school year. Those disallowances are as follows:

Table 6

Employee	Salary
"Correct Salary & Fringe"	$54,500
"Salary Coding Correction"	$18,112

"Salary Coding Correction"	$14,538
Angeline, Lisa	$ 4,266
Annett, Brian	$ 1,768
Bates, Scott	$ 7,269
Bates, Scott	$34,731
Belum, Frank	$10,485
Bennet, Christopher	$ 2,579
Betner, James	$ 2,493
Bradbury, Lisa	$ 5,400
Burgin, Jennifer A.	$10,671
Crawford, Robert	$30,188
DeMesquita, Carol	$70,000
Dieterle, Kimberly	$19,462
Dreby, Timothy	$ 5,288
Faltz, Francine	$ 2,400
Gordy, Thomas	$36,234
Gromley, Paula	$18,425
Halkes, M. Kristine	$25,898
Hall, Robert	$ 9,000
Heenan, Maureen	$ 4,800
Hollywood, Joseph	$30,000
Hummell, David	$ 2,400
Ilconich, Christopher	$17,192
Johnson, Lavonne	$44,725
Keyes, Thomas	$ 6,923
Kleva, Melody	$30,000
Lafferty (Whicker), Susan	$50,000
Long (Williams), Carolyn	$ 5,887
Mahon, Michael	$16,731
Mollenhauer, Barbara	$53,196
Nicolino, Anthony	$ 2,280
Olaya, Francisco	$40,423
Phillips, Ronald	$19,231
Pizarro, Michael A.	$ 5,212
Raymond, Diane	$ 1,846
Raymond, Diane	$21,692
Reed (Walker), Nancy	$ 2,400
Robbins, Helene	$ 3,846
Rosen, Steve	$ 8,385
Scaravaglione, Tonette	$ 8,173
Sereday, Joyce E.	$20,000
Steranko, Catherine	$ 2,400
Thoms, Theresa	$ 2,308
Tomasello, Kerri	$19,961
Watkins, Carl S.	$ 132
Wenner, Barbara	$ 3,562
Whittaker, Chester	$70,192
Yurchuck, Sally	$67,500

28. Of the $945,104 identified in Table 6, approximately $546,571 represents salaries paid to nineteen individuals during the 1995-1996 school year that Archway did not challenge in its Petition appealing the Limited Fiscal Reviews. Those undisputed disallowances are summarized below in Table 7 as follows:

Table 7

Employee	Salary
Angeline, Lisa	$ 4,266
Annett, Brian	$ 1,768
Burgin, Jennifer A.	$10,671
Crawford, Robert	$30,188
DeMesquita, Carol	$70,000
Gordy, Thomas	$36,234
Hall, Robert	$ 9,000
Ilconich, Christopher	$17,192
Johnson, Lavonne	$44,725
Keyes, Thomas	$ 6,923
Lafferty (Whicker), Susan	$50,000
Mollenhauer, Barbara	$53,196
Phillips, Ronald	$19,231
Raymond, Diane	$ 1,846
Raymond, Diane	$21,692
Rosen, Steve	$ 8,385
Sereday, Joyce E.	$20,000
Wenner, Barbara	$ 3,562
Whittaker, Chester	$70,192
Yurchuck, Sally	$67,500

29. Of the total $945,104 in disallowed salaries identified in Table 6, approximately $10,220 represents salaries paid to the following three professional staff members employed by Archway during the 1995-1996 school year.

Table 8

Employee	Salary
Dreby, Timothy	$5,288
Heenan, Maureen	$4,800
Watkins, Carl S.	$ 132

30. Archway no longer contests the salaries identified in Table 8 (see Petition ¶ 13).

31. The parties summarize stipulations 27 through 30 as follows: Out of the total $945,104 in disallowed salaries identified in Table 6, the sum of approximately $546,571 was not challenged by Archway, and Archway no longer contests the sum of approximately $10,220. The sum of approximately $388,313 remains in dispute (see Petition ¶ 13).

32. The disputed $388,313 identified in stipulation 31 consists of the three salary-related entries and salaries paid to twenty-three professional staff members employed by Archway during the 1995-96 school year, identified in Table 6. For ease of reference, these disputed disallowances are restated in Table 9 below:

Table 9

Employee	Salary
"Correct Salary & Fringe"	$54,500
"Salary Coding Correction"	$18,112
"Salary Coding Correction"	$14,538
Bates, Scott	$ 7,269
Bates, Scott	$34,731
Belum, Frank	$10,485
Bennett, Christopher	$ 2,579
Betner, James	$ 2,493
Bradbury, Lisa	$ 5,400
Dieterle, Kimberly	$19,462
Faltz, Francine	$ 2,400
Gormley, Paula	$18,425
Halkes, M. Kristine	$25,898
Hollywood, Joseph	$30,000
Hummell, David	$ 2,400
Kleva, Melody	$30,000
Long (Williams), Carolyn	$ 5,887
Mahon, Michael	$16,731
Nicolino, Anthony	$ 2,280
Olaya, Francisco	$40,423
Pizarro, Michael A.	$ 5,212
Reed (Walker), Nancy	$ 2,400
Robbins, Helene	$ 3,846
Scaravaglione, Tonette	$ 8,173
Steranko, Catherine	$ 2,400
Thoms, Theresa	$ 2,308
Tomasello, Kerri	$19,961

1996-1997 Limited Fiscal Review

33. Based on the findings set forth in the 1996-97 Limited Fiscal Review, the Department identified approximately $1,712,960 in non-allowable costs

that Archway had included in calculating its 1996-97 PSH tuition rates. After accounting for adjustments to tuition waivers and working capital fund computation, the Department determined that Archway should refund approximately $1,711,062 to its sending public school districts.

Schedules A/B

34. Out of the $1,712,960 in non-allowable costs identified in the 1996-1997 Limited Fiscal Review, approximately $633,231 subtotaled in Schedules A and B represents salaries paid to the following forty-three professional staff members employed by Archway during the 1996-1997 school year:

Table 10

Employee	Salary
Annett, Brian	$ 2,378
Bates, Scott	$ 3,231
Bennett, Christopher	$ 5,803
Black, Sharon	$26,215
Bradbury, Lisa	$ 3,000
Burgin, Jennifer	$ 9,679
Campbell, John	$ 6,446
Crawford, Robert	$ 8,360
DeMesquita, Carole	$78,050
Faltz, Francine	$ 2,400
Flesher, David	$ 3,231
Freeman, Melissa	$ 2,400
Gordy, Thomas	$37,685
Gormley, Paula	$16,794
Halkes, Kristine	$27,248
Heenan, Maureen	$ 2,400
Hollywood, Joseph	$30,900
Hummell, David	$ 2,400
Ilconich, Christopher	$ 5,192
Johnson, Lavonne	$46,738
Kieserman, Regina	$ 5,460
Kleva, Melody	$ 7,269
Lafferty (Whicker), Susan	$53,105
Mason, Julie	$10,498
McGinn, Michael	$ 5,115
Mollenhauer, Barbara	$33,575
Nicolino, Anthony	$ 2,400
Pizarro, Michael	$ 7,963
Rapatski, Kelly	$ 462
Raymond, Diane	$27,669
Richards (Dursi), Tracy	$ 9,102
Robbins, Helene	$ 3,846

Rosen, Steve	$29,744
Scaravaglione, Tonette	$ 9,946
Sereday, Joyce	$ 6,223
Tomasello, Kerri	$32,509
Townsend, Mary	$ 500
Vandergrift, Christine	$ 300
Vaughn, Celeste	$ 1,500
Waldron, Shirley	$ 9,121
Whittaker, Chester	$50,731
Williams, Monica	$ 3,662
Zeldenrust, Lizabeth	$ 1,981

35. Of the $633,231 identified in Table 10, approximately $328,225 represents disallowed salaries paid to twenty-four individuals during the 1996-1997 school year that Archway did not challenge in its Petition appealing the Limited Fiscal Reviews. Those undisputed disallowances are summarized in Table 11 as follows:

Table 11

Employee	Salary
Bates, Scott	$ 3,231
Bradbury, Lisa	$ 3,000
Burgin, Jennifer	$ 9,679
Campbell, John	$ 6,446
Crawford, Robert	$ 8,360
DeMesquita, Carole	$78,050
Faltz, Francine	$ 2,400
Flesher, David	$ 3,231
Freeman, Melissa	$ 2,400
Heenan, Maureen	$ 2,400
Ilconich, Christopher	$ 5,192
Johnson, Lavonne	$46,738
Kieserman, Regina	$ 5,460
Mason, Julie	$10,498
McGinn, Michael	$ 5,115
Mollenhauer, Barbara	$33,575
Pizarro, Michael	$ 7,963
Rapatski, Kelly	$ 462
Robbins, Helene	$ 3,846
Rosen, Steve	$29,744
Sereday, Joyce	$ 6,223
Vaughn, Celeste	$ 1,500
Whittaker, Chester	$50,731
Zeldenrust, Lizabeth	$ 1,981

36. Of the total $633,231 in disallowed salaries identified in Table 10, approximately $93,590 represents salaries paid to the following seven professional staff members employed by Archway during the 1996-1997 school year:

Table 12

Employee	Salary
Bennett, Christopher	$ 5,803
Gordy, Thomas	$37,685
Kleva, Melody	$ 7,269
Nicolino, Anthony	$ 2,400
Raymond, Diane	$27,669
Richards (Dursi), Tracy	$ 9,102
Williams, Monica	$ 3,662

37. Archway no longer contests the $93,590 in disallowed salaries identified in Table 12 (see Petition ¶ 13).

38. The parties summarize stipulations 34 through 37 as follows: Out of the total sum of $633, 231 in disallowed salaries identified in Table 10, the sum of approximately $328,225 was not challenged by Archway, and Archway no longer contests the sum of approximately $93,590. The sum of approximately $211,416 remains in dispute (see Petition ¶ 13).

39. The disputed $211,416 identified in stipulation 37 represents salaries paid to twelve professional staff members employed by Archway during the 1996-1997 school year, identified in Table 10. For ease of reference, these disputed disallowances are restated in Table 13 below:

Table 13

Employee	Salary
Annett, Brian	$ 2,378
Black, Sharon	$26,215
Gormley, Paula	$16,794
Halkes, Kristine	$27,248
Hollywood, Joseph	$30,900
Hummell, David	$ 2,400
Lafferty (Whicker), Susan	$53,105
Scaravaglione, Tonette	$ 9,946
Tomasello, Kerri	$32,509
Townsend, Mary	$ 500
Vandergrift, Christine	$ 300
Waldron, Shirley	$ 9,121

The first day of the hearing in the consolidated matter took place on July 14, 2006. During his opening statement, Steven D. Weinstein, Esq., on behalf of Archway, indicated that Archway would be moving to dismiss part of EDU 4607-03, specifically, that portion of the case that deals with the DOE's audits for 1997-98 and 1998-99 school years. I requested the parties to present briefs as to Archway's motion to dismiss part of EDU 4607-03. After receipt of briefs, I issued an order, dated September 21, 2006, denying the motion. This order is attached and incorporated herein. (Attachment I).

The hearing continued on August 1, 4, 7, 11, and 14, 2006, and September 6, 2006.

After the seventh day of the hearing, Archway submitted a motion to dismiss EDU 8646-00, in which Archway challenges the findings in the Thomas report. The motion was discussed at the hearing on September 6, 2006, and Deputy Attorney General Melanie Brooks, who represented DOE at that time, stated that DOE would not enforce the Thomas report. After receipt of a written statement from Brooks, Archway withdrew its appeal as to EDU 8646-00. I ordered on September 21, 2006, that EDU 8646-00 be dismissed with prejudice. This order is attached and incorporated herein. (Attachment II)

On October 12, 2006, I received a supplemental joint stipulation of facts as to EDU 4607-03, prepared by Archway and DOE. (Exh. J-3). This stipulation provides:

1997-1998 Limited Fiscal Review

1. Based on the findings set forth in the 1997-98 Limited Fiscal Review, the Department identified approximately $1,194,071 in non-allowable costs that Archway had included in calculating its 1997-98 PSH tuition rates. After accounting for adjustments the Department determined that Archway should refund approximately $1,672,513 to its sending public school districts.

Schedules A/B

2. Out of the approximately $1,696,566 in non-allowable costs identified in the 1997-1998 Limited Fiscal Review, approximately $626,547 subtotaled in Schedules A & B of the report consists of salary-related entries that had been recorded in the ledgers maintained by Archway and disallowed by the Department, as well as salaries paid to forty-five professional staff members employed by Archway during the 1997-98 school year:

Table 14

Employee	Salary
Annett, Brian	$ 3,962
Bates, Scott	$37,169
Benbridge, Rose	$ 4,385
Black, Sharon	$ 8,000
Byrd, Sharon	$ 1,291
Cobb, Eunice J.	$ 2,695
Connor, Horace M.	$ 2,115
Delmar, Laurel	$14,400
DeMesquita, Carole	$79,413
DePaul, Thomas A.	$12,299
Dluoik, Cheryl	$15,218
Donley, William C.	$25,029
Fineberg, Alfred	$ 5,250
Flesher, David A.	$18,577
Franklin (Castells), Michele L.	$31,719
Gonnella, Renee	$ 4,038
Gordy, Thomas	$21,923
Gormley, Paula	$18,798
Gupta (Foster), Michelle B.	$28,146
Hollywood, Joseph	$31,216
Hughes, John W.	$ 981
Hunter, Kristen M.	$21,858
Johnson, Kelly	$ 8,418
Journal Entry	$ 8,373
Journal Entry	$ 7,404
Morrow, Bertha A.	$ 4,808
Morrow, Bertha A.	$ 769
Newbill, Lakiba	$ 1,119
Parker, James	$ 8,311
Raymond, Diane	$29,491
Reagan, Donna M.	$12,927
Richards (Dursi), Tracy A.	$ 7,500
Rosado, Sharon L.	$ 912
Schoener, Scott D.	$15,555
Scott, Michael A.	$ 5,866
Small, Thomas L.	$ 2,308
Smith, Joseph	$23,193

Stein, Lori H.	$24,329
Stinson, Colleen E.	$31,702
Tomasello, Kerri L.	$19,055
Tuttle, Terrence M.	$ 5,538
Vaccaro, Lisa A.	$ 6,231
Waldron, Shirley	$ 6,646
Whitman, Edward	$ 3,462
Wise, Juanita	$ 225
Whittaker, Chester	$ 3,923

3. Of the $626,547 identified in Table 14, approximately $94,163 represents disallowed salaries paid to nine individuals during the 1997-98 school year that Archway did not challenge in its Petition appealing the Limited Fiscal Reviews. Those undisputed salaries are summarized in Table 15 as follows:

Table 15

Employee	Salary
Bates, Scott	$37,169
Fineberg, Alfred	$ 5,250
Gonnella, Renee	$ 4,038
Gupta (Foster), Michelle B.	$28,146
Morrow, Bertha A.	$ 769
Richards (Dursi), Tracy A.	$ 7,500
Rosado, Sharon L.	$ 912
Vaccaro, Lisa	$ 6,231
Wise, Juanita	$ 225
Whittaker, Chester	$ 3,923

4. Of the total disallowed $626,547 identified in Table 14, approximately $226,883 represents two charges labeled "Journal entry" as well as salaries paid to ten professional staff members employed by Archway during the 1996-97 school year:

Table 16

Employee	Salary
Connor, Horace M.	$ 2,115
Delmar, Laurel	$14,400
DeMesquita, Carole	$79,413
DePaul, Thomas A.	$12,299
Dluoik, Cheryl	$15,218
Flesher, David A.	$18,577
Hunter, Kristen M.	$21,858

"Journal entry"	$ 8,373
"Journal entry"	$ 7,404
Morrow, Bertha A.	$ 4,808
Raymond, Diane	$29,491
Reagan, Donna M.	$12,927

5. Archway no longer contests the $226,883 in disallowed salaries identified in Table 16.

6. The parties summarize stipulations 1 through 5 as follows: out of the total sum of $626,547 in disallowed salaries identified in Table 14, the sum of approximately $94,163 was not challenged by Archway, and Archway no longer contests the sum of approximately $226,883. The sum of approximately $305,501 remains in dispute.

7. The disputed $305,501 discussed in stipulation 6 consists of salaries paid to the following 24 professional staff members employed by Archway during the 1997-98 school year, identified Table 17 below:

Table 17

Employee	Salary
Annett, Brian	$ 3,962
Benbridge, Rose	$ 4,385
Black, Sharon	$ 8,000
Byrd, Sharon	$ 1,291
Cobb, Eunice J.	$ 2,695
Donley, William C.	$25,029
Franklin, Michele L.	$31,719
Gordy, Thomas	$21,923
Gormley, Paula	$18,798
Hollywood, Joseph	$31,216
Hughes, John W.	$ 981
Johnson, Kelly	$ 8,418
Newbill, Lakiba	$ 1,119
Parker, James	$ 8,311
Schoener, Scott D.	$15,555
Scott, Michael A.	$ 5,866
Small, Thomas L.	$ 2,308
Smith, Joseph	$23,193
Stein, Lori H.	$24,329
Stinson, Colleen E.	$31,702
Tomasello, Kerri L.	$19,055
Tuttle, Terrence M.	$ 5,538
Waldron, Shirley	$ 6,646
Whittman, Edward	$ 3,462

1998-99 Limited Fiscal Review

8. Based on the findings set forth in the 1998-1999 Limited Fiscal Review, the Department identified approximately $1,180,074 in non-allowable costs that Archway had included in calculating its 1998-1999 PSH tuition rates. After accounting for adjustments, the Department determined that Archway should refund approximately $1,095,588 to its sending public school districts.

Schedules A/B

9. Out of the $820,512 identified in non-allowable costs identified in the 1998-99 Limited Fiscal Review, approximately $382,596 subtotaled in Schedules A& B of the report represents salaries paid to the following thirty-three professional staff members employed by Archway during the 1998-99 school year:

Table 18

Employee	Salary
Afflerbach, Fredericka	$ 2,031
Bates, Scott	$55,000
Black, Sharon	$ 3,000
Brown, Gale	$ 6,215
Byrd, Sharon	$ 3,787
Byrd, Sharon	$ 3,692
Cambron, Frank	$ 1,474
Campbell, John	$ 4,615
Cobb, Eunice	$ 2,695
Creedon, Patrick	$ 6,090
Cromwell (Miller), Lisa	$ 1,292
Delmar, Laurel	$17,787
DePaul, Thomas	$18,584
DePaul, Thomas	$ 9,292
DiCriscio, Jennifer	$ 1,213
Dluoik, Cheryl	$31,979
Donley, William	$20,275
Gonnella, Renee	$ 2,308
Gormley, Paula	$21,860
Gupta (Foster), Michelle	$36,347
Hummell, David	$ 5,325
Landgraf, Keith	$16,800
Laniti, Michelle	$16,867
Leonardi, Alan	$ 1,154
McCouch, Pamela	$ 7,162
Raymond, Diane	$ 5,365
Regan, Donna	$12,992

Small, Thomas	$ 4,615
Stein, Lori	$12,762
Stinson, Colleen	$25,701
Trefz, Greg	$17,769
Turkot, Theresa	$ 600
Williams, Monica	$ 2,308
Wilson, Frederick	$ 1,923
Wittman, Edward	$ 2,077

10. Out of the $382,956 identified above in Table 18, approximately $34,057 represents disallowed salaries paid to eight individuals during the 1998-1999 school year that Archway did not challenge in its Petition appealing the Limited Fiscal Reviews. Those undisputed salaries are summarized in Table 19 as follows:

Table 19

Employee	Salary
Afflerbach, Fredericka	$2,031
Brown, Gale	$6,215
Byrd, Sharon	$3,692
Cambron, Frank	$1,474
Campbell, John	$4,615
Creedon, Patrick	$6,090
Hummell, David	$5,325
Small, Thomas	$4,615

11. Of the $382,956 identified above in Table 18, approximately $156,040 represents salaries paid to the following nine professional staff members employed by Archway during the 1998-1999 school year:

Table 20

Employee	Salary
Bates, Scott	$55,000
Byrd, Sharon	$ 3,787
Cromwell (Miller), Lisa	$ 1,292
Dluoik, Cheryl	$31,979
McCouch, Pamela	$ 7,162
Raymond, Diane	$ 5,365
Regan, Donna	$12,992
Stein, Lori	$12,762
Stinson, Colleen	$25,701

12. Archway non longer contest the $156,040 in disallowed salaries identified in Table 20.

13. The parties summarize stipulations 8 through 12 as follows: out of the total sum of $382,956 in disallowed salaries identified in Table 18, the sum of approximately $34,057 was not challenged by Archway, and Archway no longer contests the sum of approximately $156,040. The sum of approximately $192,859 remains in dispute.

14. The disputed $192,859 identified in stipulation 13 represents salaries paid to seventeen professional staff members employed by Archway during the 1998-99 school year, identified in Table 21 below:

Table 21

Employee	Salary
Black, Sharon	$ 3,000
Cobb, Eunice	$ 2,695
Delmar, Laurel	$17,787
DePaul, Thomas	$18,584
DePaul, Thomas	$ 9,292
DiCriscio, Jennifer	$ 1,213
Donley, William	$20,275
Gonnella, Renee	$ 2,308
Gormley, Paula	$21,860
Gupta (Foster), Michelle	$36,347
Landgraf, Keith	$16,800
Laniti, Michelle	$16,867
Leonardi, Alan	$ 1,154
Trefz, Greg	$17,769
Turkot, Theresa	$ 600
Williams, Monica	$ 2,308
Wilson, Frederick	$ 1,923
Wittman, Edward	$ 2,077

The hearing continued on October 18, 2006, and on November 3 and 13, 2006. By November 13, 2006, both Archway and DOE had presented their witnesses and, on that date, both Frederick W. Hardt, Esq., on behalf of Pemberton, and Jeffrey F. Belz, Esq., on behalf of Ewing, stated that they would present no witnesses or exhibits, and expected to enter into settlements with Archway.

On November 13, 2006, Archway orally presented three motions. The first motion was to dismiss EDU 4834-01 (audit for 1994-95 school year) and EDU 4607-03

(audits for the 1995-96, 1996-97, 1997-98 and 1998-99 school years) since DOE had not presented at the end of its case the specific amounts it was seeking to be returned by Archway to the sending public school districts.

It had been DOE's position throughout the hearing that I should make findings of fact in this initial decision and that the final calculations as to disallowances and the amounts that Archway had to return to the sending public school districts should be made in the final decision of the Commissioner of DOE (Commissioner). Brooks noted that, as to some of the schedules in the five audits, the calculation of the disallowed amounts is dependent on the decision as to disallowances in other schedules. Brooks stated that having the Commissioner determine the actual specific amounts of the disallowed costs and expenses in the final decision was the procedure used in several similar OAL cases. I had reservations about DOE's suggested procedure and I opined that my initial decision should contain the specific amounts of the disallowed costs and expenses.

As to Archway's motion, Brooks repeated her argument that the Commissioner should decide the specific amounts of the disallowed costs and expenses, and the amounts that Archway had to return to the sending public school districts. (10T29-30, 33-41).[1]

I orally denied Archway's motion. (10T42-44). I suggested that I would first issue a ruling on the disputed facts and then have DOE calculate the disallowed amounts that were dependent on the disallowances in the other schedules, as well as the exact amounts that Archway had to return to the sending public school districts. Thereafter, Archway could dispute the calculation. Archway filed an interlocutory appeal as to my ruling with the Commissioner on November 17, 2006. The Commissioner elected to review the matter at the end of this case.

[1] The hearing transcripts are designated as follows: 1T=Transcript for July 14, 2006; 2T=Transcript for August 1, 2006; 3T=Transcript for August 4, 2006; 4T=Transcript for August 7, 2006; 5T=Transcript for August 11, 2006; 6T=Transcript for August 14, 2006; 7T=Transcript for September 6, 2006; 8T=Transcript for October 18, 2006; 9T=Transcript for November 3, 2006; 10T=Transcript for November 13, 2006.

After reading the final briefs in this matter, as well as reviewing my notes of the hearing, I am reversing my decision as reflected above. I will be making findings in this initial decision as to the facts in the consolidated matters, as well as some calculations of disallowances. I am now accepting Brooks' position that the Commissioner should make the final decision as to the calculation of all the disallowances, including those that are dependent on disallowances in other schedules, as well as the final decision as to the amounts to be returned by Archway to the sending public school districts. I now believe it is more appropriate for there to be one recalculation as part of the final decision in this matter. Archway will have the right to appeal the Commissioner's final decision and the Commissioner also has the right to remand the matter to the OAL.

Archway's second motion was to renew its prior motion to dismiss part of EDU 4607-03 and DOE opposed the motion. On November 21, 2006, I issued a letter order denying the motion. The order is attached and incorporated herein. (Attachment III).

The third motion was to seek a decision as to EDU 6956-00, which deals with the staff salary increases. Archway presented an oral argument. (10T65-70). I allowed DOE to submit a written response and Archway to submit a written reply. By order dated May 2, 2007, I granted Archway's motion. This order is attached and incorporated herein. (Attachment IV).

By letter dated July 2, 2007, Archway informed me that it would not present any rebuttal witnesses but noted that there had been no resolution as to the Pemberton and Ewing cases. I scheduled a conference for August 13, 2007.

On July 30, 2007, I received a signed settlement for the Ewing case. I issued an order on August 13, 2007, requiring the parties to comply with the settlement. This order is attached and incorporated herein. (Attachment V).

On August 13, 2007, Hardt appeared at the conference and presented a signed settlement for the Pemberton cases. I issued an order on August 13, 2007, requiring

the parties to comply with the settlement. This order is attached and incorporated herein. (Attachment VI).

Archway submitted its brief on November 29, 2007, and DOE submitted its response on February 19, 2008. Archway submitted a reply brief and the record closed on April 17, 2008. At my request, the time for filing my initial decision was extended to September 1, 2008.

II – UNDISPUTED FACTS

The pertinent background facts are not in issue.

Archway is a non-profit corporation which provides educational and human service programs for individuals with special needs. (Exh. J-1). This matter concerns only the programs for the special education students at its PSH. These special education students have individual education plans (IEPs) prepared by their school districts and are sent by their school districts to Archway for their education. During the periods in issue, about 340 special education students from over 100 school districts were enrolled in Archway's PSH. (Exh. A-1). The school districts pay tuition for their student's education at Archway's PSH.

Archway's PSH is a state-approved facility and , as such, is authorized to charge its sending districts tuition for its services. The tuition must conform to the limits set forth by statute. N.J.S.A. 18A:46-21 provides that the tuition assessed by a PSH must not exceed the "actual cost per pupil" as determined by applicable regulations. In this matter, the amount representing the "actual cost per pupil" is calculated in accordance with regulations in effect during the period in issue. As a state-approved PSH, Archway had to submit to DOE independent audits for every school year. It submitted such an audit for 1994-95 (Exh. A-6), 1995-96 (Exh. A-7), 1996-97 (Exh. A-8) and 1997-98 (Exh. A-9).

Archway's PSH consists of two campuses; one located in Atco in Camden County and the other in Washington in Gloucester County. (Exh. J-1). At both campuses, the facilities are used for both PSH and non-PSH programs. (2T 13-14). At the time in issue, the Atco campus consisted of 20 buildings, including office and maintenance facilities, a barn and stable for the therapeutic riding academy, and two school buildings. The Atco campus is situated on 54 acres straddling Camden and Burlington Counties, and divided by the Mullica River. Part of the campus, including one school building, lies in Evesham, in Burlington County, and the other part is in Camden County. (2T10-13).

The Atco campus has a lower school and an upper school, each of which provide a ten-month school program and an extended school year (ESY) program. The ESY is usually a six-week program and usually starts in the beginning of July. Also during the time in issue, the Atco campus had a "Challenge" program designed for severely challenged students. (Exh. J-1; 2T8-10).

The Washington campus has a preschool through eighth grade program. (Exh. J-1; 2T8-10).

In 1995, the DOE received an anonymous letter which alleged fraudulent and illegal financial practices by Archway's administration. The letter prompted DOE to initiate an investigation of Archway's fiscal practices during the 1994-95 school year. On September 6, 1995, DOE initiated an audit of Archway's finances for its PSH.

In November 1998, the DOE released the audit of the 1994-95 school year, and determined that Archway had included approximately 2.5 million dollars in non-allowable expenses and costs in its calculation of the tuition rates charged at its PSH. (Exhs. J-1; A-1). DOE ordered that the tuition overcharges be refunded to the participating school districts, restricted Archway's right to accept new students, and started to take administrative action to revoke Archway's license as a state-approved PSH and to close Archway's PSH at the end of the 1998-99 school year.

Archway filed an appeal and the matter was referred to the OAL on September 13, 1999. (OAL Dkt. No. EDU 8096-99). The matter was assigned to Administrative Law Judge Solomon Metzger. Archway entered into a settlement with DOE, which allowed Archway's PSH program to continue, and DOE appointed Wayne Thomas to act as Archway's fiscal monitor. The appropriate 2.5. million dollars in non-allowable expenses and costs was reduced to 2.3 million dollars.

Archway's Board of Trustees dismissed the Chief Executive Officer, Dr. James Mason, and his wife, Dr. Sydelle Mason, the Chief Operating Officer. Mason was replaced by Dr. Robert Scanlon, a member of the Archway's Board of Trustees and the former Pennsylvania Commissioner of Education.

In addition to the 1994-95 school year audit, Archway had other financial problems, including a default of its New Jersey EDA/Summit Bank loan, delinquencies in IRS taxes, and an outstanding order of the New Jersey Department of Environmental Protection for seven installments. Scanlon and the Board of Trustees made major changes to the school's programs, sold unnecessary facilities, made a substantial reduction to the budget and implemented other fiscal reforms.

Archway filed an appeal as to the DOE's 1994-95 audit (EDU 4834-01).

In light of its fiscal problems and the adverse publicity, Archway was concerned about future enrollment and the possibility that some school districts would send their students elsewhere. Archway was also aware of its staff's concerns about their job security. Archway had in the past, experienced a high turnover of staff since its salary packages were not as good as that paid by the public schools. In order to encourage its staff to remain, Archway included a 3% salary increase for all staff members in its 1999-2000 school year budget, which was adopted on May 25, 1999. (Exh. A-S5). DOE disallowed the 3% salary increase as an allowable cost and Archway filed an appeal. (EDU 6596-00).

In July 2000, Archway received a copy of the Fiscal Monitoring report prepared by Thomas as the fiscal monitor. This report stated that there was a total of $768,199 in non-allowable expenses and costs included in Archway's fiscal report for the 1998-99 school year. Archway filed an appeal as to the Thomas report (EDU 8646-00).

In August 2002, Archway received DOE's audits for the 1995-96, 1996-97, 1997-98 and 1998-99 school years. These audits stated that there were approximately 2 million in non-allowable expenses and costs for the 1995-96 school year, approximately 1.7 million in non-allowable expenses and costs for the 1996-97 school year; approximately 1.2 million in non-allowable expenses and costs for the 1997-98 school year and approximately 1.2 million in non-allowable expenses and costs for the 1998-99 school year. Archway disputed specific disallowances set forth in the four audits and filed an appeal. (EDU 4607-03).

DOE's five audits and the Thomas report concluded that Archway had overcharged the school districts sending special education students to Archway's facilities, and that Archway should refund the amount of the excessive tuition to the school districts. Two school districts, Pemberton and Ewing, filed separate cases seeking to recover the excessive tuition for their students (EDU 4608-06 and EDU 427-03).

III – APPLICABLE REGULATIONS

The former regulations that governed the determination of the tuition rates for PSHs, at the time in issue, were previously codified at N.J.A.C. 6:20-4.1 et seq., and are contained in J-2, and R-8. The following description of the applicable regulations is from Archway's brief (p.3-5).

These regulations establish a complex formula for calculating tuition rates, which ultimately are based on the "certified actual cost per pupil" identified in a certified audit. N.J.A.C. 6:20-4.2(a) and 4.8. The "certified actual cost per pupil" is the actual allowable cost for the school year plus the applicable working capital adjustment divided by average daily enrollment. N.J.A.C. 6:20-4.1(a). The "actual allowable costs" are those

costs that can be included in the tuition rate. The regulations vaguely define "actual allowable costs" as costs "that are consistent with the individualized educational program of a handicapped pupil and...ordinary and necessary and not in excess of the cost that would be incurred by an ordinarily prudent person in the administration of public funds." N.J.A.C. 6:20-4.1(a)1.

The regulations also contain several cost-allocation methodologies for determining whether expenses can be included in the tuition rare. Which methodology applies depends on whether the cost is "direct" or 'indirect," whether it was incurred for a "common or joint purpose" within the PSH operation, N.J.A.C. 6:20-4.1(c), or for facilities used by both the PSH program and unrelated activities, N.J.A.C. 6:20-4.1(d). The direct costs are those that "can be identified specifically with an approved" PSH facility or program and must be allocated to that facility or program. N.J.A.C. 6:20-4.1(b). The indirect costs "are costs which are incurred for a common or joint purpose and not readily assignable to an approved" PSH facility or program. N.J.A.C. 6:20-4.1(c). The regulations divide indirect costs into two categories: (i) those associated with activities having a common or joint purpose of educating pupils, within the PSH setting, N.J.A.C. 6:20-4.1(c), (d)1; and (ii) those associated with facilities used by the PSH program and unrelated activities N.J.A.C. 6:20-4.1(d)2. The regulations prescribe three methods for allocating indirect costs. N.J.A.C. 6:20-4.1(c)1, 2; N.J.A.C. 6:20-4.1(d)1,2.

Regardless of category, indirect costs can be allocated in accordance with "an equitable allocation plan approved by the Commissioner [of Education]." N.J.A.C. 6:20-4.1(c),(d). There was no such plan for the period in issue. (3T 28, 8T 163.) If no Commissioner-approved allocation is in place, then indirect costs associated with activities that have a common/joint purpose of educating pupils within the PSH setting must be allocated as follows:

(i.) directly to the program they benefit, if identified; or

(ii.) Based on a ratio of average daily enrollment for each program to total average daily enrollment.

N.J.A.C. 6:20-4.1(c)1, 2.

Indirect costs associated with facilities used by the PSH program and unrelated activities are allocated:

(i.) In accordance with subsection (c), i.e., direct costs or daily enrollment ratio, if the indirect costs serve a common/joint purpose of educating pupils. N.J.A.C. 6:20-4.1(d)1; or,

(ii) If the costs are associated with activities that do not have a common/joint purpose of educating pupils, "based on the ratio of the revenues for the approved private school to all the revenues for all purposes." N.J.A.C. 6:20-4.1(d)2.

IV – CONTESTED FACTS

After the orders were issued in the matter, as heretofor described, the remaining issues in this matter deal with the five audits (EDU 4834-01 and EDU 4607-03).

In its brief, Archway established a format for the presentation of the contested schedules in the five audits in issue. DOE followed this format in its brief. I will also follow the same.

A – Salary Disallowances – Schedule A

One of the major categories of disallowed costs is the salaries of teachers and other professional staff members. These disallowances are contained in Schedules A and B of the five audits in issue (Exhs. R-1–R-5). As to Schedule A, the disallowances generally fall into two categories: (1) Individuals not properly certified for the period their salaries were disallowed, and (2) individuals who allegedly did not have the appropriate certification for their positions.

As to the first category, it is not disputed that during the time period in issue there was a shortage of appropriately certified special education teachers and other professional staff members in New Jersey. At that time, both public school districts, as well as private schools, were allowed to use personnel with emergency certifications. Since Archway's salary package was not as good as that paid by the public school districts, Archway had difficulties finding appropriately certified personnel and would also lose staff annually when the individuals found better paying jobs with public school districts.

The regulations in effect during the period in issue provided that applications for such an emergency certificate could not be filed until after August 1, (N.J.A.C. 6:11-4.3(b); 5T 20), and the emergency certificate was only for one school year.

Archway noted that John Cuprzinski, the DOE's auditor for the five audits in issue, disallowed as an allowable expense the period of time a staff member was not properly certified and did not consider the fact that the person had filed for an emergency certification and the delay in getting it was due in part to DOE's delay in processing the application. Also, Archway noted that its responsibility to the public school districts required Archway to have an ESY program for some students, which usually started in the beginning of July after the regular school year. On cross-examination, Cuprzinski admitted that Archway could not obtain emergency certificates for teachers in July–August and that the salary payments for these two months should not be disallowed. (9T 63-64).

DOE argued that the disallowances are appropriate since N.J.A.C. 6:20-4.4(a)(4) specifies that a PSH may not change its sending districts for the salary of a professional staff member who is not certified but functioning in a position requiring certification in accordance with N.J.A.C. 6:11-1 et seq. Brooks, on behalf of DOE, stipulated "that individual would not have been able to obtain an emergency certificate between July 1st and July 31" (7T100, lines 3-7).

As to the second category, Archway alleged that there were misclassifications in its records but that all the personnel had the appropriate certification for their actual positions. Archway noted that in his testimony, Cuprzinski stated that he relied solely on Archway's records and if he saw a problem, he did not discuss the matter with Archway's representatives. (9T 65-69).

School Year 1994-95 – Schedule A

The following amount reflects the status of the disallowed salary payments in Schedule A:

DOE Initial Disallowance	$260,434
DOE Revised Disallowance	$230,936
Undisputed by Archway	$107,584
Amount Remaining in Dispute	$123,353

The $123,353 in dispute consists of the salaries paid to the following 14 individuals.

Employee	Salary
Alldred, Jennifer	$ 1,258
Dugan, Kelly	$ 21,250
Hummell, David	$ 8,654
Huster, Tracy	$ 2,193
Keyes, Thomas	$ 3,080
Moore, Anthony	$ 11,129
Nicolino, Anthony	$ 9,809
Novick, Phyllis	$ 2,952
Phillips, Ronald	$ 962
Reed (Walker), Nancy	$ 17,310
Robbins, Helene	$ 26,642
Shipley, Jill	$ 8,125

Wall, Christopher	$	5,373
Ziemba, Lawrence	$	4,616

The arguments of the parties, as to these fourteen individuals is summarized below.

Jennifer Alldred

DOE disallowed the $1,258.00 paid to Alldred in July and August 1994, since Archway's records showed she worked as a physical therapist and occupational therapist Intern, a title not recognized by DOE, and a position for which she was not certified. (Exh. R-1, p.24). It is Archway's position that Alldred worked as a physical therapist/occupational therapist assistant, not as an intern (5T 91), and that there is no certificate required for a PT/OT assistant. Archway stated that it is customary for prospective occupational therapists to work as assistants before becoming formally licensed. (5T 91-92). Alldred received her board certification as a registered occupational therapist. (Exh. AE-532). DOE argued that the testimony of Margaret Smith, who worked in DOE's Office of Licensing and Credentials from 1985 through August 2005 (7T 9-13), clearly shows that even if Alldred was in fact employed as an assistant, Archway, pursuant to N.J.A.C. 6:11-4.6, should have received prior approval of DOE before employing her as an assistant (7T 48–50) and should have reported her name to the County Superintendent (7T 57–58). DOE argued that the testimony of Douglas Otto, on behalf of Archway, is not persuasive as to Alldred's position in July–August 1994 since he was not employed by Archway at the time and had no direct knowledge as to Alldred's position during the time in issue. Also, there was no proof presented to show that Archway had complied with N.J.A.C. 6:11-4.6. DOE argued that Archway failed to present sufficient evidence to prove that Alldred was employed as an assistant and that DOE's disallowance should be upheld.

Kelly Dugan

Both parties agree that Dugan worked as a speech language specialist from July 1994 through June 1995. (Exh. R-1, p.25; 5T 101). DOE disallowed the $21,250.00

paid to her between July 1994 and March 1995 because she did not receive her standard certification until March 1995. (Exh. R-1, p.25). It is also not disputed that Dugan worked with an emergency certification as a speech language specialist during the preceding school year. (Exh. R-1, p.25; 5T 101). It is Archway's position that Dugan did not have to renew her emergency certification for 1994-95 since she met all of the requirements for the standard certification. She applied for a standard certification and it was issued in March 1995. (Exh. R-1, p.25; 5T 101). Archway argued that there was an administrative delay in the review and approval of Dugan's standard certification. In light of the fact that she had completed the requirements for a standard certification and had applied for said certification, Archway argued it was not unreasonable for Archway and Dugan to think that she did not have to also apply for an emergency certification.

David Hummell

Both parties agree that Hummell was paid $8,659.00 between December 1994 and March 1995 and that he was listed in Archway's records as a special education teacher. Also, it is not disputed that he was not certified as a teacher. (Exh. R-1, p.20). Archway stated that Hummell was mistakenly listed as a special education teacher (5T 56). Archway stated that prior to March 1995, Hummell worked as a substitute teacher in various classrooms. (5T 52–53). He held a permanent certification as physical education teacher, which qualified him to serve as a substitute teacher. (Exh. AE-517; 5T 52). Archway argued that, as a substitute, he did not have to hold a certification as a teacher of the handicapped. (5T 53–55). In March 1995, Hummell applied for and received an emergency certification as a teacher of the handicapped. (Exh. AE-516; 5T 56).

DOE argued that Archway presented no proof to show Hummell was a substitute teacher and that Otto's testimony is not persuasive since he was not employed by Archway at that time. Also, DOE argued that even if Hummell worked as a substitute teacher, the testimony of Smith established that Hummell had to complete the

appropriate application process to be a substitute (N.J.A.C. 6:11-4.5; 7T 19–20; 7T 22–25), and could only serve in that capacity for 20 days (7T 21–22).

Tracy Huster

Both parties agree that Huster worked as a school social worker from November 1994 through June 1995. (Exh. R-1, p.25; 5T 97), and that she did not receive her certification until December 1994. (Exh. R-1, p.25). DOE disallowed the salary payment of $1,292 paid to her in November 1994 since she did not have the appropriate certificate in that month. Archway showed that Huster's application for the standard certification as a school social worker was forwarded to DOE on September 30, 1994 – a month before she started working. (Exh. AE-530; 5T 97–98), and that DOE did not issue the standard certification until December 1994. (Exh. AE-531). Archway argued that there was an administrative delay in the review of her application.

Thomas Keyes

DOE disallowed the $3,080 paid to Keyes during the July/August 1994 summer session since he was listed as a teacher of the handicapped and did not have the proper certification. (Exh. R-1, p.23; 5T 17–22).

Archway argued that Keyes actually worked as a teacher's assistant in July and August 1994 (5T 86–87), and that the $3,080 he was paid for those months is a salary consistent with a teacher's assistant, not a teacher of the handicapped. (5T 88). Archway argued that a position of teacher's assistant does not require any certification. (5T 87).

DOE relies on its argument for Alldred as set forth above.

Anthony Moore

Both parties agree that Moore worked as a school social worker from September 1994 through June 1995. (Exh. R-1, p.25; 5T 99). DOE disallowed the $11,179.00 paid to Moore from September 1994 through December 1994 because he did not receive his certification until January 1995. (Exh. R-1, p.25).

Archway stated that Moore was hired to replace Archway's school social worker who had abruptly resigned. (5T 100). Archway submitted an application for emergency certification, on an expedited bases, for Moore on September 12, 1994. (Exh. AE-509A). DOE did not issue the certification until January 1995, five months later. (AE-510). Archway argued that it did all it could to deal with an abrupt resignation and that it needed to fill the position immediately to fulfill its obligations to its students. DOE argued that Smith set forth the requirements for an emergency certificate on a expedited basis and Archway had not shown that there was any unreasonable delay by DOE.

Anthony Nicolino

DOE disallowed the $9,809.00 paid to Nicolino between September 1994 and January 1995 because he was listed as a teacher of the handicapped without having proper certification. Archway stated that Nicolino initially worked as a substitute teacher (Exh. R-1, p.21; 5T 68) and that he held a certificate of eligibility with advanced standing that qualified him to work as a substitute teacher. (Exh. AE-512; 5T 71). Nicolino applied for emergency certification as a teacher of the handicapped in September 1994 on an expedited basis. (Exh. AE-514; 5T 69). DOE did not issue the emergency certificate until January 1995. (Exh. AE-515; 5T 70). Archway stated that his salary was properly charged to the teacher of the handicapped in mid-year.

Phyllis Novick

DOE disallowed the $2,952.00 paid to Novick for August 1994, since she worked as a special education teacher without an emergency certification. Archway argued

that DOE stipulated that it was impossible at the time in issue to get an emergency certificate for July and August and that this salary payment should be allowed since she worked that month and got the emergency certificate in September 1994.

Ronald Phillips

Phillips worked as the assistant to the director of education. DOE equated this position with an assistant to the district superintendent in the public schools, a position which requires certification. (Exh. R-1, p.19). DOE disallowed the $961 paid to Phillips because he did not possess the certification.

Archway argued that Phillips actually worked as an administrative assistant providing clerical support, a position which does not require certification (5T 42), and that someone in the position of assistant to the district superintendent would not be performing clerical work. (5T 42). Archway argued that DOE's classification of the position was incorrect. (5T 44).

Nancy Reed (Walker)

The parties agree that Reed (Walker) worked as a teacher of the handicapped from July 1994 through June 1995. (Exh. R-1, p.21; 5T 77). DOE disallowed the $17,310 paid to Reed (Walker) between July 1994 and January 1995 because she did not receive an emergency certification as teacher of the handicapped until February 1995. (Exh. R-1, p.21; 5T 77). There appears to be some confusion as to her application for emergency certification; however, there is a written application in January 1995 (Exh. AE-508), and a certificate issued February 1995 (Exh. AE-507). Archway argued her salary should be allowed since she worked for several years as an assistant and was intimately familiar with Archway's students and procedures (5T 79); and that her employment was necessary to meet Archway's responsibilities to its students.

Helene Robbins

The parties agree that Robbins worked as a school psychologist from July 1994 through June 1995. (Exh. R-1, p.24; 5T 92). DOE disallowed the $26,642 paid to her between July 1994 and January 1995 because she did not receive her emergency certification for that position until February 1995. (Exh. R-1, p.24; 5T 92).

Archway states that Robbins first applied for her certification in December 1993 (Exh. AE-502; 5T 93). Archway then submitted an application for emergency certification for Robbins in April 1994 (AE-502; 5T 94). DOE noted that Smith testified that the April application was incomplete. Archway submitted a priority request form in January 1995. (Exh. AE-503; 5T 95). The emergency certification was issued in February 1995. (Exh. AE-505; 5T 96).

Jill Shipley

The parties agree that Shipley worked as a speech language therapist from July 1994 through June 1995. (Exh. R-1, p.25; 5T 102). DOE disallowed the $8,125 paid to her from July 1994 through October 1994, because she did not receive her standard certification until November 1994. (Exh. R-1, p.25).

Archway stated that Shipley was at all times qualified to serve as a speech language therapist (5T 104). During the previous school year she taught with an emergency certification, which she first applied for in December 1993, and received in April 1994. (AE-519; 5T 102). That emergency certification was valid to July 1994, and Archway applied for standard certification for Shipley. (Exh. AE-519; 5T 103). DOE received Shipley's application for a standard certification on August 5, 1994, but did not issue the standard certification until November 1994, three months later. (Exh. AE-519). Having previously taught under an emergency certification, and having the required qualifications for a standard certification, Archway argued Shipley was qualified for her position. DOE argued that the disallowance was correct since Shipley lacked a proper certification for the disallowed period.

Christopher Wall

DOE disallowed the $5,373 paid to Christopher Wall from July through August 1994 because he was listed as a teacher of the handicapped and his salary was charged to that account, and he was not certified as a teacher of the handicapped. (Exh. R-1, p.22). Archway stated that there was an error in its record and that Wall was properly certified as a substitute teacher (Exh. AE-520) and that he worked in that capacity in July and August 1994. (5T 81). Archway submitted an application for emergency certification for Wall in July 1994 on an expedited basis (Exh. AE-521) but Wall ended his employment with Archway in August 1994. (5T 80). For the same reasons as set forth for Hummell, DOE argued that its disallowance is proper.

Lawrence Ziemba

The parties agree that Ziemba worked from September 1994 through March 1995 as a Teacher of the Handicapped. (Exh. R-1, p.22; 5T 79–83). DOE disallowed $4,616 paid to Ziemba in September and October 1994, because he did not receive an emergency certification as teacher of the handicapped until November 1994. (Exh. R-1, p.22).

Archway stated that as of August 1994, one month before he started working for Archway, Ziemba was fully certified as an elementary school teacher. (Exh. AE-524; 5T 84). Archway submitted Ziemba's application for emergency certification as a teacher of the handicapped on an expedited basis in July 1994, noting on the application an anticipated start date of September 1, 1994. (Exhs. AE-522, AE-523; 5T 83–84). DOE did not issue Ziemba's emergency certification until November 1994. (Exh. AE-524). Archway stated that Ziemba was ultimately recertified as teacher of the handicapped in March 1995. (Exh. AE-524).

It is DOE's position is that Ziemba did not have the proper certification for the period in issue and, therefore, its disallowance is correct.

School Year 1995-96 – Schedule A

The following chart reflects the status of the disallowed salary payments reflected in Schedule A:

DOE Initial Disallowance	$683,917
Undisputed by Archway	$295,601
Amount Remaining in Dispute	$388,494

The $388,494 in dispute consists of the salaries paid to the following 23 individuals, and 3 ledger entries.

Employee	Salary
"Correct Salary & Fringe"	$ 54,500
"Salary Coding Correction"	$ 18,112
"Salary Coding Correction"	$ 14,538
Bates, Scott	$ 7,269
Bates, Scott	$ 34,731
Belum, Frank	$ 10,485
Bennett, Christopher	$ 2,579
Betner, James	$ 2,493
Bradbury, Lisa	$ 5,400
Dieterle, Kimberly	$ 19,462
Faltz, Francine	$ 2,400
Gormley, Paula	$ 18,425
Halkes, M. Kristine	$ 25,898
Hollywood, Joseph	$ 30,000
Hummell, David	$ 2,400
Kleva, Melody	$ 30,000
Long (Williams), Carolyn	$ 5,887
Mahon, Michael	$ 16,731
Nicolino, Anthony	$ 2,280

Olaya, Francisco	$ 40,423
Pizarro, Michael A.	$ 5,212
Reed (Walker), Nancy	$ 2,400
Robbins, Helene	$ 3,846
Scaravaglione, Tonette	$ 8,173
Steranko, Catherine	$ 2,400
Thoms, Theresa	$ 2,308
Tomasello, Kerri	$ 19,961

As to the three ledger entries, the DOE noted that Archway did not present any arguments as to the disallowance of the items identified as "Correct Salary & Fringe" and "Salary Coding Correction," in its closing brief.

During its audit, DOE noted that Archway made the three entries in its ledgers which would have increased the amounts chargeable to the sending districts (Exh. R-2, Sch. A). DOE disallowed the expenses reported under these entries because there was no supporting documentation provided by Archway. DOE argued that Archway has failed to establish any basis that would justify a finding that it was arbitrary, unreasonable or capricious for the DOE to disallow these three unsupported expenses.

Nine Teachers

As to the following nine teachers, Archway argued that they worked during July and August, and that their salary payments should not be disallowed since it was stipulated by the DOE that they could not have received emergency certifications for that period. These teachers got emergency certifications in September.

Teacher	Amount
Christopher Bennett	$2,579 – (Exhs. AE-610-612)
James Betner	$2,493 – (Exhs. AE-614-616)
Francine Faltz	$2,400 – (Exhs. AE-617-618)

David Hummell	$2,400 – (Exhs. AE-617-618)
Anthony Nicolino	$2,280 – (Exhs. AE-630-631)
Nancy Reed (Walker)	$2,400 – (Exhs. AE-621-623)
Helene Robbins	$3,846 – (Exh. AE-608)
Catherine Steranko	$2,400 – (Exh. AE 626)
Theresa Thoms	$2,308 – (Exhs. AE-628-629)

DOE argued that its stipulation was that a teacher could not get an emergency certification for July. (7T 100). DOE disagreed as to the impact of the stipulation as to the above listed teachers for the following reasons:

(1). Christopher Bennett

Bennett's disallowed salary payments in the amount of $2,579 represents payment for service rendered between July 1995 and September 1995. (Exh. R-2, Sch. A). DOE argued that the only portion of his salary affected by the stipulation is the month of July, and that DOE's disallowance of the salary paid to Bennett from August to September should be affirmed.

(2). James Betner

Betner's disallowed salary payment in the amount of $2,493 represents payment for service rendered between July 1995 and September 1995. (Exh. R-2, Sch. A). DOE argued that the only portion of his salary affected by the stipulation is the month of July, and that DOE's disallowance of the salary paid to Betner from August to September should be affirmed.

(3). Francine Faltz

Faltz's disallowed salary payments in the amount of $2,400 represents payment for service rendered between July 1995 and September 1995. (Exh. R-2, Sch. A). DOE argued that the only portion of her salary affected by the stipulation is limited to

the month of July, and that DOE's disallowance of the salary paid to Faltz from August to September should be affirmed.

(4). David Hummell

Hummell's disallowed salary payments in the amount of $2,400 represents payment for service rendered between July 1995 and September 1995. (Exh. R-2, Sch. A). DOE argued that the only portion of his salary affected by the stipulation is limited to the month of July, and that DOE's disallowance of the salary paid to Hummell from August to September should be affirmed.

(5). Anthony Nicolino

Nicolino's disallowed salary payment in the amount of $2,280[2] represents payment for service rendered between July 1995 and September 1995. (Exh. R-2, Sch. A). DOE argued that the only portion of his salary affected by the stipulation is limited to the month of July, and that DOE's disallowance of the salary paid to Nicolino from August to September should be affirmed.

(6). Nancy Reed (Walker)

Reed's disallowed salary payment in the amount of $2,400 represents payment for service rendered between July 1995 and September 1995. (Exh. R-2, Sch. A). DOE argued that the only portion of her salary affected by the stipulation is limited to the month of July, and that DOE's disallowance of the salary paid to Reed-Walker from August to September should be affirmed.

(7). Helene Robbins

Robbins' disallowed salary payment in the amount of $3,846 represents payment for service rendered between July 1995 and September 1995. (Exh. R-2, Sch. A).

[2] In its closing brief, Archway lists the sum of $5,212 as the amount disallowed for Nicolino. DOE presumes that this is an error, since the audit report indicates that the total disallowance associated with this individual is $2,280, not $5,212. (R-2, Sch. A).

DOE argued that the only portion of her salary affected by the stipulation is limited to the month of July, and that DOE's disallowance of the salary paid to Robbins from August to September should be affirmed.

(8). Catherine Steranko

Steranko's disallowed salary payment in the amount of $2,400 represents payment for service rendered between July 1995 and September 1995. (Exh. R-2, Sch. A). DOE argued that the only portion of her salary affected by the stipulation is limited to the month of July, and that DOE's disallowance of the salary paid to Steranko from August to September should be affirmed.

(9). Theresa Thoms

Thom's disallowed salary payment in the amount of $2,308 represents payment for service rendered between July 1995 and September 1995. (Exh. R-2, Sch. A). DOE argued that the only portion of her salary affected by the stipulation is limited to the month of July, and that DOE's disallowance of the salary paid to Thoms from August to September should be affirmed.

Scott Bates

DOE disallowed the $7,269 paid to Bates from July 1995 through August 1995 based on its determination that he worked as a principal without proper certification. (Exh. R-2, Sch. A).

It is Archway's position that Bates was hired as a teacher of the handicapped and in addition, was given five hours of administration duties weekly. (Exh. AE-647). His administrative duties were assigned and supervised by the principal of the Washington School where he worked, were required to be performed without conflicting with his teaching responsibilities, and were to be performed during after-school hours. (Exh. AE-647; 5T 140). Bates had the appropriate certification for his teaching position.

(5T 140). Archway admitted that Bates had been misclassified on its books. DOE argued that Archway has not shown that Bates did not function as a principal.

Scott Bates

DOE disallowed the $34,731 paid to Bates from September 1995 through June 1996 based on its determination that he worked as a teacher of the handicapped without proper certification. (Exh. R-2, Sch. A).

Archway stated that Bates received an elementary school certification in September 1992 and emergency certification as teacher of the handicapped at the end of the 1992-93 school year and, again, in the 1993-94 and 1994-95 school years. (Exh. AE-643; 5T 137–138). The 1994-95 emergency certification expired in July 1995, when Archway applied for renewal. (Exh. AE-644; 5T 139). In July 1995, Bates received a standard certification as an elementary school teacher (Exh. AE-645) and in August 1996, he received standard certification as teacher of the handicapped. (Exh. AE-646).

DOE argued that Bates worked from September 1995 to June 1996 as a special education teacher without the appropriate certification and that the disallowance of his salary was appropriate.

Frank Belum

DOE disallowed the $10,485 paid to Belum from September 1995 through March 1996 based on a determination that Belum worked as a teacher of the handicapped without proper certification. (Exh. R-2, Sch. A).

Archway stated that Belum did not work as a teacher of the handicapped. Belum was a one-to-one assistant, a position on the same salary scale as a teaching assistant, but with slightly different duties. (Exh. AE-638; 5T 133). Archway argued that the position of a one-to-one assistant does not require certification. (5T 133). Archway

added that Belum's position was mistakenly listed as a teacher of the handicapped. (5T 133).

DOE argued that Archway did not show that Belum was employed as an assistant and, even if he were an assistant, Archway failed to show that it complied with the prior approval and annual reporting requirement applicable to assistants contained in N.J.A.C. 6:11-4.6.

Lisa Bradbury

Both parties agree that Bradbury worked as a teacher of the handicapped from July 1995 through June 1996. (Exh. AE-606; 5T 112). DOE disallowed the $5,400 paid to her in August/September 1995 because her emergency certification expired in July 1995, and was not renewed until October 1995. (Exh. R-2, Sch. A; 5T 112).

Archway argued that based on DOE's stipulation regarding emergency certification applications, the August 1995 portion of Bradbury's salary is allowable. Archway argued that the September portion should also be allowable service. Archway submitted the appropriate paperwork to the County Superintendent's Office to review her emergency certification in July 1995. (Exh. AE-606; 5T 113). The County Superintendent signed off on the renewal on August 18, 1995, and DOE did not issue the renewal until October 1995.

DOE argued that its stipulation only covers July and does not cover August as argued by Archway. DOE argued that the salary payments for August and September were properly disallowed since she was not certified for that period and Archway has not shown that the delay in certification was the fault of DOE.

Kimberly Dieterle

DOE disallowed the $19,462 paid to Dieterle from July through December 1995 based on its position that she worked as a learning disability teacher/consultant without proper certification. (Exh. R-2, Sch. A).

It is Archway's position that Dieterle worked as a principal, a position for which she had a provisional certification from January through July 1995. (Exh. AE-634). Archway applied for renewal of Dieterle's provisional certification in September 1995. (Exh. AE-635; 5T 131). The County Superintendent signed off on the renewal on September 13, 1995. (Exh. AE-635). Due to budget shortfalls, Archway eliminated Dieterle's position effective September 1, 1995, and provided her with several months' severance pay. (Exh. AE-636). It is Archway's position that the $19,462 paid to Dieterle was not salary but severance pay. (Exh. AE-636; 5T 131–132).

Paula Gormley

DOE disallowed the $18,425 salary paid to Gormley during the 1995-96 school year based on its determination that she worked as a physical education teacher without proper certification. (Exhibit R-2, Schedule A).

It is Archway's position that Gormley was a certified water safety instructor who worked as a teacher assistant, and provided swimming instruction. Archway argued that her position did not require DOE certification. (Exh. AE-637; 5T 132).

DOE argued that Gormley was hired as a swimming instructor as indicated in her letter of employment, and a certificate is required for such a position. (Exh. AE-708; 7T 73–74). Also, DOE argued, even if she was employed as an assistant, Archway did not show prior approval or compliance with the reporting requirement in N.J.A.C. 6:11-4.6.

M. Kristine Halkes

DOE disallowed the $25,898 paid to Halkes during the 1995-96 school year based on its determination that Halkes worked as a physical therapist without proper certification. (Exh. R-2, Sch. A).

It is Archway's position that Halkes actually worked as a physical therapist assistant (5T 130) and that, during the time in issue, Halkes was licensed by the State Board of Physical Therapy as a physical therapist assistant. (Exhs. AE-632, AE-633; 5T 129–130).

DOE argued that Archway's proof is inadequate to show Halkes was an assistant and, even if she was an assistant, Archway did not show prior approval or compliance with the reporting requirement in N.J.A.C. 6:11-4.6.

Joseph Hollywood

Both parties agree that Archway's records show that Hollywood worked as a teacher of the handicapped and DOE disallowed the $30,000 paid to him from July 1995 through June 1996 because he was not certified as a teacher of the handicapped.
(Exh. R-2, Sch. A)

It is Archway's position that Hollywood actually served as a physical education teacher in Archway's Washington School (Exh. AE-601a; 5T 106–107) and that he was properly certified for that position, having had his standard certification as a health/physical education teacher since 1992. (Exh. AE-601; 5T 106). Archway argued that he was not required to have certification as a teacher of the handicapped for that position (5T 107), and that he was mistakenly classified as a teacher of the handicapped in Archway's records.

Melody Kleva

DOE disallowed the $30,000 salary paid to Kleva during the 1995-96 school year based on a determination that she worked as a teacher of the handicapped without proper certification. (Exh. R-2, Schedule A).

It is Archway's position that Kleva was employed as an "associate teacher," a position which does not require formal certification. (Exh. AE-631d). Kleva held certificates of eligibility with advanced standing as both an elementary school teacher and a music teacher. (Exh. AE-631e; 5T 128–129).

DOE argued that Archway's proof is inadequate as to Kleva's position. In the alternative, DOE argued non-compliance with N.J.A.C. 6:11-4.6.

Carolyn Long (Williams)

Both parties agree that Long worked as a teacher of the handicapped from July 1995 through June 1996. (Exh. R-2, Sch. A). DOE disallowed the $5,887 paid in August and September 1995 because her emergency certification expired in July 1995 and was not renewed until October 1995. (Exh. R-2, Sch. A; 5T 110).

Archway stated that Long had an emergency certification for the previous school year (1994-95) that was valid from September 1994 through July 1995. (Exh. AE-604; 5T 111). Based on DOE's stipulation, Archway argued that her salary for August is allowable and that the September portion should also be allowable since the County Superintendent's Office did not process the paperwork and submit it to Trenton until August 18, 1995 (Exh. AE-604; 5T 111), and DOE did not issue a permanent certificate until October 1995. (Exh. AE-604; 5T 112).

DOE argued that its stipulation only covers July and does not cover August as argued by Archway. DOE argued that the salary payments for August and September

were properly disallowed since she was not certified for that period and Archway has not shown that the delay in certification was the fault of DOE.

Michael Mahon

DOE disallowed the $16,731 paid to Mahon from October 1995 through May 1996 based on its position that he worked as a teacher of the handicapped without proper certification. (Exh. R-2, Sch. A).

It is Archway's position that Mahon worked as a teacher of health and physical education, for which he held a certificate of eligibility with advanced standing, effective October 1995 (Exh. AE-642; 5T 136–137), and that, as a health/physical education teacher, he did not require certification as a teacher of the handicapped (Exh. 5T 137).

DOE argued that, even if Mahon was a physical education teacher, he was not properly certified since a certificate of eligibility with advanced standing is not sufficient (7T 84) and that he needed a provisional certificate. (N.J.A.C. 6:11-4.4(a)).

Francisco Olaya

It is DOE's position that Olaya worked from July 1995 through June 1996 as a school social worker without proper certification for that position. (Exh. R-2, Sch. A). DOE disallowed the $40,423 paid to Olaya during the 1995-96 school year. (Exh. R-2, Sch. A).

It is Archway's position that Olaya worked as a school counselor, which does not require certification as a school social worker. (Exhs. AE-631a, AE-631b; 5T 126). Olaya was qualified to serve as a counselor by virtue of a series of certifications he held, including (i) permanent certification as a teacher of psychology (effective June 1992) and general business studies (effective September 1994), and (ii) emergency certification in student personnel services (effective September 1994). (Exhs. AE-631a, AE-631b; 5T 126–127).

It is DOE's position that he was not properly certified since his emergency certification in student personnel services expired in July 1995. (AE-631).

Michael Pizarro

DOE disallowed the $5,212 paid to Pizarro from January 1996 through June 1996 based on its position that he worked as a teacher of the handicapped without proper certification. (Exh. R-2, Sch. A). It is Archway's position that Pizarro worked as a one-to-one teacher's aide, a position that does not require certification. (AE-641; 5T 136).

DOE argued that Archway did not show that Pizarro was employed as an aide and that, even if he was an aide, Archway failed to comply with N.J.A.C. 6:11-4.6.

Tonette Scaravaglione

DOE disallowed the $8,173 paid to Scaravaglione from March 1996 through June 1996 based on its determination that she worked as a teacher of the handicapped without proper certification. (Exh. R-2, Sch. A).

It is Archway's position that Scaravaglione worked as an "associate teacher of the handicapped," which is the same as a teaching assistant (Exh. AE-640a; 5T 135) and that her position did not require a certificate. (5T 135). Archway stated that it confirmed her position in a June 1996 letter to DOE, which stated that Scaravaglione had, by that time, completed five years of supervised teaching, another way of referring to a teaching assistant. (Exh. AE-640; 5T 134–135).

DOE noted that in Archway's petition, it claimed that Scaravaglione was a substitute teacher (A-2). DOE questioned whether Scaravaglione was qualified to be an teaching assistant (7T 43) and argued that Archway had not shown it complied with N.J.A.C. 6:11-4.6.

Kerri Tomasello

It is DOE's position that Tomasello worked as an occupational therapist from November 1996 through June 1996 without proper certification for that position, and it disallowed the $19,961 paid to her during that time. (Exh. R-2, Sch. A).

It is Archway's position that Tomasello worked as an occupational therapist assistant, a position for which there is no required certification. (5T 108). Archway argued that she is qualified for that position since Tomasello received a certification as an occupational therapy assistant in August 1993 (before the 1995-96 school year) and it was renewed in 1998 and 2003. (Exhs. AE-602, AE-603; 5T 108–109).

DOE argued that Archway's proof is inadequate to show that Tomasello was an assistant and, even if she was an assistant, Archway did not show compliance with N.J.A.C. 6:11-4.6.

School Year 1996-97 - Schedule A

The following chart reflects the status of the disallowed salary payments as reflected in Schedule A for the school year.

DOE Initial Disallowance	$456,751
Undisputed by Archway	$245,337
Amount Remaining in Dispute	$211,416

The $211,416 in dispute consists of the salaries paid to the following 12 individuals.

Employee	Salary
Annett, Brian	$ 2,378
Black, Sharon	$ 26,215
Gormley, Paula	$ 16,794
Halkes, Kristine	$ 27,248
Hollywood, Joseph	$ 30,900
Hummell, David	$ 2,400
Lafferty (Whicker), Susan	$ 53,105

Scaravaglione, Tonette	$ 9,946
Tomasello, Kerri	$ 32,509
Townsend, Mary	$ 500
Vandergrift, Christine	$ 300
Waldron, Shirley	$ 9,121

David Hummell

DOE disallowed the $2,400 paid to Hummell between July 1996 and September 1996 based on its determination that he worked as a teacher of the handicapped during that period without proper certification. Archway argued that the salary payments for July and August should be approved pursuant to DOE's stipulation and that Hummell got his emergency certificate in September. (Exhs. AE-711, AE-712). DOE repeated its argument that the stipulation is limited to the July salary payment.

Brian Annett

DOE disallowed the $2,378 paid to Annett from May 1997 through June 1997 based on its determination that he worked as a teacher of the handicapped without proper certification. (Exh. R-2, Sch. A).

Archway argued that Annett's salary was misclassified and that Annett worked as a substitute teacher. (Exh. AE-716; 5T 157). Also, the amount paid to Annett, $2,378, is consistent with the salary of a substitute, not a teacher of the handicapped. (5T 158). Archway argued that Annett did not require teacher of the handicapped certification to work as a substitute teacher. (5T 157).

DOE argued that Archway did not prove that Annett actually functioned as a substitute, that he was qualified to be a substitute or that it complied with the 20-day limit for a substitute. (7T 19, 25-28).

Paula Gormley

DOE disallowed the $16,794 paid to Gormley in the 1996-97 school year based on its determination that she worked as a physical education teacher without proper certification. (Exh. R-3, Sch. A)

It is Archway's position that Gormley's salary was misclassified and that Gormley worked as a swimming instructor, a position that does not require certification as a physical education teacher. (Exh. AE-708; 5T 151).

DOE stated that a certificate is required for a swimming instructor. (7T 73-74).

M. Kristine Halkes

DOE disallowed the $27,248 paid to Halkes in the 1996-97 school year based on its determination that (i) she did not have a school physical therapist certificate, and (ii) she was not supervised by a person with a school physical therapist certificate. (Exh. R-3, Sch. A).

It is Archway's position that Halkes was employed as a physical therapy assistant in the 1996-97 school year. (Exhs. AE-705; AE-707; 5T 150). Also, Archway stated that it employed a fully certified physical therapist in 1996-97. (Exh. AE-705; 5T 150).

DOE argued that Archway has not shown that she was employed as an assistant and, even if she were an assistant, Archway did not comply with N.J.A.C. 6:11-4.6.

Joseph Hollywood

DOE disallowed the $30,900 paid to Hollywood in the 1996-97 school year based on its determination that he worked as a teacher of the handicapped without proper certification. (Exh. R-3, Sch. A).

It is Archway's position that Hollywood was employed as a physical education teacher, not a teacher of the handicapped. (Exh. AE-706; 5T 148). Hollywood was permanently certified as a physical education teacher in June 1992 (Exh. AE-601). Archway admitted that he should have been listed as a physical education teacher on Archway's records. (5T 149).

Susan Lafferty

Lafferty worked as a principal from July 1996 through June 1997. (Exh. R-3, Sch. A, 5T 144). DOE disallowed the $53,105 paid to Lafferty during the 1996-97 school year based on its determination that she was not properly certified until July 1997. (Exh. R-3, Sch. A).

Archway stated that in a June 29, 1996, letter from the Camden County Superintendent's Office, DOE granted a waiver, effective June 21, 1996, to allow Lafferty to act as a principal in October 1996 (Exh. AE-702; 5T 145-146), and granted her a provisional certification as a principal in July 1997. (Exh. AE-702; 5T 146). It is Archway's position that DOE approved the appointment of Lafferty as principal for the 1996-97 school year. (Exh. AE-701; 5T 146).

DOE argued that Lafferty lacked a certificate as a principal until July 1997.

Tonette Scaravaglione

Scaravaglione worked as a teacher of the handicapped from July 1996 through June 1997. (Exhs. AE-709; R-3, Sch. A). DOE disallowed the $9,946 paid to her from July through October 1996, because her emergency certification was not issued until November 1996. (Exh. R-3, Sch. A).

Archway stated that Scaravaglione was hired in July 1996 as a teacher of the handicapped and, based on DOE's stipulation regarding emergency certifications, the July/August 1996 portion of her salary should be allowed. Archway argued that the

September/October portion should also be allowable. Archway stated that there are no documents showing when Archway applied for Scaravaglione's emergency certification, but that it consistently submitted timely applications for emergency certifications and there was routinely a two-to-three-month lag time for the application to be approved by DOE. Archway argued that it should be inferred that Archway did submit a timely application for Scaravaglione.

DOE argued that its stipulation only covers July. As to Scaravaglione, DOE argued that Archway has not shown it filed a timely request for emergency certification or that there was an unreasonable delay by DOE.

Kerri Tomasello

Tomasello worked as an occupational therapist assistant from July 1996 through June 1997. (Exhs. R-3, Sch. A, AE-704). DOE disallowed her $32,509 salary based on its determination that she was not supervised by someone with an occupational therapist certificate. (Exh. R-3, Sch. A).

Archway stated that she was an assistant and that its records show it had two fully certified occupational therapists on staff. (Exh. AE-705; 5T 148).

DOE argued that Archway had not shown that Tomasello actually worked as an assistant, and even assuming she was an assistant, Archway has not shown it received prior approval or complied with N.J.A.C. 6:11-4.6.

Mary Townsend

DOE disallowed the $500 paid to Townsend in July 1996 based on its determination that she worked as a teacher of the handicapped without proper certification. (Exh. R-3, Sch. A).

It is Archway's position that Townsend was misclassified and that she worked as a teacher's assistant, a position for which no certification is required. (Exh. AE-713; 5T 155).

DOE questioned Townsend's actual position and argued that, even if she were an assistant, Archway failed to comply with N.J.A.C. 6:11-4.6.

Christine Vandergrift

DOE disallowed the $300 paid to Vandergrift in July 1996 based on its determination that she worked as a teacher of the handicapped without proper certification.

It is Archway's position that Vandergrift was misclassified and that she worked as a teacher's assistant, a position for which no certification is required. (Exh. AE-714; 5T 155).

DOE questioned Vandergrift's actual position and argued that, even if she were an assistant, Archway failed to comply with N.J.A.C. 6:11-4.6.

Shirley Waldron

DOE disallowed the $9,121 paid to Waldron from July 1996 through March 1997 based on its determination that she worked as a teacher of the handicapped without proper certification. (Exh. R-2, Sch. A).

It is Archway's position that Waldron's position was misclassified and that she worked as a vocational assistant, a position similar to a teacher's assistant which does not require certification. (Exh. AE-715; 5T 156-157).

DOE questioned Waldron's actual position and argued that, even if she were an assistant, Archway failed to comply with N.J.A.C. 6:11-4.6.

School Year 1997-98 – Schedule A

The following chart reflects the status of the disallowed salary payments as reflected in Schedule A for the school year.

DOE Initial Disallowance	$622,624
Undisputed by Archway	$317,123
Amount Remaining in Dispute	$305,501

The $305,501 in dispute consists of the salaries paid to the following 24 individuals.

Employee	Salary
Annett, Brian	$ 3,962
Benbridge, Rose	$ 4,385
Black, Sharon	$ 8,000
Byrd, Sharon	$ 1,291
Cobb, Eunice J.	$ 2,695
Donley, William C.	$ 25,029
Franklin, Michele L.	$ 31,719
Gordy, Thomas	$ 21,923
Gormley, Paula	$ 18,798
Hollywood, Joseph	$ 31,216
Hughes, John W.	$ 981
Johnson, Kelley	$ 8,418
Newbill, Lakiba	$ 1,119
Parker, James	$ 8,311
Schoener, Scott D.	$ 15,555
Scott, Michael	$ 5,866
Small, Thomas L.	$ 2,308
Smith, Joseph	$ 23,193
Stein, Lori H.	$ 24,329
Stinson, Colleen E.	$ 31,702
Tomasello, Kerri L.	$ 19,055
Tuttle, Terrence M.	$ 5,538
Waldron, Shirley	$ 6,646
Whittman, Edward	$ 3,462

DOE argued that since the disallowances of the salaries paid to Sharon Byrd, John Hughes, Lori Stein and Colleen Stinson were disputed by Archway but were not

addressed during the hearing or in its closing briefs, that DOE's disallowance of these salaries should be affirmed.

DOE stated that it no longer seeks the disallowance of the salary of $2,695 paid to Eunice Cobb.

Brian Annett

DOE disallowed Annett's $3,962 salary based on its determination that he worked from July 1997 through October 1997 as a teacher of the handicapped without proper certification. (Exh. R-4, Sch. A).

It is Archway's position that Annett was improperly classified and that he worked as a substitute teacher. (Exh. AE-716; 5T 178-179).

DOE questioned Annett's actual position and argued that, even if he was an assistant, Archway failed to comply with N.J.A.C. 6:11-4.6.

Rose Benbridge

Benbridge worked as a teacher of the handicapped from September 1997 through June 1998. (Exh. R-4, Sch. A). DOE disallowed the $4,385 paid to her in September and October 1997 based on its determination that she was not properly certified as a teacher of the handicapped until November 1997. (Exh. R-4, Sch. A).

Archway stated that it applied for emergency certification for Benbridge in September 1997. (Exh. AE-807). She was issued a standard certification as teacher of the handicapped in November 1997. (Exh. AE-808).

DOE argued its position is correct since she did not have an appropriate certification in September and October 1997.

Sharon Black

Black worked as a speech therapist from July 1997 through June 1998. (Exh. R-4, Sch. A). DOE disallowed the $8,000 paid to her from July through September 1997 because she did not have her emergency certification until October 1997. (Exh. R-4, Sch. A).

Archway stated that it applied for Black's emergency certification in September 1997, and it was issued in October 1997. (Exhs. AE-801; AE-802; 5T 159.3-8). It is Archway's position that the salary payments in July and August were covered by DOE's stipulation and that it had applied for a emergency certification in September.

DOE argued that its stipulation only covers July and that Archway has not shown it filed a timely request or that there was an unreasonable delay by DOE.

William C. Donley

DOE disallowed Donley's $25,029 salary based on its determination that he worked from September 1997 through June 1998 as a physical education teacher without proper certification. (Exh. R-4, Sch. A).

Archway stated that Donley was hired as a physical education teacher effective September 1, 1997. (Exh. AE-821). At that time, he possessed a certificate of eligibility with advanced standing as a physical education teacher, which allowed him to be employed in that position. (Exh. AE-822; 5T 171).

It is DOE's position that the "certification of eligibility with advanced standing" is not sufficient (7T 84) and that he could not accept the position unless he also had a provisional certification. (N.J.A.C. 6:11-4.4(a); Exh. AE-500a).

Michelle Franklin (Castells)

DOE disallowed Franklin's $31,719 salary based on its determination that she worked from September 1997 through June 1998 as a teacher of the handicapped without proper certification. (Exh. R-4, Sch. A).

It is Archway's position that Franklin was improperly classified and that she worked as a school social worker. (Exh. AE-818a; 5T 168). She possessed both a standard DOE certificate as a school social worker (effective October 1996) and a state social worker license (effective September 1996 through August 1998). (Exh. AE-819; 5T 168-169).

DOE argued that Archway did not show that Franklin served as a social worker and not as a teacher.

Thomas Gordy

DOE disallowed Gordy's $21,923 salary based on its determination that he worked from July 1997 through January 1998 in an instructional position without proper certification. (Exh. R-2, Sch. A).

It is Archway's position that Gordy's job was improperly classified and that he worked as a behavior modification manager, a position for which no certification is required. (Exh. AE-825; 5T 173-174).

DOE stated that, even if Gordy worked as a behavior modification manager, such a position was not a recognized title during the 1997-98 school year (7T 91-93), and Archway presented no proof that it had obtained the necessary prior approval to use an unrecognized title.

Paula Gormley

DOE disallowed Gormley's $18,798 salary based on its determination that she worked from July 1997 through June 1998 as a physical education teacher without proper certification. (Exh. R-2, Sch. A).

It is Archway's position that Gormley's position was improperly classified and that she worked as a swimming instructor and was properly certified. (Exhs. AE-637, AE-708; 5T 174).

DOE noted that, for 1995-96 school year, Archway stated that Gormley provided swimming instructions as a teacher assistant. DOE argued that Archway had not shown what position Gormley held.

Joseph Hollywood

DOE disallowed Hollywood's $31,216 salary based on its determination that he worked from July 1997 through June 1998 as a teacher of the handicapped without proper certification. (Exh. R-4, Sch. A).

It is Archway's position that Hollywood, as in prior years, worked as a physical education teacher; not as a teacher of the handicapped. (Exh. AE-820; 5T 170). He was properly certified to work as a physical education teacher, having been permanently certified in that position since June 1992. (Exh. AE-601; 5T 170).

DOE again argued that Archway had not shown that Hollywood did not work as a teacher of the handicapped.

Kelly Johnson

DOE disallowed the $8,418 paid to Johnson based on its determination that she worked from September through December 1997 as a teacher of the handicapped without proper certification. (Exh. R-4, Sch. A).

Archway stated that Johnson's position was not properly classified and that she worked as a counselor/teaching assistant, a position for which she did not require certification. (Exh. AE-826; 5T 176).

DOE argued that Archway had not shown that Johnson worked as a counselor/assistant and that, if she was an assistant, Archway had not met the requirements in N.J.A.C. 6:11-4.6.

Lakiba Newbill

DOE disallowed Newbill's $1,119 salary based on its determination that she worked as a teacher of the handicapped from May through June 1998 without proper certification. (Exh. R-4, Sch. A).

It is Archway's position that Newbill's position was improperly classified and that she worked as a one-to-one aide, a position for which no certification is required. (Exhs. AE-832, AE-833; 5T 180).

DOE presented the same argument as for Johnson.

James Parker

DOE disallowed the $8,311 paid to Parker based on its determination that he worked from February 1998 through June 1998 as a teacher of the handicapped without proper certification. (Exh. R-4, Sch. A).

It is Archway's position that Parker's position was improperly classified and that he worked as a teaching assistant, a position for which no certification is required. (Exhs. AE-827, AE-828; 5T 176-177).

DOE presented the same argument as for Johnson.

Scott D. Schoener

DOE disallowed Schoener's $15,554.55 salary based on its determination that he worked from October 1997 through June 1998 in an instructional position without proper certification. (Exh. R-2, Sch A).

It is Archway's position that Schoener's position was improperly classified and that he worked as a teaching assistant, a position that does not require certification. (5T 175).

DOE presented the same argument as for Johnson.

Michael A. Scott

DOE disallowed Scott's $5,866 salary based on its determination that he worked from October 1997 through February 1998 in an instructional position without proper certification. (Exh. R-4, Sch. A).

It is Archway's position that Scott's position was improperly classified and that he worked as a counselor/crisis assistant, a position equivalent to a teaching assistant, for which no certification is required. (Exh. AE-831; 5T 178).

DOE presented the same argument as for Johnson.

Thomas Small

Small worked from September 1997 through June 1998 as a teacher of the handicapped. (Exhs. AE-816; R-4, Sch. A). DOE disallowed the $2,308 paid to him in September 1997 based on its determination that he was not properly certified until October 1997. (Exh. R-4, Sch. A).

Archway stated that it rehired Small as a teacher of the handicapped in August 1997, with a start date of September 5, 1997. (Exh. AE-817; 5T 167). DOE renewed his emergency certification in October 1997. (Exh. AE-818; 5T 167-168). The disallowed period covers the time Small's emergency certification was being processed by DOE and Archway argued it should not be disallowed.

DOE argued that filing for an emergency certification is not sufficient to initiate employment and that a person cannot start working unless he or she has the appropriate certification.

Joseph Smith

DOE disallowed Smith's $23,193 salary based on its determination that he worked from July 1997 through June 1998 in an instructional position without proper certification. (Exh. R-4, Sch. A).

It is Archway's position that Smith's job was misclassified and that he served as director of information services, a non-teaching position which involved technical support. (Exh. AE-823; 5T 172-173). He did not require DOE certification for that position. (Exh. 5T 173).

DOE stated that Archway's document (Exh. AE-823) suggests that Smith was given non-teaching duties but argued that Archway had not shown that he did not act in an instructional capacity during the school year.

Kerri L. Tomasello

DOE disallowed Kerri Tomasello's $19,055 salary based on its determination that she worked from July 1997 through June 1998 in an instructional position without proper certification. (Exh. R-4, Sch. A).

It is Archway's position that Tomasello actually worked as an occupational therapy assistant under the supervision of a fully-licensed, and fully-certified occupational therapist on staff at Archway. (Exhs. AE-602, AE-603, AE-704, AE-705; 5T 180). Tomasello did not require a certification for her position. (5T 180-187).

Terrence M. Tuttle

Tuttle worked as a teacher of the handicapped from September 1997 through June 1998. (Exh. R-4, Sch. A). DOE disallowed the $5,538 paid to him from September through November 1997 because he did not receive his emergency certification until December 1997. (Exh. R-4, Sch. A).

Archway stated that it applied for an emergency teacher of the handicapped certification for Tuttle in November 1997 and that certification was issued effective December 1997. (Exhs. AE-804, AE-805; 5T 159-160). Archway stated that from September through November 1997, Tuttle worked as a substitute and a volunteer in the PSH program. (Exh. AE-804; 5T 160). Tuttle did not require a teacher of the handicapped certification to serve as a substitute. (5T 162). Archway requested the emergency certification for Tuttle because of his familiarity with the program and students, and because no other qualified candidates were available. (Exh. AE-807). Tuttle received his standard certification as a teacher of the handicapped in March 1998. (Exh. AE-806).

DOE argued that Archway had not shown that Tuttle was a substitute from September 1997 through November 1997, and, even if he were a substitute, Archway had not shown it complied with the regulation governing substitute teachers. (7T 19).

Shirley Waldron

DOE disallowed the $6,646 paid to Waldron based on its determination that she worked from July 1997 through December 1997 as a teacher of the handicapped without proper certification.

It is Archway's position that Waldron's position was incorrectly classified and that she worked as a vocational assistant, which is a teacher's assistant in the vocational area, a position that does not require certification. (Exhs. AE-829, AE-830; 5T 177).

DOE presented the same argument as for Johnson.

Edward Whittman

Edward Whittman worked as a speech therapist from September 1997 through June 1998. (Exhs. AE-809; R-4, Sch. A). DOE disallowed the $3,462 paid to him in September and October 1997 based on its determination that he was not properly certified as a speech therapist until November 1997. (Exh. R-4, Sch. A).

Archway stated that it applied for emergency certification for Whittman in September 1997. (Exh. AE-809; 5T 163). Archway submitted the application on an expedited basis. (Exh. AE-810; 5T 164). The certification was not issued until November 1997. (Exh. AE-812). Archway stated that the disallowed amount corresponds to the period during which Whittman's application for certification was being processed by DOE, and argued it should not be disallowed.

DOE argued that filing for an emergency certification is not sufficient to initiate employment and that a person cannot start working unless he or she has the appropriate certification.

School Year 1998-99-Schedule A

The following chart reflects the status of the disallowed salary payments as reflected in Schedule A for the school year.

DOE Initial Disallowance	$348,898
Undisputed Archway	$156,040
Amount Remaining in Dispute	$192,859

The $192,859 in dispute consists of the salaries paid to the following 18 individuals.

Employee	Salary
Black, Sharon	$ 3,000
Cobb, Eunice	$ 2,695
Delmar, Laurel	$ 17,787
DePaul, Thomas	$ 18,584
DePaul, Thomas	$ 9,292
DiCriscio, Jennifer	$ 1,213
Donley, William	$ 20,275
Gonnella, Renee	$ 2,308
Gormley, Paula	$ 21,860
Gupta (Foster), Michelle	$ 36,347
Landgraf, Keith	$ 16,800
Laniti Michelle	$ 16,867
Leonardi, Alan	$ 1,154
Trefz, Greg	$ 17,769
Turkot, Theresa	$ 600
Williams, Monica	$ 2,308
Wilson, Frederick	$ 1,923
Whittman, Edward	$ 2,077

DOE argued that since the disallowances of the salaries paid to Laurel Delmar, Jennifer, DiCriscio, William Donley, Keith Landgraf, Michelle Laniti, Greg Trefz and Theresa Turkot were disputed by Archway, but were not addressed during the hearing or in its closing brief, that DOE's disallowance of these salaries should be affirmed.

Six Teachers

As to the following six teachers, Archway argued that they worked during July and August, and that their salary payments should not be disallowed since it was stipulated by the DOE that they could not have received emergency certifications for that period. These teachers got emergency certifications in September.

Teacher	Amount
Sharon Black	$3,000 (Exhs. AE-903, AE-904)
Eunice Cobb	$2,695 (Exhs. AE-905, AE-906)
Renee Gonnella	$2,308 (Exh. AE-909)

Monica Williams	$2,308 (Exh. AE-907)
Frederick Wilson	$1,923 (Exhs. AE-913, AE-914)
Edward Whittman	$2,077 (Exhs. AE911, AE-912)

As to these six teachers, DOE argued that it stipulated an individual would not have been able to obtain an emergency certificate between July 1st and July 31st (7T 100) and that the stipulation only affects the disallowed salaries for July. DOE argued that its determination that the salary payments in August be disallowed should be affirmed.

Thomas DePaul

There are two separate entries in the 1998-99 audit for DePaul. It is not disputed that DePaul was a vocational education teacher. DOE disallowed $18,584 of his 1998-99 salary based on its determination that his salary was charged to schools that did not have auto mechanics programs. (Exh. R-2, Sch. A). In addition, DOE disallowed an additional $9,292 of his 1998-99 salary based on its determination that he also worked as a program developer, an unrecognized job title that was not approved by the county superintendent. (Exh. R-2, Sch. A)

It is Archway's position that during the 1998-99 school year, it had a vocational education program in the Upper School for special education students, and that DePaul worked as a vocational teacher in that program. (5T 183-184). Archway argued that he had the correct certification for that position since he had a standard certificate as a teacher coordinator of cooperative industrial education (issued November 1994) and a standard certificate as a teacher of skilled trades (issued June 1999). (Exhs. AE-901, AE-902). As part of his responsibilities as a vocational teacher, DePaul coordinated a job program, an activity for which he was properly certified based on his standard certificate as a teacher coordinator of cooperative industrial education. (Exh. AE-901; 5T 184).

DOE argued that Archway has not presented convincing proof as to DePaul's actual position and has not denied he served as a program developer which is an unrecognized title.

Paula Gormley

DOE disallowed Gormley's $21,860 salary based on its determination that she worked as a physical education teacher without proper certification. (Exh. R-5, Sch. A).

Archway repeated the same argument presented for the 1995-96, 1996-97 and 1997-98 school years and argued that Gormley was not a physical education teacher, but a teacher's assistant who provided swimming instruction and that her position did not require a physical education certificate. (5T 190-191).

DOE also repeats its prior arguments as to the disallowances of Gormley's salary.

Michelle Gupta (Foster)

DOE disallowed Gupta's $36,347 salary based its determination that she worked from July 1998 through June 1999 as a school social worker without proper certification. (Exh. R-5, Sch. A).

It is Archway's position that Gupta worked as a school psychologist, a position for which she was properly certified. (Exh. AE-915). Archway applied for emergency certification for Gupta as a school psychologist in January 1998, seven months prior to her July 1998 start date. (Exhs. AE-916, AE-917; 5T 189). DOE issued the emergency certification in November 1998. (Exh. AE-917).

DOE does not dispute that Gupta worked as a school psychologist but argued that part of her salary should be disallowed since she did not receive her emergency certificate until November 1998.

Alan Leonardi

Leonardi worked from March 1999 through June 1999 as a teacher of the handicapped. (Exh. R-5, Sch. A). DOE disallowed the $1,154 paid to him in March 1999 because he did not renew his emergency certification until April 1999. (Exh. R-5, Sch. A).

Archway stated that it submitted an application for Leonardi's emergency certification on February 19, 1999, to fill the vacancy of a teacher who had unexpectedly resigned. (Exh. AE-918; 5T 192). At the time, Leonardi held a certificate of eligibility with advanced standing as a teacher of English and was filling the vacancy on a substitute basis. (Exh. AE-918; 5T 192). Archway informed DOE of the unexpected resignation in a letter accompanying the application. (Exh. AE-911). DOE responded in a letter dated March 25, 1999, authorizing Archway to offer Leonardi a contract as a teacher of the handicapped, effective March 24, 1999. (Exh. AE-920; 5T 192-194). The official emergency certificate issued by DOE to Leonardi states that it is effective April 1999, the same month that Archway executed a personnel transaction form officially changing Leonardi's position from substitute to teacher of the handicapped. (Exh. AE-919). During March 1999, the month in which DOE disallowed Leonardo's salary, he served as a substitute and was properly certified since he had a certificate of advanced standing. (Exh. AE-918; 5T 193).

DOE argued that the evidence does not support Archway's position that Leonardi functioned as a substitute teacher in March 1999, and that Archway allowed him to fill the vacancy without proper certification. In the alternative, DOE argued that Archway violated its 20-day limit for substitute teachers.

Conclusions as to Schedule A

In the 5 Audits

As stated, the disallowed salaries can be divided into two categories. The first deals with DOE's disallowances of the salary payments due to the lack of certification

for the period of time. In general, it is Archway's position that it had to hire staff in order to meet the needs of the special education students it agreed to educate, and that, due to a shortage of special education personnel, it had to hire staff who qualified for emergency certificates. The DOE's regulation at the time, N.J.A.C. 6:11-4.3(b), provided that applications for emergency certificates could not be filed before August 1 for the next school year. DOE, at the hearing, recognized that Archway had to sometimes hire staff for the ESY programs, which took place in July and part of August. These programs were required by the IEPs for some of its special education students. DOE stipulated that the regulation precluded individuals from obtaining an emergency certification for July. (7T 100). At the hearing and in its brief, DOE stated it would not seek salary disallowances in the five audits for personnel without emergency certification who worked for Archway during July.

Archway took the position that this was too limited a period and that the stipulation should cover the salary payments in both July and August. Archway noted that DOE's own witness, Smith, admitted it took at least a month or longer to process an application for emergency certification. (7T 143-147). Also, Cuprzinski admitted that the salary payments for July – August should not be disallowed. (9T 63–64).

Within this first category, there are personnel who worked for longer or other periods of time while their applications for emergency certification or full certification were under review by DOE. Archway argued that the salary payments during these periods of time should also be allowed.

Archway argued that DOE should not insist on adherence with its regulations and then make compliance almost impossible. Archway stated that it had to hire staff to fill vacancies in July or during the school year if there was an unexpected vacancy in order to comply with its contracts with the public school districts and to meet the requirements of the IEPs of the special education students. (5T 39). Archway stated it hired and applied for emergency certification for personnel it was confident would eventually get the certification and all of the staff listed in Schedule A of the five audits ultimately got their certification. (5T 37–39).

DOE argued that Archway was required to comply with the regulation that required all staff at DOE's approved PSHs to be properly certified. DOE argued that there should be strict compliance with this regulation. Also, DOE argued that the clear language in N.J.A.C. 6:20-4.4(a)(4) prohibits a PSH from including as a salary expense in its tuition calculation any salary paid to an individual who was not properly certified.

Having reviewed the arguments of the parties, I **CONCLUDE** that DOE should not have disallowed the salary payments paid to personnel who worked for a while without an emergency certification or full certification. As to these salary payments, I **CONCLUDE** that the equitable doctrine of substantial compliance applies. The court in Bernstein v. Bd. of Trustees, 151 N.J. Super. 71, 76-7 (App. Div. 1977), held that the following factors should be considered in deciding whether to apply the doctrine of substantial compliance: (1) lack of prejudice to the defending party; (2) a series of steps taken to comply with the statute involved; (3) a general compliance with the purpose of the statute; (4) a reasonable notice of the petitioner's claim; and (5) a reasonable explanation why there was no strict compliance with the statute. In this matter, Archway filed for the certificates, and, in each case the staff person had the necessary qualifications and eventually received the certificate.

It was not disputed that there was a lack of fully-certified special education personnel in New Jersey during the period in issue. DOE had to review the applications for emergency certification and although there is no basis for a finding that there was an unreasonable delay, the facts clearly show it took some time for DOE to complete its review. Also, there was no prejudice to the public school districts that sent their special education students to Archway since the students received the education required by their IEPs.

In a similar case involving a different PSH, In Search Day Program, Inc. v. NJDOE, EDU 8569-04 (Initial Decision March 9, 2006) (http://lawlibrary.rutgers.edu/oal/hlml/initial/edu08569-041.html), Administrative Law Judge Joseph F. Martone held that DOE has the clear responsibility to act promptly on applications for emergency certification, and that DOE has allowed teachers for many

years to start working in September without an emergency certification provided that an application had been filed. Martone concluded that DOE was equitably estopped from designating the salaries and benefits of the teachers in the Search Day Program case as non-allowable costs for the calculation of tuition payments. Martone held that there was no detriment to the public interest since the teachers performed their job responsibilities and there was no showing that they were ineligible for their positions.

It is interesting to note that in the Search Day Program case, Martone states Smith testified that, because of the volume of applications, most emergency certificates are issued by November. She acknowledged that the regulation requires a teacher to have the emergency certificate before starting to work but stated that it would be impossible to follow the regulation literally.

The Commissioner adopted Martone's conclusions on June 2, 2006.

As to the second category, these employees were listed on Archway's records in positions requiring certification and did not have the necessary certifications. Archway produced some written records to support its position that these employees were improperly classified and actually worked in positions not requiring certification or had the right certification for the position they actually held. I recognize that due to the lapse of time it was difficult for Archway to produce testimony as to the actual responsibilities of these employees and that it would have been better if Cuprzinski, who conducted the DOE audits, had discussed the employees' actual positions with Archway when he saw the problems. The fact that he did not do so does not warrant a finding in favor of Archway.

DOE argued that there was no proof presented to show what duties these employees actually had at Archway. Also, DOE argued that if they were actually substitute teachers or in aide/assistant positions, Archway did not show that it complied with specific regulations as to these positions.

In its reply brief, Archway argued that Douglas Otto's testimony as to the misclassifications and the actual jobs performed by the staff is more persuasive than that of Cuprzinski. Although Otto was not hired until June 1998, as Executive Director Educational Services, Archway stated that Otto, as part of his job, had to familiarize himself with Archway's programs and staff and, therefore, has a more personal knowledge of the actual responsibilities of Archway's staff. Archway stated that, by his own admission, Cuprzinski only looked at the records. (9T 65–69).

As to DOE's argument regarding compliance with N.J.A.C. 6:11-4.6, Archway stated that the regulation only requires prior approval of a type of position and not a specific person filling the position. Archway stated that during her testimony, Smith admitted that N.J.A.C. 6:11-4.6 only dealt with positions. (7T 124).

Having reviewed the arguments of the parties, I agree with DOE as to the second category. Archway argued that all the misclassifications were just bookkeeping errors; however, I have difficulty believing that Archway's staff made so many such errors and, in some cases, continued to make the same error as to a person's position over a number of years. Archway's records created the conflict as to the job responsibilities of its staff in this category, and I have not been persuaded by Archway's presentation that DOE's disallowances were arbitrary, unreasonable or improper. I **CONCLUDE** that the salaries of these employees be disallowed in the calculation of the tuition rates for the five school years.

As to the three ledger items disallowed for the 1995-96 school year, Archway did not dispute the disallowances, and I hereby **AFFIRM** the same. Also, as stated by DOE, Archway offered no argument as to the disallowances of the salary payments of four employees in 1997-98 and of seven employees in 1998-99, and I note Archway offered no argument as to the disallowance of the salary payment to Sharon Block in 1996-97. I hereby **AFFIRM** these disallowances for lack of proof by Archway.

In summary, I **CONCLUDE** that the following salaries should not be disallowed:

1994-95 School Year

Employee	Salary
Dugan, Kelly	$ 21,250
Huster, Tracy	$ 2,193
Moore, Anthony	$ 11,129
Novick, Phyllis	$ 2,952
Reed (Walker), Nancy	$ 17,310
Robbins, Helene	$ 26,642
Shipley, Jill	$ 8,125
Ziemba, Lawrence	$ 4,616
Total	$ 94,217

Therefore, of the remaining salaries in dispute ($123,353) for this school year, I **CONCLUDE** that $94,217 should not have been disallowed.

1995-96 School Year

Employee	Salary
Bates, Scott	$34,731
Bennett, Christopher	$ 2,579
Betner, James	$ 2,493
Bradbury, Lisa	$ 5,400
Faltz, Francine	$ 2,400
Hummell, David	$ 2,400
Long (Williams), Carolyn	$ 5,887
Nicolino, Anthony	$ 2,280
Reed (Walker), Nancy	$ 2,400
Robbins, Helene	$ 3,846
Steranko, Catherine	$ 2,400
Thoms, Theresa	$ 2,308
Total	$ 69,124

Therefore, of the remaining salaries and three ledger items in dispute ($388,494) for this school year, I **CONCLUDE** that $69,124 should not have been disallowed.

1996-97 School Year

Employee	Salary
Hummell, David	$ 2,400
Lafferty (Whicker), Susan	$ 53,105
Scaravaglione, Tonette	$ 9,946
Total	$ 65,451

Therefore, of the remaining salaries in dispute ($211,416) for this school year, I **CONCLUDE** that $65,451 should not have been disallowed.

1997-98 School Year

Employee	Salary
Benbridge, Rose	$ 4,385
Cobb, Eunice J.	$ 2,695
Donley, William L.	$ 25,029
Small, Thomas L.	$ 2,308
Tuttle, Terrence M.	$ 5,538
Whittman, Shirley	$ 3,462
Total	$ 43,417

Therefore, of the remaining salaries in dispute ($305,501) for this school year, I **CONCLUDE** that $43,417 should not have been disallowed.

1998-99 School Year

Employee	Salary
Black, Sharon	$ 3,000
Cobb, Eunice	$ 2,695
Gonnella, Renee	$ 2,308
Gupta (Foster), Michelle	$ 36,347
Leonardi, Alan	$ 1,154
Williams, Monica	$ 2,308
Wilson, Frederick	$ 1,923
Whittman, Edward	$ 2,077

Total	$ 51,812

Therefore, of the disallowed salaries in dispute ($192,859) for the school year, I **CONCLUDE** that $51,812 should not have been disallowed.

B – Non-Teacher Salary Disallowances – Schedule B

When it filed its appeals, Archway disputed the findings of DOE in the five audits as to Schedule B expenses.

Year	Schedule	Disallowances
1994-95	Schedule B (Exh. R-1)	$386,436
1995-96	Schedule B (Exh. R-2)	$261,191
1996-97	Schedule B (Exh. R-3)	$176,479
1997-98	Schedule B (Exh. R-4)	$ 3,923
1998-99	Schedule B (Exh. R-5)	$ 34,058
	Total	$862,087

The parties stipulated that DOE's findings as to the expenses outlined in Schedule B of the audits are no longer in dispute. (J-1). The DOE's finding that Archway is required to exclude a total of $862,087 from the calculation of the tuition payments is hereby **AFFIRMED**.

C – Non-Salary Expenses Charged to PSH Schools – Schedule C

DOE in its five audits disallowed certain non-salary expenses from being included as expenses in the computation of the tuition charged by Archway for its PSH schools.

Year	Schedule	Disallowances
1994-95	Schedule C1 (Exh. R-1)	$105,266
1994-95	Schedule C2 (Exh. R-1)	$ 5,546
1995-96	Schedule C (Exh. R-2)	$ 67,264

1996-97	Schedule C (Exh. R-3)	$ 81,809
1997-98	Schedule C (Exh. R-4)	$ 10,425
1998-99	Schedule C (Exh. R-5)	$ 19,324
	Total	$289,634

The expenses in the Schedule C in the five audits concern a variety of non-salary expenses that were determined by DOE to be non-allowable expenses but were included by Archway in computation of its tuition for its PSH school. The issue is whether each of the disputed expenses is an allowable expense pursuant to N.J.A.C. 6:20-4.4. In addition to the specific expenses prohibited in N.J.A.C. 6:20-4.4, subsection (a)(54) excludes any "cost found to be patently unreasonable." Therefore, it is Archway's burden to show that each of the disputed expenses identified in these schedules were allowable and not unreasonable. These expenses include such things as travel and food allowances, entertainment and marketing expenses.

Archway relies on its expert witness, Philip Klickner, who prepared the RW report (Exh. A-12). Klickner felt that, based on his discussion with Archway's staff and a review of Archway's records, the expenses disallowed by DOE in these schedules were appropriate and reasonable since they related to activities that benefited the PSH program except for expenses totaling $34,000 as set forth in his report. (A-12, Exh. 1-2).

Archway noted that in Schedule C-2 of the 1994-95 audit, DOE disallowed $28,496 in interest paid on three loans to Archway from three members of its Board of Trustees, William F. Hordis, Dr. Robert Scanlon and Dr. James Mason, based on its determination that these were related-party loans that were not approved by DOE. (Exh. R-1). Archway stated that the Hordis loan was retroactively approved by DOE in an April 29, 1993 letter to Archway. (Exh. A-12, Vol. I, Exh. 3-1) and that the Scanlon loan was approved by DOE in a letter to Archway dated March 31, 2004. (Exh. A-12, Vol. I, Exh. 3-1). Archway argued that since the Hordis and Scanlon loans were approved by DOE, interest paid on the Hordis and Scanlon loans should be deemed allowable costs. Also, Archway argued that the Mason loan should be deemed

allowable, even though there was no formal approval by DOE of the Mason loan. Klickner testified that the Mason loan was significantly less than the Hordis loan and it was reasonable to assume that DOE would also have approved the Mason loan. (4T 100). DOE argued that this assertion must be rejected since Klickner had no first-hand knowledge of Archway's operations during the years in dispute.

DOE noted that the only expenses in these schedules that Archway specifically addressed related to the interest paid on three loans in Schedule C-2 of the 1994-95 audit. DOE argued that Archway misstated DOE's basis for disallowing the interest payments. Archway suggested that DOE disallowed the interest payments as related to the Scanlon and Hordis loans because DOE's prior approval had not been received. It is DOE's position that it disallowed only the portion of interest paid on these loans which exceeded the approved rate of interest. (Exh. R-1; 4T:91-99). As to the Mason loan, DOE noted that there was no proof that it was approved by the DOE and that Klickner's conclusion that it could have been approved is insufficient. (4T:99-101).

DOE stated that, although Archway contested the disallowance of most of the expenses in the schedules for the five audits, it did not present evidence to address each of the disputed expenses, nor has it identified specifically which expenses are in dispute except for the interest as to the three loans. It is Archway's position that most of the expenses in this section are allowable is based solely on Klickner's review. DOE argued that its determinations as to these schedules should be affirmed. I agree with DOE's arguments and I **AFFIRM** the disallowances.

D – Maintenance / Transportation / Depreciation Expenses
Schedules D, E, F, G and H for 1994-95 and Schedule D for the other Audits

In issue are the following expenses disallowed by DOE.

Year	Schedule	Indirect Costs	Disallowances
1994-95	Schedule D1 (Exh. R-1)	Petting Zoo and Janitorial Services	$14,287

1994-95	Schedule D2 (Exh. R-1)	Pool Expenses	$779
1994-95	Schedule E (Exh. R-1)	Pupil Transportation Costs	$103,279
1994-95	Schedule F (Exh. R-1)	Construction Labor Costs	$65,470
1994-95	Schedule G (Exh. R-1)	Landscaping, Maintenance and Security Expenses	$189,085
1994-95	Schedule H (Exh. R-1)	Depreciation	$130,900
1995-96	Schedule D (Exh. R-2)	Indirect Costs Associated with Facilities used by PSH Program	$281,236
1996-97	Schedule D (Exh. R-3)	Indirect Costs Associated with Facilities used by PSH Program	$299,445
1997-98	Schedule D (Exh. R-4)	Indirect Costs Associated with Facilities used by PSH Program	$255,456
1998-99	Schedule D (Exh. R-5)	Indirect Costs Associated with Facilities used by PSH Program	$196,728

The regulations in effect at the time in issue recognized a distinction between "direct costs" which are expenses that are assigned to a specific program and "indirect costs" which are shared expenses. (N.J.A.C. 6:20-4.1(b) and (c)). Also, the costs may be "allowable costs" which are expenses for which a PSH may seek reimbursement and "non-allowable costs" which must be excluded from the calculation of tuition. (N.J.A.C. 6:20-4.4(a)(1) – (54)). A PSH may recoup the category of "allowable indirect costs" through a variety of allocation methods. (N.J.A.C. 6:20-4.1(c) and (d)).

Archway appealed the DOE's findings in Schedules D1 though H in the 1994-95 audit, and took the position that a revenue-based allocation should have been used as to each of those schedules, pursuant to N.J.A.C. 6:20-4.1(d)2. (Exh. A-1; 3T 73-75; 3T 86-87; 3T 99).

Except for Schedule G, Cuprzinski stated that he did not use a revenue-based allocation and that he allocated costs using various criteria such as average daily enrollment, mileage, billable days, square footage, or a combination thereof. (Exhs. R-1, pp.91, 104, 110, 124; 9T 23, 33-34, 38-39; Exh. A-45). As to Schedule G, Archway argued that Cuprzinski used the wrong revenue ratio. In his report, Klickner recalculated Schedules D1 through H using the revenue ratio. (Exhs. A-12, Vol. I, Exh. 3-1, pp.1-28). A comparison between these calculations and the 1994-95 audit shows that the 1994-95 audit substantially overstated the disallowed costs. (Exh. A-12, Vol. I; Exh. 3-1; AE-45: p.50 of Archway's brief).

DOE stipulated that Cuprzinski applied improper methodologies in disallowing the costs identified in Schedules D through H, except for Schedule G, of 1994-95 audit and that the revenue-based allocation provided in N.J.A.C. 6:20-4.1(d)2 should have been used. (8T 45–46). As stated, Klickner reallocated the costs identified in Schedules D through H based on the revenue ratio; however, DOE does not accept his recalculations. (8T 45–46).

DOE stipulated that since the methodology used to determine allowable/non-allowable costs in other schedules for the 1994-95 audit was incorrect, the revenue ratio used by Cuprzinski in Schedule G, which is a product of those misallocations, is also incorrect. Based on Klickner's report, the reallocating of the other schedules based on the revenue ratio results in an increased revenue ratio of 42.63% for Schedule G. (Exh. A-12, Vol. I, Exh. 3-1, pp.6, 28).

Both parties agree that DOE used the revenue-based method for allocating allowable indirect costs in Schedule D in its audits for 1995-96, 1996-97, 1997-98 and 1998-99, and that DOE's calculations of the amounts of the disallowances are now

incorrect because of the carryover effect from the 1994-95 calculations, and that a recalculation is necessary to establish the correct costs. (4T 18-20).

Both parties recognized that the procedure for determining the correct allocation percentage involves rolling calculations that have a carryover effect from year to year. (3T 78-79). An increase or decrease in the amount of allowable costs in one year will result in adjustments that offset revenue numbers, working capital and overhead allocations in subsequent years. (3T 78-79; 9T 71).

Archway argued that after DOE stipulated that the wrong method of allocation was used in the 1994-95 audit, it should have recalculated and presented a revised set of determinations for the 1994-95, 1995-96, 1996-97, 1997-98 and 1998-99 audits. Since DOE did not make such a presentation, Archway argued that the calculations in Klickner's report as to the five audits should be accepted.

DOE argued that the only issue to be decided in this matter is the method of allocating the indirect expenses in Schedules D1, D2, E, F, G and H for the 1994-95 audit and in Schedule D for the other four audits. DOE argued that the multi-layer calculation of the costs in the schedules in issue depends on a resolution of the expenses that are in dispute in related schedules and that it is reasonable not to do the calculations until after the Commissioner makes a final decision as to the underlying expenses. In the Commissioner's Final Decision, the DOE will recalculate the allowable costs for these schedules and Archway will be able to challenge this calculation on appeal.

I agree with DOE's arguments as to the calculations and I do not accept Klickner's calculations as accurate.

E – Maximum Salary Caps -
Schedule I for 1994-95 and Schedule E for the Other Audits

In issue are the following expenses disallowed by DOE.

Year	Schedule	Disallowances
1994-95	Schedule I (Exh. R-1)	$ 37,470
1995-96	Schedule E (Exh. R-2)	$ 43,945
1996-97	Schedule E (Exh. R-3)	$ 54,415
1997-98	Schedule E (Exh. R-4)	$ 74,900
1998-99	Schedule E Exh. R-5)	$ 55,819
	Total	$266,549

Pursuant to N.J.A.C. 6:20-4.4(a)(7), the portion of a salary which exceeds the maximum associated with that position as determined in accordance with N.J.A.C. 6:20-4.1(1) is not allowable. The DOE disallowed salary payments which it concluded exceeded the maximum salary amounts allowed by regulation and also certain travel costs.

Part of the amount disallowed in Schedule I for the 1994-95 school year relates to the salary paid to John D. Hughey, who was then Archway's Director of Maintenance. Hughey supervised all maintenance activities for Archway's multi-county operation. He was based at the Atco campus in Camden County (3T 108; 9T 48) and his 1994-95 salary was $79,796; of his total salary, Archway charged $49,753 to the PSH program (Exh. R-1, p.131).

The maximum salaries DOE permits to be charged to PSH programs vary by county. In 1994-95, the maximum allowable salary chargeable to the PSH program for Hughey's position in Camden County was $62,941. (R-1, p.131). Since only $49,753 of his salary was charged to the PSH program (8T 47), Archway argued that no portion of his salary should have been disallowed.

In Schedule I, DOE disallowed $25,794 of the $49,753 charged to the PSH program based on Cuprzinski's finding that it exceeded DOE's maximum allowable salary for that position. Cuprzinski decided that, because Archway had facilities in both Camden and Gloucester Counties and because Hughey supervised maintenance in both counties, that his salary should be prorated rather than based on the maximum for

Camden County where he was based. (Exh. R-1, p.129). Cuprzinski testified that he took the maximum allowable salaries for Camden County ($62,941) and Gloucester County ($51,618) and reduced them by the percentage of Archway's revenue attributable to its PSH activities in these counties, 31.16% for Camden and 8.42% for Gloucester. (3T 111-112). That resulted in a maximum salary for Camden of $19,612 and a maximum salary for Gloucester of $4,346. He then added these two amounts together for an allowable maximum salary of $23,957. The $25,794 disallowed in Schedule I represents the difference between the $49,753 salary for Hughey that Archway charged to PSH and the $23,957 maximum salary determined by Cuprzinski.

DOE recognized that the applicable regulations do not provide a formula for calculating the disallowable portion of a salary where an individual works in multiple counties; however, it does provide that "[p]art-time or split-time position shall be prorated." N.J.A.C. 6:20-4.4(a)(7). Since Hughey worked in two counties, DOE argued that it was appropriate to calculate the maximum salary on a prorated basis.

Archway argued that Cuprzinski's methodology has no support in the regulations or in common sense. Also, Archway noted that N.J.A.C. 6:20-4.4(a)(7) does not apply to a proration based on geography but only to a proration based on an employee's status.

Also in Schedule I, Cuprzinski disallowed $11,675 in travel allowances paid to Hughey and Paul Winkler, the Director of Education. (Exh. R-1, p.131). Archway argued that these allowances were properly considered as a part of the employees' compensation, as reported on their federal income tax forms. (Exh. A-12, p.11). Archway stated, even when the travel allowances were added to the salaries of Winkler and Hughey, the salaries were still below the DOE's maximum for their positions. (Exh. A-12, pp.11–12).

DOE stated that it disallowed the travel allowances paid to the two employees because Archway had no documentary evidence that any travel expenses were actually incurred. (R-1, p.130). DOE stated that its determination is consistent with N.J.A.C.

6:20-4.3(a)(20), which states that a PSH "shall maintain all pertinent financial record(s) for seven years." DOE argued that Archway presented no evidence to show that this determination was arbitrary, unreasonable or capricious.

Part of the amounts disallowed in Schedule E for the other four audits relate to the salaries paid to Hughey and Dennis Matousch, the Manager of Program Services. (Exhs. R-2, R-3, R-4, R-5, Sch. E). Archway stated that both employees were based in Camden County and in each year, the portion of their salaries charged to the PSH program was below the approved maximum for these positions in Camden. (Exh. A-12, Vol. I, Exh. 3-2 through 3-5, p.4). Archway noted that Cuprzinski used the same calculations that he used for Hughey's salary in 1994-95 to reduce the allowable salaries for these two employees for the four other audits. Based on Cuprzinski's calculation, the disallowed salary payments for the four school years totaled $221,193.

Having reviewed the arguments of both parties, I am persuaded by Archway's arguments as to the calculation of the salaries. Also, I accept Archway's argument that the travel allowances were a part of the salaries. Therefore, I **CONCLUDE** that there be no disallowances in Schedule I for 1994-95 or for Schedule E in the other audits.

F-Food/Entertainment Expenses

Schedule J for 1994-95

In issue are the following expenses disallowed by DOE.

Year	Schedule	Disallowances
1994-95	Schedule J (Exh. R-1)	$2,072
1995-96	Not applicable in this year	
1996-97	Not applicable in this year	
1997-98	Not applicable in this year	
1998-99	Not applicable in this year	
	Total	$2,072

As stipulated by the parties, the DOE's findings with respect to the $2,072 in food/entertainment expenses contained in Schedule J is no longer in dispute. (Exhs. J-1, A-22). Therefore, the DOE's disallowance of these expenses is hereby **AFFIRMED**.

G-Fringe Benefit Costs-
Schedule K for 1994-95 and Schedule F
for the other Audits

In issue are the following costs disallowed by DOE.

Year	Schedule	Disallowances
1994-95	Schedule K (Exh. R-1)	$ 256,397
1995-96	Schedule F (Exh. R-2)	$ 270,289
1996-97	Schedule F (Exh. R-3)	$ 178,503
1997-98	Schedule F (Exh. R-4)	$ 226,742
1998-99	Schedule F (Exh. R-5)	$ 165,686
	Total	$1,097,617

The items in these schedules represent fringe benefit costs which the DOE disallowed pursuant to N.J.A.C. 6:20-4.4(a)(11). This regulation states that "[a] cost which is not allowable in the calculation of the certified actual cost per pupil includes the following . . The cost of fringe benefits which are based on a non-allowable salary." (Exh. J-2). DOE computed the $1,097,617 based on its disallowance of salary payments in the other schedules of the audits. (4T 26-28).

Archway argued since DOE failed to provide a revised list of fringe benefit cost disallowances during the hearing that the DOE's findings as to these schedules are invalid.

DOE argued that not submitting a recalculation of the disallowances for these schedules is not a "failure" and the recalculation should be done as part of the final decision in this matter.

I will not require DOE to do any recalculations at this time. I recognize that the recalculations will be done as part of the Commissioner's final decision. The appropriate disallowances have to be calculated after a final decision is made as to what salary payments identified in other schedules should be disallowed. Based on my findings as to allowable salary payments in the other schedules, DOE's original calculation of $1,097,617 is clearly wrong.

H-Food Services Costs-
Schedule L for 1994-95

In issue are the following expenses disallowed by DOE.

School Year	Schedule	Amount Disallowed
1994-95	Schedule L (Exh. R-1)	$84,293
1995-96	Not applicable in this year	
1996-97	Not applicable in this year	
1997-98	Not applicable in this year	
1998-99	Not applicable in this year	
	Total	$84,293

As stipulated by the parties, the DOE's findings with respect to the $84,293 in food service costs outlined in Schedule L of the 1994-95 audit are no longer in dispute. Therefore, the DOE's disallowance of these costs is hereby **AFFIRMED**. (Exh. J-2).

I - Organizational Overhead -
Schedules M, O, P, Q, R for 1994-95 and
Schedules G, H, I, J for the other Audits

The organizational overhead cost is an an indirect cost. (3T29). It is a "catchall" category of administrative-related salaries and expenses associated with the entire Archway operation, including the PSH program. (3T120; Exh. A-12, Vol. I, p.13, Exh. 3-1). Archway stated that it allocated the organizational overhead costs based upon the

ratio of each program's direct costs to the total direct costs for all Archway programs, as required by the applicable regulation. (N.J.A.C. 6:20-4.1(c); Exh. A-12, Vol. I, p.13; 3T126). DOE questioned the representation of Archway as to the ratio of the PSH program to the entire Archway program and stated that the burden of proof was on Archway to show that DOE's calculations in the five audits was wrong.

Archway stated that in Schedule M of the 1994-95 audit and Schedule G2 of the other audits, Cuprzinski took various items and salaries that Archway had considered direct costs associated with the PSH program, determined that they were indirect costs associated with the entire operation, and reallocated them to overhead. (3T120; Exh. A-12, Vol. I, p.13, Exh. 3-1 through 3.5, p.12). Archway argued that the documents were reviewed by Klickner and he concluded that the documents established that these items were properly classified by Archway (Exh. A-12, Vol. I, p.13, Exh. 3-1, p.12; 3T121), and that the $99,846 in expenses identified in Schedule M of the 1994-95 audit and the $360,066 identified in Schedule G2 of the 1995 through 99 audits should be allowed. (3T121).

DOE argued that Archway failed to provide any factual support for its assertions as to Schedule M for 1994-95 and Schedule G2 for the other audits, and that it relies exclusively upon the testimony of Klickner who had no first-hand knowledge of Archway's operations during the years in dispute, and was not in the position to testify as to the factual circumstances regarding each of the expenses outlined in these schedules, or to establish to what extent the PSH program benefited from the expenditures. DOE argued that Archway has failed to establish that it was unreasonable for the DOE to treat these expenses as indirect costs, and that the DOE's findings should be affirmed.

As to Schedule O1 of the 1994-95 audit and Schedule G1 of the other audits, Archway argued that Cuprzinski did the reverse and he took what Archway classified as indirect costs allocable to the entire organization and reclassified them as direct costs. (3T126). DOE disallowed the salaries of six administrative employees – Barbara Hill, Kristine MacDuff, Dr. Sydelle Mason, Marl Hatoff, Michael Snyder and Maurice

Hershman, who Archway charged to overhead and partially allocated to the PSH program. Cuprzinski decided that the six individuals worked exclusively for the Early Childhood Division and not partially for the PSH program. (Exhs. R-1, p.402; R-2 through R-5, Sched. G1).

Archway stated that Dr. Sydelle Mason and her staff, Hill and MacDuff, actively participated in the overall management of Archway, not solely the Early Childhood Program. Therefore, one-third of their salaries, which for five years totals $226,374, is properly allocable to the PSH program. (Exh. A-12, Vol. I, Exh. 3-1, p.15; Exh. 3-2 through 3-5, p.6; 3T125).

Archway stated that although his office was physically located in the Early Childhood Section, Hatoff had administrative responsibilities for all of Archway; therefore, his salary was properly charged to organizational overhead and partially allocated to the PSH program (Exh. A-12, Vol. I, Exh. 3-1, p.15; Exhs.3-2 through 3-5, p.6; 3T 125-126). For all five years , the total allowance for Hatoff's salary should be $178,579.

Archway stated that Hershman provided payroll and tax accounting services for all of Archway and served as Treasurer for the Archway Board of Trustees, (Exh. A-12, Vol. I, Exh. 3-1, p15; Exh. 3-2 through 3-5, p.6; 3T126), and the allocation of $19,396 of his salary to the PSH Program for 1994-95 is appropriate.

In his report, klickner stated that the partial allocation of Snyder's salary to the PSH was an error. (Exh. A-12, Vol 1, Exh. p. 3-1, p.15).

As to Schedule O1 of 1994-95 and G1 of the other audits, DOE stated that the basis for disallowing the salaries paid to the six individuals in these schedules varied from a lack of documentation to show that the expense was properly incurred to a lack of information to establish that the work performed by the individuals was for the benefit of the PSH. (Exh. R-1, pp.180-182). DOE stated that Archway did not present any legally competent evidence to show that the $464,349 in costs for the individuals were

accurate and that it relied exclusively on the opinion of Klickner, who did not have any first-hand knowledge on which to base his conclusions. DOE argued that the DOE's finding should be upheld as to Schedules O1 and G.

Archway argued that the fringe benefit costs disallowed in Schedule Q for 1994-95 and Schedules I for the other audits were associated with the salaries which were disallowed in Schedule O1 of the 1994-95 audit and Schedules GI of the other audits, and should likewise be allowed, (Exh. A-12, Vol. I, Exh. 3-1, p.18; Exh.3-2 through 3-5, p.9; 3T129-130).

DOE argued that the disallowance of $75,362 as non-allowable fringe benefits costs in Schedule Q for 1994-95 and for $697,285 in Schedule I for the other audits is correct on the basis that the salaries of the six individuals were determined to be not allowable.

Archway stated that in Schedules O2 and P of the 1994-95 audit and Schedule H for the other audits, DOE disallowed various costs and reimbursements to Dr. James Mason charged to organizational overhead. (Exh. R-1, pp.413-416). Archway does not contest those disallowances, which total $395,839. (Exh. A-12, Vol. I, Exh.3-1, pp.16-17, Exhs. 3-2 – 3-5, p.8).

Both parties agree that Schedule R of the 1994-95 audit and Schedule J of the other audits summarize DOE's findings as to the previous schedules concerning organization overhead. (Exhs. R-1, p.438; R-2 through R-5, Schedule J).

Based on Klickner's calculations, Archway argued that the amount to be disallowed in this category should be reduced from $2.1 million to $1.5 million. DOE argued that all the disallowances in this category should be **AFFIRMED**.

Having reviewed the arguments of the parties as to the schedules in this category, I agree with DOE's arguments and I **CONCLUDE** that the disallowance of $2.1 million be **AFFIRMED**.

J-Working Capital -
Schedule T for 1994-95 and Schedule L
for the other Audits

In issue are the following amounts determined by the DOE.

Year	Schedule	Amounts
1994-95	Schedule T (Exh. R-1)	$415,137
1995-96	Schedule L (Exh. R-2)	$ 3,451
1996-97	Schedule L (Exh. R-3)	(-) $ 46,948
1997-98	Schedule L (Exh. R-4)	(-) $ 11,151
1998-99	Schedule L (Exh. R-5)	(-) $ 76,704

N.J.A.C. 6:20-4.6 provides that for PSHs the "the school's tuition rate may include an amount which will permit the school to establish a working capital fund which is not in excess of 15 percent of the private school's allowable actual costs." The above chart reflects DOE's calculation as to Archway's allowable working capital based on its calculation of allowable actual costs in its five audits.

Based on my findings as to costs and expenses in this initial decision, the above chart is no longer accurate. I did not require the DOE to recalculate these numbers. Archway argued that since DOE did not present revised numbers for these schedules that Archway's figures should be accepted. Since I am not accepting all of Archway's arguments as to all of the schedules, I cannot accept its figures. I **FIND** that the final numbers should be determined after the Commissioner makes the necessary decisions as to the other schedules.

K-Tuition Waivers -
Schedule N for 1994-95 and Schedule S
For the other Audits

Archway no longer contests the DOE's disallowances as to tuition waivers which total $87,076 for the five audits. (Exh. A-12, Vol. I, p.15). DOE's disallowances as to these schedules are hereby **AFFIRMED**.

V CONCLUSIONS

As stated in the beginning of this initial decision, I envisioned making a decision as to the appropriate disallowances in to all the schedules in the five audits in issue, as well as a finding as to the amount of money to be returned by Archway to the sending public school districts. Since then I have reconsidered my position based on the substantial amount of work that I would be requiring the parties to perform based on my findings of fact and conclusions of law in this initial decision. The Commissioner will be making a final decision as to all of the involved schedules, and at that time will decide the amount of money to be returned to the sending public school districts. If Archway disagrees with the final decision, it will have the opportunity to appeal the matter.

In its reply brief, Archway argued that it was arbitrary and unreasonable for DOE not to prepare revised calculations for all the schedules in the five audits, and that its failure to do so constitutes sufficient grounds to dismiss DOE's disallowances in all five audits. I disagree with the argument.

I **CONCLUDE** and **ORDER** that:

Schedule A

1994-95 – of the amount of disallowances remaining in dispute, $123,353, is reduced to $ 29,136.

1995-96 – of the amount of disallowances remaining in dispute, $388,494,

is reduced to $319,370.

1996-97 – of the amount of disallowances remaining in dispute, $211,416, is reduced to $145,965.

1997-98 – of the amount of disallowances remaining in dispute, $305,501, is reduced to $262,084.

1998-99 – of the amount of disallowances remaining in dispute, $192,859, is reduced to $141,047.

Schedule B

1994-95 – nondisputed disallowances are – $386,436
1995-96 – nondisputed disallowances are – $261,191
1996-97 – nondisputed disallowances are – $176,479
1997-98 – nondisputed disallowances are – $ 3,923
1998-99 – nondisputed disallowances are – $ 34,058

Schedule C (Including C1 and C2 for 1994-95)

1994-95 – affirm DOE's disallowances – $110,812
1995-96 – affirm DOE's disallowances – $ 67,264
1996-97 – affirm DOE's disallowances – $ 81,809
1997-98 – affirm DOE's disallowances – $ 10,425
1998-99 – affirm DOE's disallowances – $ 19,324

Schedules D, E, F, G, H for 1994-95 and Schedule D for the other audits

Calculation of allowable expenses to be based on the revenue-based allocation and the disallowances to be calculated in the final decision.

Schedule I for 1994-95 and Schedule E for the other audits

1994-95 – affirm Archway's allowances – $37,470
1995-96 – affirm Archway's allowances – $43,945

1996-97 – affirm Archway's allowances – $54,415

1997-98 – affirm Archway's allowances – $74,900

1998-99 – affirm Archway's allowances – $55,819

Schedule J

1994-95 – nondisputed disallowances – $2,072

Schedule K for 1994-95 and Schedule F for the other audits

Amount of disallowances to be determined in the final decision

Schedule L

1994-95 – nondisputed disallowances – $84,293

Schedules M, O, P, Q, R for 1994-95 and Schedules G, H, I, J for the other audits

As to these schedules, I affirm DOE's disallowances, which total to approximately 2.1 million dollars.

Schedule T for 1994-95 and Schedule L for the other audits

Amounts to be determined in the final decision

Schedule N for 1995-95 and Schedule S for the other audits

Nondisputed disallowances totaling $87,076.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 2, 2008
DATE

Beatrice S. Tylutki
BEATRICE S.TYLUTKI, ALJ t/a

Date Received at Agency:

Kathy Duncan
SEP 3 2008
9-4-08 JB

Mailed to Parties:

[redacted]
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

APPENDIX

EXHIBITS ADMITTED INTO EVIDENCE

Joint Exhibits:

J-1	Joint Stipulation of Facts received on June 28, 2006
J-2	Applicable DOE Regulations (N.J.A.C. 6:20-4.1 et. seq.)
J-3	Supplemental Stipulation of Facts, received on October 12, 2006

For Petitioner (Archway):

A-1	Archway Petition of Appeal 1994-95
A-2	Archway Petition of Appeal 1995-96 through 1998-99
A-3	Archway – Thomas Report Appeal
A-4	Archway – Salary Appeal
A-5	Letter from Bob Poznek to Thomas King, dated March 18, 1997
A-5a	Letter from Bob Poznek to Thomas King, dated May 30, 1997
A-5b	Letter from Bob Poznek to Thomas King, dated August 18, 1997
A-6	Independent Audit (KMPG Peat Marwick) – 1994-95
A-7	Independent Audit (KMPG Peat Marwick) – 1995-96
A-8	Independent Audit (KMPG Peat Marwick) – 1996-97
A-9	Independent Audit (Drucher, Rahl & Fein) – 1997-98
A-10	Resume – Philip Kleckner
A-11	Resume – Keith Balla
A-12	Archway's – Expert Report prepared by Rosenfarb Winters, LLC, dated November 11, 2005
A-13	Excerpt – N.J.A.C. 6:20-4.1(a)
A-14	Excerpt – N.J.A.C. 6:20-4.1(a)1
A-15	Excerpt – N.J.A.C. 6:20-4.1(a)2
A-16	Excerpt – N.J.A.C. 6:20-4.1(b)
A-17	Excerpt – N.J.A.C. 6:20-4.1(c)

A-18 Excerpt – N.J.A.C. 6:20-4.1(d)

A-19 Summary of DOE Accounting Regulations

A-20 Rosenfarb Winters (hereinafter "RW") Ex. 1

A-21 RW Ex. 1-1

A-22 RW Ex. 1-2

A-23 RW Ex. 2-1

A-24 RW Ex. 2-2

A-24a RW Ex. 2-3

A-25 RW Ex. 3-1, p.1 of 28 (Schedule A & B) (94-95)

A-26 RW Ex. 3-1, p.3 of 28 (Schedule D) (94-95)

A-27 RW Ex. 3-1, p.4 of 28 (Schedule E) (94-95)

A-28 RW Ex. 3-1, p.5 of 28 (Schedule F) (94-95)

A-29 RW Ex. 3-1, p.6 of 28 (Schedule G) (94-95)

A-30 RW Ex. 3-1, p.7 of 28 (Schedule H) (94-95)

A-31 RW Ex. 3-1, p. 8 of 28 (Schedule I) (94-95)

A-32 Excerpt – N.J.A.C. 6:20-4.1(e)

A-33 RW Ex. 3-1, p.10 of 28 (Schedule K) (94-95)

A-34 RW Ex. 3-1, p.12 and 13 of 28 (Schedule M1 and M2) (94-95)

A-35 p. 171 and 172 – DOE Notice of Determination from "informal" 1st Petition of Appeal (November 1998)

A-36 RW Ex. 3-1, p.15 of 28 (Schedule O1) (94-95)

A-37 RW Ex. 3-1, p.18 of 28 (Schedule Q) (94-95)

A-38 RW Ex. 3-1, p.19 of 28 through p.21 of 28 (Schedule R) (94-95); RW Ex. 3-1, p.22 of 28 and p.23 of 28 (Schedule R-1 and Schedule R-2) (94-95); RW Ex. 3-1, p.24 of 28 (Schedule R-3) (94-95)

A-39 RW Ex. 3-1, p.27 of 28 (Schedule T) (94-95)

A-40 RW Ex. 3-1, p.28 of 28 (Adjusted Revenue) (94-95)

A-41 N.J.A.C. 6:20-4.8(a) – Audit Requirements (Excerpts)

A-42 N.J.A.C. 6:20-4.8(b) and (c)

A-43 N.J.A.C. 6:20-4.8(d) (Excerpts)

A-44 N.J.A.C. 6:20-4.8(e) (Excerpts)

A-45 Comparison – RW Schedules with DOE Schedules (94-95)

A-50 RW Ex. 3-2, p.1 of 1 (95-96)

A-51 RW Ex. 3-2, p.1 of 19 (Schedules A & B)

A-52 RW Ex. 3-2, p.2 of 19 (Schedule C) (95-96

A-53 RW Ex. 3-2, p.3 of 19 (Schedule D) (95-96)

A-54 RW Ex. 3-2, p.4 of 19 (Schedule E) (95-96)

A-55 RW Ex. 3-2, p.5 of 19 (Schedule F) (95-96)

A-56 RW Ex. 3-2, p.6 of 19 (Schedule G1) (95-96)

A-57 RW Ex. 3-2, p.7 of 19 (Schedule G2) (95-96)

A-58 RW Ex. 3-2, p.8 of 19 (Schedule H) (95-96)

A-59 RW Ex. 3-2, p.9 of 19 (Schedule I) (95-96)

A-60 RW Ex. 3-2, pp.10, 11, 12, 13, 14 of 19 (Schedules J, J1 & J2) (95-96)

A-61 RW Ex. 3-2, p.15 of 19 (Schedule K) (95-96)

A-62 RW Ex. 3-2, p.16 of 19 (Schedule L) (95-96)

A-63 RW Ex. 3-2, p.19 of 19 – Adjusted Revenue (95-96)

A-64 Archway's Statement of Assurances, dated February 5, 1999

A-65 Archway's Draft Policy on the Ethical Conduct of Business, February 1999

A-66 Letter from Roy Montgomery of DOE to Daniel Martin of Archway, dated July 26, 2006

A-67 Certification of John M. Cuprzinski, dated July 31, 2006

A-68 Audit Program for the Financial Accounting for NJ Private Schools for the Handicapped, issued June 1998 by DOE

A-E-500 Excerpt from DOE Response to Archway Informal Appeal (pp.018-026)

A-E-500a N.J.A.C. 6:11-4.3 (2 pages)

A-E-500b N.J.A.C. 6A:9-6.3 (revised)

A-E-501 Helene Robbins – Letter to DOE re: Certification status, dated December 13, 1993

A-E-502 Helene Robbins – Application to DOE re: Emergency Certification (3 pages), dated April 13, 1994

A-E-503 Helene Robbins – Priority Request Form to DOE re: Emergency Certification, dated January 8, 1995

A-E-504 Helene Robbins - Emergency Certification

A-E-505 Helene Robbins - Renewal of Emergency Certification for Following Year, dated September 9, 1995

A-E-506 Kelly Dugan – Standard Certificate – Speech Language Specialist – Issued March 1995

A-E-506a Kelly Dugan – Personnel Transaction Form

A-E-507 Nancy Reed (Walker) – Notice of Certificate Issuance (Emergency) – Applied August 4, 1994 – Signed February 9, 1995

A-E-508 Nancy Reed (Walker) – Application for Emergency Certificate, dated January 1995

A-E-509 Nancy Reed (Walker) – Emergency Certificate – Teacher of Handicapped, dated February 1995

A-E-509A Anthony Moore – Application for Emergency Certificate, dated September 12, 1994 (3 pages)

A-E-510 Anthony Moore – Priority Request Form for Emergency Certification, dated September 12, 1994

A-E-511 Anthony Moore – Standard Certificate – School Social Worker – Issued January 1995

A-E-512 Anthony Nicolino – Certificate of Eligibility with Advanced Standing, dated June 1994

A-E-513 Anthony Nicolino – Application for Emergency Certificated, dated September 9, 1994

A-E-514 Anthony Nicolino – Priority Request Form for Emergency Certification, dated September 9, 1994

A-E-515 Anthony Nicolino – Renewal of Emergency Certification, dated August 1995

A-E-516 David Hummell – Application for Emergency Certificate, dated March 1995

A-E-517 David Hummell – Printout from DOE Certification Database, Showing Certificate Issued

A-E-518 Jill Shipley – Emergency Certificate – Teacher of Handicapped (Previous Year)

A-E-519 Jill Shipley – Letter from DOE Regarding Certifications Issued (2 pages)

A-E-520 Christopher Wall – Substitute Teacher Certificate, dated September 1991

A-E-521 Christopher Wall – Application for Emergency Certification, dated July 11, 1994 (Priority Request Form)

A-E-522 Lawrence Ziemba – Application for Emergency Certification, dated July 21, 1994

A-E-523 Lawrence Ziemba – Priority Request Form for Emergency Certificate, dated July 21, 1994

A-E-524 Lawrence Ziemba – DOE Certification Database Printout

A-E-525 Thomas Keyes – Application for Emergency Certification, dated July 11, 1994

A-E-526 Thomas Keyes – Priority Request Form for Emergency Certification, dated July 11, 1994

A-E-527 Thomas Keyes – DOE Certification Database Printout

A-E-528 Phyllis Novick – Priority Request Form for Permanent Certification, dated July 21, 1994

A-E-529 Phyllis Novick – DOE Certification Database Printout (2 pages)

A-E-530 Tracy Huster – Letter from DOE, dated January 27, 1999 (applied September 30, 1994) Listing Certifications Issued (2 pages)

A-E-531 Tracy Huster – Standard Certificate, dated December 1994

A-E-532 Jennifer Alldred – National Board for Certification in Occupational Therapy Certificate, dated May 2000

A-E-533 List of Terminated Staff and reasons why they left job with Archway

A-E-601 Joseph Hollywood – Standard Certification – Health/Physical Education, dated June 1992

A-E-601a Joseph Hollywood – Letter of Employment as Physical Education Teacher, dated June 5, 1995

A-E-602 Kerri Tomasello – American Occupational Therapy Board Certification, dated August 1993

A-E-603 Kerri Tomasello – National Board for Certification in Occupational Therapy Certificate, dated August 1995

A-E-604 Carolyn Long (Williams) – Renewal of Emergency Certification, dated August 1995

A-E-605 Carolyn Long (Williams) – Standard Certification – Teacher of Handicapped, dated October 1995

A-E-606 Lisa Bradbury – Renewal of Emergency Certification, dated August 1995

A-E-607 Lisa Bradbury – DOE Certification Database Printout

A-E-608 Helene Robbins – Renewal of Emergency Certificate, dated September 1995

A-E-609 Helene Robbins – DOE Certification Database Printout

A-E-610 Christopher Bennett – Priority Request Form for Emergency Certification, dated July 1995

A-E-611 Christopher Bennett – Emergency Certification – Renewal, dated September 1995

A-E-612 Christopher Bennett – DOE Certification Database Printout

A-E-613 James Betner – Emergency Certification for Previous School Year (1994-95)

A-E-614 James Betner – Priority Request Form for Emergency Certification, dated July 1995

A-E-615 James Betner – Renewal of Emergency Certification, dated August 1995

A-E-616 James Betner – DOE Certification Database Printout

A-E-617 Francine Faltz – Renewal of Emergency Certification, dated August 1995

A-E-618 Francine Faltz – DOE Certification Database Printout

A-E-619 David Hummell - Renewal of Emergency Certification, dated August 1995

A-E-620 David Hummell – DOE Certification Database Printout (2 pages)

A-E-621 Nancy Reed (Walker) – Priority Request Form for Emergency Certification

A-E-622 Nancy Reed (Walker) – Renewal of Emergency Certification, dated July 1995

A-E-623 Nancy Reed (Walker) – Emergency Certification – Teacher of Handicapped, dated September 1995

A-E-624 Nancy Reed (Walker) – Letter from Archway to DOE Recommending Standard Certification, dated August 21, 1995

A-E-625 Nancy Reed (Walker) – Standard Certification – Teacher of Handicapped, dated May 1996

A-E-626 Catherine Steranko – Renewal of Emergency Certification, dated August 1995

A-E-627 Catherine Steranko – DOE Certification Database Printout

A-E-628 Theresa Thoms – Renewal of Emergency Certification, dated August 1995

A-E-629 Theresa Thoms – Emergency Certification issued September 1995

A-E-630 Anthony Nicolino – Renewal of Emergency Certification, dated August 1995

A-E-631 Anthony Nicolino – Emergency Certification, dated September 1995

A-E-631a Francisco Olaya – Letter of Employment as School Counselor, dated June 5, 1995

A-E-631b Francisco Olaya – Staff Roster (95-96) – 2 pages

A-E-631c Francisco Olaya – DOE Certification Database Printout

A-E-631d Melody Kleva – Letter of Employment as Assistant Teacher for the Handicapped, dated June 1995

A-E-631e Melody Kleva – Certificates of Eligibility of Advanced Standing – Music (July 1994) and Elementary School (April 1995)

A-E-632 M. Kristine Halkes – State Physical Therapist Assistant License, dated August 1995 to January 1996

A-E-633 M. Kristine Halkes – State Physical Therapist Assistant License, dated February 1996 to January 1998

A-E-634 Kimberly Dieterle – Provisional Certificate (Principal/Supervisor) from 94-95 Year (January 1995 – July 1995)

A-E-635 Kimberly Dieterle – Renewal of Emergency Certification, dated September 1995

A-E-636 Kimberly Dieterle – Termination Letter, dated August 1995

A-E-637 Paula Gormley – Swimming Instructor Certification (1 page)

A-E-638 Frank Belum – Personnel Transaction Form, dated September 5, 1995

A-E-639 Tonette Scaravaglione – Substitute Teacher Certification, dated March 1995

A-E-640 Tonette Scaravaglione – Letter from Archway to DOE re: completion of three years of supervised teacher, dated May 1996

A-E-640a Tonette Scaravaglione – Letter of Employment as Associate Teacher, dated June 1995

A-E-641 Michael Pizarro – Personnel Transaction Form, dated July 17, 1995

A-E-642 Michael Mahon – Certificate of Eligibility with Advanced Standing in Physical Education, dated October 1995

A-E-643 Scott Bates – DOE Certification Database Printout (3 pages)

A-E-644 Scott Bates – Renewal Form for Emergency Certification – Teacher of Handicapped, dated July 1995

A-E-645 Scott Bates – Standard Certification – Elementary School

A-E-646 Scott Bates – Standard Certification – Teacher of Handicapped

A-E-647 Scott Bates – Letter of Employment as Teacher, dated August 1995

A-E-701 Sue Lafferty – Letter from DOE granting waiver, dated July 29, 1996

A-E-702 Sue Lafferty – Certificate of Eligibility – Principal, dated October 1996

A-E-703 Sue Lafferty – Provisional Certificate – Principal, dated July 1997

A-E-704 Kerri Tomasello – Letter of Employment as Occupational Assistant, dated June 11, 1996

A-E-705 Kerri Tomasello – Employee List – List of Positions

A-E-706 Joseph Hollywood – Letter of Employment as Physical Education Teacher, dated June 11, 1996

A-E-707 M. Kristine Halkes – Letter of Employment as Physical Therapy Assistant, dated June 11, 1996

A-E-708 Paula Gormley – Letter of Employment as Swimming Instructor, dated July 24, 1996

A-E-709 Tonette Scaravaglione – Letter of Employment as Teacher of the Handicapped, dated June 11, 1996

A-E-710 Tonette Scaravaglione – Emergency Certificate issued November 1996

A-E-711 David Hummel – Letter of Employment as Teacher of the Handicapped, dated June 11, 1996

A-E-712 David Hummel – Renewal of Emergency Certificate, dated September 1996

A-E-713 Mary Townsend – Letter of Employment as Teacher Assistant, dated June 11, 1996

A-E-714 Christine Vandergrift (Foley) – Letter of Employment as Teacher Assistant, dated June 11, 1996

A-E-715 Shirley Waldron – Teacher Certification List

A-E-716 Brian Annett – Personnel Transaction Form – as substitute teacher, dated May 1997

A-E-801 Sharon Black – Application for Emergency Certificate, dated September 1997

A-E-802 Sharon Black – Emergency Certificate – issued October 1997

A-E-803 Terrance Tuttle – Application for Emergency Certification, dated September 1997

A-E-804 Terrance Tuttle – Letter from Archway to County Superintendent requesting Emergency Certification, dated November 1997

A-E-805 Terrance Tuttle – Letter from County Superintendent granting certification, dated January 1998

A-E-806 Terrance Tuttle – Standard Certificate – Teacher of the Handicapped – issued March 1998

A-E-807 Rose Bembridge – Application for Emergency Certification, dated September 1997

A-E-808 Rose Bembridge – Standard Certificate – Teacher of the Handicapped – issued November 1997

A-E-809 Edward Wittman – Personnel Transaction Form – Speech Therapist, dated September 1997

A-E-810 Edward Wittman – Application for Emergency Certificate, dated September 1997

A-E-811 Edward Wittman – Application for Expedited Review of Credentials, dated September 1997

A-E-812 Emergency Certificate – Speech Language Specialist, dated November 1997

A-E-813 Eunice Cobb – Employment History

A-E-814 Eunice Cobb – Letter of Employment as Teacher of the Handicapped, dated September 3, 1997

A-E-815 Eunice Cobb – Emergency Certificate – Teacher of the Handicapped – issued September 1997

A-E-816 Thomas Small – Letter of Employment as Teacher of the Handicapped, dated August 12, 1997

A-E-817 Thomas Small – Application for Emergency Certificate, dated September 1997

A-E-818 Thomas Small – Renewal of Emergency Certificate, dated October 1997

A-E-818a Michele Franklin – Personnel Transaction Form – School Social Worker, dated August 1997

A-E-819 Michele Franklin – Standard Certificate – School Social Worker – issued October 1996

A-E-820 Joseph Hollywood – Letter of Employment as Physical Education Teacher, dated September 5, 1997

A-E-821 William Donley – Personnel Transaction Form – Physical Education Teacher, dated August 1997

A-E-822 William Donley – Certificate of Eligibility with Advanced Standing – issued February 1997

A-E-823 Joseph Smith – Archway letter regarding transfer to Business Division, dated October 1996

A-E-824 Joseph Smith – Position Chart

A-E-825 Thomas Gordy – Letter of Employment as Behavior Modification Manager, dated September 5, 1997

A-E-826 Kelly Johnson – Letter of Employment as Counselor/Teacher Assistant, dated September 5, 1997

A-E-827 James Parker – Personnel Transaction Form – Teacher Assistant, dated October 1997

A-E-828 James Parker – Personnel Transaction Form – Teacher Assistant / Counselor, dated February 1998

A-E-829 Shirley Waldron – Letter of Employment as Vocational Assistant, dated September 5, 1997

A-E-830 Shirley Waldron – Personnel Transaction Form – Computer Voc. Asst. Teacher, dated October 1997

A-E-831 Michael Scott – Personnel Transaction Form – Counselor/Crisis Assistant, dated October 1997

A-E-832 Lakiba Newbill – Personnel Transaction Form – Substitute One-to-One Aide, dated May 6, 1998

A-E-833 Lakiba Newbill – Personnel Transaction Form – Substitute One-to-One Aide, dated May 11, 1998

A-E-901 Thomas DePaul – Standard Certificate – Teacher Coordinator of Cooperative Industrial Education, issued November 1994

A-E-902 Thomas DePaul – Standard Certificate – Teacher of Skilled Trades: Auto Body Repair, issued June 1999

A-E-903 Sharon Black – Application for Renewal of Emergency Certification, dated August 1998

A-E-904 Sharon Black – Emergency Certificate – Speech Language Specialist, dated September 1998

A-E-905 Eunice Cobb – Application for Renewal of Emergency Certificate, dated August 1998

A-E-906 Eunice Cobb – Emergency Certificate – Teacher of the Handicapped, issued September 1998

A-E-907 Monica Williams – Application for Renewal of Emergency Certificate, dated July 1998

A-E-908 Monica Williams – Emergency Certificate – Teacher of the Handicapped, issued September 1998

A-E-909 Renee Gonnella – Application for Renewal of Emergency Certificate, dated July 1998

A-E-910 Renee Gonnella – Emergency Certificate – School Psychologist, issued September 1998

A-E-911 Edward Wittman – Application for Renewal of Emergency Certificate, dated July 1998

A-E-912 Edward Wittman – Emergency Certificate – Speech Language Specialist, issued September 1998

A-E-913 Frederick Wilson – Application for Renewal of Emergency Certificate, dated July 1998

A-E-914 Frederick Wilson – DOE Database Printout of Certificates Issued

A-E-915 M. Gupta Foster – Letter to County Superintendent requesting Emergency Certificate as School Psychologist, dated January 1998

A-E-916 M. Gupta Foster – Application for Renewal of Emergency Certificate, dated July 1998

A-E-917 M. Gupta Foster – Emergency Certificate, School Psychologist, issued November 1998

A-E-918 Alan Leonardi – Letter to County Superintendent requesting Emergency Certification, dated February 29, 1999

A-E-919 Alan Leonardi – Personnel Transaction Form – Teacher of the Handicapped, dated April 1999

A-E-920 Alan Leonardi – Letter from County Superintendent granting Emergency Certification, dated March 25, 1999

A-E-921 Alan Leonardi – Emergency Certificate – Teacher of the Handicapped, issued April 1999

A-S1 N.J.A.C. 6:20-4.4(a)35 (3 pages)

A-S2 N.J.A.C. 6:20-4.4(a)48

A-S3 N.J.A.C. 6:20-4.3(a)13

A-S4 N.J.A.C. 6:20-4.3(a)14

A-S5 Archway Board of Trustees Minutes, dated May 25, 1999, with Budget Summary Page (total 6 pages)

A-S6 Archway Employee Turnover Analysis – 1999

A-S7 Poznek to Verner letter, dated March 15, 2000 (2 pages)

A-S8 Jack Fein (Drucker, Rahl & Fein) to Michael Azzara letter, dated March 30, 2000 (2 pages)

A-S9 Doug Otto Sample Letter to Employees

A-T1 Report submitted by Wayne Thomas, dated July 1999

A-T2 Archway's Petition of Appeal, dated October 10, 2000

A-T3 Interim Settlement Agreement between DOE and Archway, dated February 15, 1999

A-T4 Consent Order Dismissing Archway's Order to Show Cause and DOE Cross-Petition and Emergent Application, dated February 19, 1999

A-T5 DOE Answer to Archway Petition of Appeal

A-T6 DOE's Answer #138 to Archway Interrogatories

For Respondent (DOE):

R-1 1994-95 Notice of Determination

R-2 1995-96 Limited Fiscal Review Report

R-3 1996-97 Limited Fiscal Review Report

R-4 1997-98 Limited Fiscal Review Report

R-5 1998-99 Limited Fiscal Review Report

R-6 1998-99 Fiscal Monitoring Report

R-7 Letter to Robert Poznek from Mike Azzaro, dated April 17, 2000

R-8 DOE's regulations in effect during the time in issue, N.J.A.C. 6:20-4.1 et. seq. (same as J-2)

R-9 Memo from Mike Azzaro, dated July 20, 1994

R-10 Archway's form letter offering employment

R-11 Archway's form letter offering employment

R-12 Minutes of a joint meeting of the Board of Trustees of Archway Programs, Inc., and Archway Programs, Delaware, Inc.

R-13 Letter from Robert C. Poznek, dated March 21, 2000

R-14 Marked for identification only

R-15 Memo from Wayne W. Thomas, dated June 16, 2000

R-16 Letter from Robert C. Poznek, dated March 23, 2000

R-17 Copy of N.J.A.C. 6:11-4.6

R-18 Marked for identification only

R-19 Marked for identification only

R-20 Letter from James I. Mason to Elton Price, dated June 10, 1993, with attachments

R-21 Independent Contractor Agreement for Archway

R-22 Letter from Robert H. Davis to Patricia Sperduto, dated April 29, 1993

R-23 Letter from Robert H. Davis to Patricia Sperduto, dated March 31, 1994

R-24 Statement of amount due to Anne Klein & Associates from Archway, dated December 8, 1998

R-25 Archway's check, dated August 24, 1994, and attachments

R-26 Letter from James Verner to Robert Poznek, dated March 14, 2000

R-27 Marked for identification only

R-28 Letter from Mike Azzaro to Jack Fein, dated April 19, 2000

WITNESSES

For Petitioner (Archway):

Daniel J. Martin
Robert C. Poznek
Philip Kleckner
Douglas W. Otto
Robert G. Scanlon
Jack Fein

For Respondent (DOE):

Margaret Smith
John M. Cuprzinski
James W. Verner

ATTACHMENTS

I	Order dated September 21, 2006
II	Order dated September 21, 2006
III	Order dated November 21, 2006
IV	Order dated May 2, 2007
V	Order dated August 13, 2007
VI	Order dated August 13, 2007

ATTACHMENT I

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

DENIAL OF MOTION FOR

PARTIAL SUMMARY DECISION

OAL DKT. NOS. EDU 6956-00, 8646-00,
4834-01, 4608-03, 4607-03 AND 427-06
AGENCY DKT. NOS. 271-7/00, 381-10/00,
227-8/99, 392-12/02, 216-5/03 and 57-2/06

ARCHWAY PROGRAMS, INC.,

Petitioner,

v.

NEW JERSEY DEPARTMENT
OF EDUCATION,

Respondent,

And

PEMBERTON TOWNSHIP
BOARD OF EDUCATION,

Petitioner,

v.

ARCHWAY PROGRAMS, INC.,

Respondent,

And

ARCHWAY PROGRAMS, INC.,

Petitioner,

v.

BOARD OF EDUCATION OF EWING TOWNSHIP,

Respondent.

Steven D. Weinstein and **Anthony Merlino**, Esq., for Archway Programs, Inc. (Blank, Rome, Comisky and McCauley, attorneys)

Melanie Brooks and **Soakie Bae**, Deputy Attorney Generals for New Jersey Department of Education (Anne Milgram, Acting Attorney General of New Jersey, attorney)

Frederick W. Hardt, Esq., for Pemberton Township Board of Education

Jeffrey F. Belz, Esq., for Ewing Township Board of Education

BEFORE **BEATRICE S. TYLUTKI**, ALJ t/a:

This matter concerns the four Archway Programs, Inc. v. New Jersey Department of Education cases (EDU 6956-00, 8646-00, 4834-01 and 4607-03), the Pemberton Township Board of Education v. Archway Programs, Inc. case (EDU 4608-03) and the Archway Programs, Inc. v. Ewing Township Board of Education case (EDU 427-06). The cases were transmitted to the Office of Administrative Law for disposition pursuant to N.J.S.A. 52:14B-1 through -15 and N.J.S.A. 52:14F-1 through -13. All these cases deal with the state audits and report regarding the accounts of Archway Program, Inc. (Archway) for its private school for the handicapped (PSH), and have been consolidated.

Briefly, the consolidated case involves:

EDU 6956-00 – the disallowance by the New Jersey Department of Education (DOE) of the 3% staff salary increase given by Archway as shown in the 1999-2000 school year budget.

EDU 8646-00 – Archway's objections to the non-allowable costs set forth in DOE's fiscal monitor's report for the 1998-99 school year (Thomas report).

EDU 4834-01 – Archway's objections to the non-allowable costs set forth in DOE's audit for the 1994-95 school year.

EDU 4607-03 – Archway's objections to the non-allowable costs set forth in DOE's audits for the 1995-96, 1996-97, 1997-98 and 1998-99 school years.

EDU 4608-03 – Pemberton Township Board of Education (Pemberton) seeks a set-off against its tuition payments to Archway based on the DOE's audits.

EDU 427-03 – Archway sues for tuition payments from Ewing Township Board of Education (Ewing), and Ewing alleges it is entitled to a set-off based on the DOE's audits.

Archway is a non-profit corporation which provides educational and human service programs for individuals with special needs. This matter concerns only the programs for special education students at its PSH. These special education students have individual education plans (IEPs) prepared by their school districts and are sent by their school districts to Archway for their education. During the periods in issue, more than 240 special education students from over 100 school districts were enrolled in Archway's PSH. The school district pays tuition for their student's education at Archway's PSH.

The first day of hearing in the consolidated case took place on July 14, 2006. Steven D. Weinstein, Esq., appearing on behalf of Archway, stated during his opening statement, that he would be presenting witnesses as to the DOE's audits for the 1994-95, 1995-96 and 1996-97 school years and the disallowed staff salary increases given by Archway in the 1999-2000 school year. Weinstein stated that he would then move to dismiss the determinations of non-allowable costs contained in DOE's audits for the 1997-98 and 1998-99 school years. This would cause a cancellation of some of the hearing dates since the other parties would need time to prepare their responses to this motion and I would have to render a decision before we could continue with the hearing. Since there was a lapse of time between the first and second day of the

hearing, I requested the parties to present briefs as to the DOE's audits for the 1997-98 and 1998-99 school years after the first day of the hearing.

I received Archway's brief on July 24, 2006, and DOE's brief on August 1, 2006. Neither Pemberton or Ewing submitted a brief. At the hearing on August 11, 2006, I orally told the parties that I would deny Archway's motion and would issue this written order thereafter.

In its brief, Archway stated that the DOE's regulations set forth a vague definition of "allowable costs," N.J.A.C. 6:20-4.1(a)1, which is used to determine the "certified actual cost per pupil," N.J.A.C. 6:20-4.8, 6:20-4.1(a), which then is used to determine the tuition payments due from the local school districts, N.J.A.C. 6:20-4.8. Also by regulation, all PSHs have to submit a certified independent audit for each school year by November 1 next following the June 30 closure of the school year, N.J.S.A. 6:20-4.8(c).

DOE began its audit for the 1994-95 school year on September 6, 1995, and did not release its report on the audit until November 6, 1998. Robert C. Paznek was appointed as the Chief Financial Officer for Archway in early 1997, and on numerous occasions in early 1997 asked DOE to complete its audit and/or provide information as to its findings so that Archway could make any necessary adjustments for the 1997-98 school year budget. DOE provided no information and Archway's budgets for the 1997-98 and 1998-99 school years followed its previous format, which had been approved by its independent auditors. Thereafter, DOE's audits for 1997-98 and 1998-99 school years concluded that there were about 2.7 million in disallowed costs for these two school years. These disallowances are similar to those stated for the 1994-95 school year. After receiving the DOE's audit for 1994-95, Archway instituted a number of changes and reforms.

Archway argued that the DOE "has an overriding obligation to deal forthrightly and fairly" with the public. F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418, 426 (1985), and that equitable estoppel applies to "prevent fundamental injustice from

taking place." Essex County Improvement Auth. v. RAR Development Assocs., 323 N.J. Super. 505, 523 (Law Div. 1999). See, Middletown Policemen's Benevolent Assn. Local No. 124 v. Twp. Of Middletown, 162 N.J. 361, 367 (2000) (quoting Gruber v. Mayer and Twp. Comm. Of Twp. Of Raritan, 39 N.J. 1, 13 (1962). Archway stated that courts have applied equitable estoppel where the government's silence, omission, or delay precipitates the very conduct it seeks to penalize, Summer Cottages Assn. of Cape May v. City of Cape May, 19 N.J. 493, 503-504 (1955); In re Allstate Ins. Co., 179 N.J. Super. 581, 593 (App. Div. 1981); Anske v. Borough of Palisades Park, 139 N.J. Super. 342, 349-50 (App. Div. 1976); Watford v. Unsatisfied Claim and Judgment Fund, 113 N.J. Super. 495, 505 (App. Div. 1971).

Archway argued that DOE's silence and the delay in the issuance of its audit regarding the 1994-95 school year, placed it in an untenable position and that it had no choice but to continue its existing practices which had been approved by its independent auditor, KPMG Peat Marwick, and in the past by DOE.

Also, Archway argued that the dismissal of DOE's determination as to non-allowable costs for the 1997-98 and 1998-99 school years would not prejudice its essential government (audit) functions. See, Wood v. Borough of Wildwood Crest, 319 N.J. Super. 650, 656 (App. Div. 1999).

DOE argued that the doctrine of equitable estoppel is not applicable and that the DOE's audit findings for the 1997-98 and 1998-99 school years should not be dismissed. In O'Malley v. Dep't of Energy, 109 N.J. 309, 317 (1987), the court stated that "the essential elements of equitable estoppel are a knowing and intentional misrepresentation by the party sought to be estopped under circumstances in which the misrepresentation would probably induce reliance, and reliance by the party seeking estoppel to his or her detriment." The purpose of this doctrine is to prevent harm to a party who has changed his position to his detriment based upon a reasonable reliance on the conduct of another. Middletown Twp. Policemen's Benev. Ass'n Local No. 124 v. Twp. Of Middletown, 162 N.J. 361, 367 (2000); O'Malley, supra.

DOE argued that in this matter it did not make a voluntary and intentional misrepresentation nor were the circumstances such as to induce reliance on its silence or the substantial time that expired before the 1994-95 audit was released.

DOE argued that the audit was highly complex and entailed the review of a massive amount of information. In addition, DOE had to check in the allegation of illegal administration activities stated in an anonymous letter received by DOE. It represented that its staff worked in good faith to complete the audit as quickly as possible, and that since it had advised Archway that the audit was taking place, this should have put Archway on notice that there could be a problem. Also, DOE stated that because of the complexity of the audit, it would have been premature for it to provide Archway with any opinions or findings until the audit was completed. DOE argued it is Archway's responsibility under the regulations to fix its tuition rates based only on allowable costs.

Also, DOE argued that Archway has an affirmative and independent obligation to comply with the regulatory requirements and DOE was under no obligation to counsel Archway on how to conduct its internal operations until its auditing process was completed.

DOE noted that the second essential element of equitable estoppel requires a showing of reasonable reliance upon the conduct of the party against whom estoppel is sought. Summer Cottagers' Ass'n of Cape May, 19 N.J. at 504. DOE argued that Archway has failed to establish how its action during its audit procedure constituted a bases for reasonable reliance.

DOE argued that there is no basis for Archway's assertion that it was unable to take any corrective action for the 1997-98 and 1998-99 school years because of DOE's action. DOE argued that it was Archway's failure to comply with the regulations, and not any act or omission of the Department, that resulted in Archway's use of non-allowed expenses in determining its tuition charges for the disputed years.

DOE noted that equitable estoppel is applied to a governmental body only under extraordinary circumstances, and only where its application will not "prejudice essential governmental functions." Twp. Of Middletown, 162 N.J. at 367. DOE argued that Archway has failed to establish any exceptional circumstances. DOE argued that the cases cited by Archway are factually distinct from the present matter since in those cases there was a reasonable reliance by the party asserting the doctrine.

Also, the DOE argued that it should not be estopped from seeking to recover the portion of tuition payments allegedly wrongfully charged to the public school districts for the two years in issue. DOE has the obligation to enforce the school laws and thereby ensuring that Archway properly calculates the tuition to be charged and to prevent the misuse of public funds on expenses unrelated to student needs.

Having reviewed the briefs, I agree with the DOE's arguments and I **CONCLUDE** and **ORDER** that Archway's motion should be denied.

This order may be reviewed by **DEPARTMENT OF EDUCATION** either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

September 21, 2006
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ t/a

/cad

ATTACHMENT II

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
GRANTING MOTION FOR
PARTIAL SUMMARY DECISION
OAL DKT. NOS. EDU 6956-00, 8646-00,
4834-01, 4608-03, 4607-03 AND 427-06
AGENCY DKT. NOS. 271-7/00, 381-10/00,
227-8/99, 392-12/02, 216-5/03 and 57-2/06

ARCHWAY PROGRAMS, INC.,
Petitioner,
v.
NEW JERSEY DEPARTMENT
OF EDUCATION,
Respondent,
And
PEMBERTON TOWNSHIP
BOARD OF EDUCATION,
Petitioner,
v.
ARCHWAY PROGRAMS, INC.,
Respondent,
And

ARCHWAY PROGRAMS, INC.,

Petitioner,

v.

BOARD OF EDUCATION OF

EWING TOWNSHIP,

Respondent.

Steven D. Weinstein and **Anthony Merlino**, Esq., for Archway Programs, Inc. (Blank, Rome, Comisky and McCauley, attorneys)

Melanie Brooks and **Soakie Bae**, Deputy Attorney Generals for New Jersey Department of Education (Anne Milgram, Acting Attorney General of New Jersey, attorney)

Frederick W. Hardt, Esq., for Pemberton Township Board of Education

Jeffrey F. Belz, Esq., for Ewing Township Board of Education

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Archway is a non-profit corporation which provides educational and human service programs for individuals with special needs. This matter concerns only the programs for special education students at its PSH. These special education students have individual education plans (IEPs), prepared by their school districts, and are sent by their school districts to Archway for their education. During the periods in issue, more than 240 special education students from over 100 school districts were enrolled in Archway's PSH. The school district pays tuition for their student's education at Archway's PSH.

After the sixth day of the hearing, Archway submitted a motion to dismiss EDU 8646-00. This matter deals with the report of the fiscal monitoring review conducted by Wayne Thomas, the DOE's fiscal monitor at Archway. Archway argued that this report should be dismissed or in the alternative the portions of this report which duplicate what is contained in DOE's 1998-99 limited fiscal review (part of EDU 4607-03) should be dismissed.

In response, DOE stipulated that DOE's 1998-99 audit supersedes the Thomas report in its entirety and suggested that Archway should withdraw its appeal regarding the Thomas report (August 25, 2006 letter attached hereto).

During the next hearing date, September 6, 2006, the matter was discussed. I requested Archway to send me a letter withdrawing its request for a hearing as to the Thomas report based on the representation by Deputy Attorney General Brooks that DOE would not try to enforce the Thomas report.

On September 14, 2006, I received a letter from Steven D. Weinstein, Esq., on behalf of Archway, in which he questioned Brooks' representation in the August 25, 2006 letter that the parties agreed that the Thomas report was not an appealable determination. I **CONCLUDE** that it is too late to raise such an issue. Archway filed a petition to challenge the Thomas report. The Commissioner of Education determined that it was a contested matter and referred the matter to the Office of Administrative Law for a hearing. No motion to dismiss this matter as an unappealable determination was filed, and the parties engaged in extensive discovery and settlement negotiations as to all of the Archway cases. Specifically, there was a great deal of discussion as to whether the Thomas report duplicated, in part, the formal state audit for the 1998-99 school year. At no time during this discussion was I advised of any concern regarding the appropriateness of the case involving the Thomas report. Therefore, I **CONCLUDE** that the Thomas report is an appropriate contested case.

Since Brooks' letter also stated that DOE would no longer pursue the determinations in the Thomas report, Weinstein withdrew Archway's appeal as to the Thomas report (EDU 8696-00) (September 12, 2006 letter attached).

Therefore, I **ORDER** that EDU 8696-00, which is part of the consolidated Archway matter, be dismissed with prejudice.

This order may be reviewed by **DEPARTMENT OF EDUCATION** either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

September 21, 2006
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ t/a

/cad

JON S. CORZINE
Governor

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
25 MARKET STREET
PO Box 112
TRENTON, NJ 08625-0112

ZULIMA V. FARBER
Attorney General

RECEIVED
2006 SEP 20 P 2:49
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

August 25, 2006

Via Fax and Hand Delivery
Hon. Beatrice S. Tylutki, ALJ
Office of Administrative Law
9 Quakerbridge Plaza
P.O. Box 049
Trenton, New Jersey 08625-0049

Re: Archway Programs v. New Jersey Dept. of Education
OAL Docket Nos. EDU 4834-01, EDU 6956-00,
EDU 8646-00 & EDU 4607-04

Dear Judge Tylutki:

Please accept this letter on behalf of the Department of Education in response to Archway's motion to dismiss the report by fiscal monitor Wayne Thomas of Archway's allowable costs for the 1998-1999 fiscal year ("Thomas Report"). Archway's Petition of Appeal concerning the Thomas Report is currently docketed as EDU 8646-00; the Thomas Report is also in evidence as Exhibit R-6.

The Department agrees with Archway's assertion that the Thomas Report was not an appealable determination. Accordingly, the Department will stipulate that the Department's 1998-1999 Limited Fiscal Review Report (Exh. R-5) supersedes the Thomas Report in its entirety. Based upon the foregoing stipulation, it appears that Archway should withdraw its appeal of the Thomas Report.

Thank you for your attention to this matter. Please do not hesitate to contact me with any questions or concerns.

Respectfully submitted,

ZULIMA V. FARBER
ATTORNEY GENERAL OF NEW JERSEY

By: Melanie M. Brookes
Melanie M. Brookes
Deputy Attorney General

c: Steven D. Weinstein, Esq.
Frederick W. Hardt, Esq.
Jeffrey F. Belz, Esq.
(via fax and regular mail)

BLANK ROME LLP
COUNSELORS AT LAW

...EIVED

2006 SEP 14 A 10:39

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

Phone: (856) 779-3601
Fax: (856) 779-7647
Email: weinstein@blankrome.com

September 12, 2006

Honorable Beatrice Tylutki, T/A
State of New Jersey
Office of Administrative Law
Quakerbridge Plaza, Building 9
P.O. Box 049
Mercerville, NJ 08625-0049

Re: Archway Programs, Inc. v. DOE – OAL Docket # EDU 04834
Archway Programs, Inc. v. DOE – OAL Docket # EDU 04607-2003S
Archway Programs, Inc. v. DOE – OAL Docket # EDU 08646
Archway Programs, Inc. v. DOE – OAL Docket # EDU 06956
Pemberton Twp. BOE v. Archway Programs, Inc. – OAL Docket # 04608
Archway Programs v. Board of Education of Ewing Township
School District - OAL # 427-06/Agency Docket # 57-2/06

Dear Judge Tylutki:

This letter is in reference to Archway's motion to dismiss the Thomas Report case, Docket No. EDU 8646-00 from the above-entitled proceedings. The Department responded to the motion in its August 25, 2006 letter to Your Honor. I note for the record that the primary basis of the dismissal motion was not, as stated by the Department, that the Thomas Report was not an appealable determination. It was actually the Department's Answer setting forth it was not an appealable determination. Nevertheless, we did argue that the Thomas Report was duplicative of the Department's later 1998-1999 Limited Fiscal Review Report and that Archway should not be put to the task of a double determination of non-allowable expenses.

Archway has maintained throughout these proceedings that the Thomas Report was inappropriate as a non-allowable expense determination. The Department resisted this throughout the pre-trial and early trial proceedings. Given the Department's current position as expressed in its August 25, 2006 letter, it is appropriate for Your Honor to issue an Order dismissing the Thomas Report case. Given the fact that that Order will not be final until acted upon by the Commissioner, you may include in the Order, after the dismissal provision, that based upon the Department of Education's position of August 25, 2006 and the issuance of the Recommended Order of Dismissal, Archway has withdrawn its appeal of EDU 8646-00, and thus the case is dismissed.

Should you require anything further from us, please do not hesitate to let me know. Thank you.

Respectfully yours,

Steven D. Weinstein

SDW:bf

cc: Melanie Brookes, DAG
Frederick W. Hardt, Esq.
Jeffrey F. Belz, Esq.
Daniel Martin
Robert Poznek

ATTACHMENT III

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
9 Quakerbridge Plaza
P.O. Box 049
Trenton, New Jersey 08625
(609) 588-6573
FAX No. (609) 588-6574

BEATRICE S. TYLUTKI
ADMINISTRATIVE LAW JUDGE t/a

November 21, 2006

SEE ATTACHED
SERVICE LIST

LETTER ORDER

RE: *ARCHWAY PROGRAMS, INC. v. STATE OF NEW JERSEY DEPARTMENT OF EDUCATION*
OAL DKT. NOS. EDU 6956-00, 8446-00, 4834-01, 4607-01, 4607-03, 4608-03 AND 427-06

Dear Counsel:

Prior to the presentation of witnesses in this matter, Steven Weinstein, Esq., on behalf of Archway Programs, Inc. (Archway), moved to dismiss the determinations as to non-allowable costs contained in the audits of the Department of Education (DOE) for the 1997-98 and 1998-99 school years. After reviewing the briefs submitted by Archway and DOE, I denied the motion by order dated September 21, 2006 (copy of order attached).

Weinstein renewed the motion after both Archway and DOE had presented its witnesses. He argued that equitable estoppel should be applied as to DOE's audits for the 1997-98 and 1998-99 school years since the testimony of John M. Cuprzinski, the then financial monitor, who conducted the audit of Archway's records for the 1994-95 school year, shows that during his lengthy audit (from September 6, 1995 to November 6, 1998), Cuprzinski was aware that Archway continued to use the financial format it had used for the 1994-95 school year thereby continuing to reflect alleged wrong and inappropriate costs which resulted in higher tuition costs to the school districts. Weinstein emphasized that Robert C. Paznek, the new chief financial officer for Archway, appointed in 1997, had on numerous occasions asked for information regarding the 1994-95 audit and was provided with no information even though Cuprzinski had submitted to his supervisor a preliminary report around January 1997, and Cuprzinski was aware that Archway would probably had taken corrective action in its 1997-98 and 1998-99 school year

budgets if given information as to Cuprzinski's findings regarding the 1994-95 school year. Weinstein argued that there was no proof that Cuprzinski was told not to talk to Archway because of possible criminal charges, which were later filed against James I. Mason, the then chief executive officer for Archway. Once Archway received the 1994-95 audit, it fired Mason, reduced its expenses and reduced its tuition rate.

Weinstein argued that Archway had shown the essential elements for the application of equitable estoppel as set forth in O'Malley v. Dep't of Energy, 109 N.J. 309, 317 (1987). He argued that DOE's silence as the 1994-95 audit constitutes a knowing and intentional misrepresentation since it was aware that Archway would continue to use the financial format it had in place during the 1994-95 school year.

Deputy Attorney General Melanie M. Brooks, argued that it took Cuprzinski a long time to figure out what was wrong in the 1994-95 audit. During his testimony and in his certification of July 31, 2006 (attached to DOE's brief as to the previous motion), Cuprzinski stated that he was working on several other audits at the same time, that he had to review Archway's source documents which supported the budget items after he found errors, and that he did not fully recognize that a substantial amount of money was involved until he was summarizing his finding for the final financial audit report.

Brooks argued that equitable estoppel should not apply since there would be harm to the school districts which had sent students to Archway during the 1997-98 and 1998-99 school years, and had to pay a larger tuition rate for those school years based on Archway's inclusion of alleged non-allowable costs in its calculation of the tuition rate. Brooks stated that if this motion is granted, these school districts would have no legal recourse.

Having reviewed the oral arguments of the parties given on November 13, 2006, as well as the arguments presented with the first motion, I **CONCLUDE** that Archway's motion be denied. Although there was a substantial amount of testimony at the hearing regarding the 1994-5 audit, there was no proof of any voluntary and intentional misrepresentation by any DOE employee and nor were the circumstances such as to induce Archway's reliance on DOE's silence. Also there would be prejudice to DOE's essential governmental functions since the school districts sending students to Archway rely on DOE's review of Archway's tuition rates.

Therefore, I **ORDER** that Archway's motion be denied.

This order may be reviewed by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

Sincerely,

Beatrice S. Tylutki
Administrative Law Judge t/a

BST/cad

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BEATRICE S. TYLUTKI
ADMINISTRATIVE LAW JUDGE t/a

September 21, 2006

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Jeffrey F. Belz, Esq.
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RE *ARCHWAY PROGRAMS, INC. v. BOARD OF EDUCATION*
OAL DKT. NOS. EDU 6596-00, 8646-00, 4834-01, 4607-03, 4608-03 and 427-06

Dear Counsel:

Enclosed please find a copy of the Order issued in regards to the above captioned matters.

Sincerely,

Beatrice S. Tylutki

Beatrice S. Tylutki
Administrative Law Judge

BST/cad
Cc: Sandra Hlatky, Deputy Clerk, OAL-T

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
DENIAL OF MOTION FOR
PARTIAL SUMMARY DECISION
OAL DKT. NOS. EDU 6956-00, 8646-00,
4834-01, 4608-03, 4607-03 AND 427-06
AGENCY DKT. NOS. 271-7/00, 381-10/00,
227-8/99, 392-12/02, 216-5/03 and 57-2/06

ARCHWAY PROGRAMS, INC.,
Petitioner,
v.
NEW JERSEY DEPARTMENT
OF EDUCATION,
Respondent,
And
PEMBERTON TOWNSHIP
BOARD OF EDUCATION,
Petitioner,
v.
ARCHWAY PROGRAMS, INC.,
Respondent,
And

ARCHWAY PROGRAMS, INC.,

Petitioner,

v.

BOARD OF EDUCATION OF EWING TOWNSHIP,

Respondent.

Steven D. Weinstein and **Anthony Merlino**, Esq., for Archway Programs, Inc. (Blank, Rome, Comisky and McCauley, attorneys)

Melanie Brooks and **Soakie Bae**, Deputy Attorney Generals for New Jersey Department of Education (Anne Milgram, Acting Attorney General of New Jersey, attorney)

Frederick W. Hardt, Esq., for Pemberton Township Board of Education

Jeffrey F. Belz, Esq., for Ewing Township Board of Education

BEFORE **BEATRICE S. TYLUTKI**, ALJ t/a:

This matter concerns the four Archway Programs, Inc. v. New Jersey Department of Education cases (EDU 6956-00, 8646-00, 4834-01 and 4607-03), the Pemberton Township Board of Education v. Archway Programs, Inc. case (EDU 4608-03) and the Archway Programs, Inc. v. Ewing Township Board of Education case (EDU 427-06). The cases were transmitted to the Office of Administrative Law for disposition pursuant to N.J.S.A. 52:14B-1 through -15 and N.J.S.A. 52:14F-1 through -13. All these cases deal with the state audits and report regarding the accounts of Archway Program, Inc. (Archway) for its private school for the handicapped (PSH), and have been consolidated.

Briefly, the consolidated case involves:

EDU 6956-00 – the disallowance by the New Jersey Department of Education (DOE) of the 3% staff salary increase given by Archway as shown in the 1999-2000 school year budget.

EDU 8646-00 – Archway's objections to the non-allowable costs set forth in DOE's fiscal monitor's report for the 1998-99 school year (Thomas report).

EDU 4834-01 – Archway's objections to the non-allowable costs set forth in DOE's audit for the 1994-95 school year.

EDU 4607-03 – Archway's objections to the non-allowable costs set forth in DOE's audits for the 1995-96, 1996-97, 1997-98 and 1998-99 school years.

EDU 4608-03 – Pemberton Township Board of Education (Pemberton) seeks a set-off against its tuition payments to Archway based on the DOE's audits.

EDU 427-03 – Archway sues for tuition payments from Ewing Township Board of Education (Ewing), and Ewing alleges it is entitled to a set-off based on the DOE's audits.

Archway is a non-profit corporation which provides educational and human service programs for individuals with special needs. This matter concerns only the programs for special education students at its PSH. These special education students have individual education plans (IEPs) prepared by their school districts and are sent by their school districts to Archway for their education. During the periods in issue, more than 240 special education students from over 100 school districts were enrolled in Archway's PSH. The school district pays tuition for their student's education at Archway's PSH.

The first day of hearing in the consolidated case took place on July 14, 2006. Steven D. Weinstein, Esq., appearing on behalf of Archway, stated during his opening statement, that he would be presenting witnesses as to the DOE's audits for the 1994-95, 1995-96 and 1996-97 school years and the disallowed staff salary increases given by Archway in the 1999-2000 school year. Weinstein stated that he would then move to dismiss the determinations of non-allowable costs contained in DOE's audits for the 1997-98 and 1998-99 school years. This would cause a cancellation of some of the hearing dates since the other parties would need time to prepare their responses to this motion and I would have to render a decision before we could continue with the hearing. Since there was a lapse of time between the first and second day of the

hearing, I requested the parties to present briefs as to the DOE's audits for the 1997-98 and 1998-99 school years after the first day of the hearing.

I received Archway's brief on July 24, 2006, and DOE's brief on August 1, 2006. Neither Pemberton or Ewing submitted a brief. At the hearing on August 11, 2006, I orally told the parties that I would deny Archway's motion and would issue this written order thereafter.

In its brief, Archway stated that the DOE's regulations set forth a vague definition of "allowable costs," N.J.A.C. 6:20-4.1(a)1, which is used to determine the "certified actual cost per pupil," N.J.A.C. 6:20-4.8, 6:20-4.1(a), which then is used to determine the tuition payments due from the local school districts, N.J.A.C. 6:20-4.8. Also by regulation, all PSHs have to submit a certified independent audit for each school year by November 1 next following the June 30 closure of the school year, N.J.S.A. 6:20-4.8(c).

DOE began its audit for the 1994-95 school year on September 6, 1995, and did not release its report on the audit until November 6, 1998. Robert C. Paznek was appointed as the Chief Financial Officer for Archway in early 1997, and on numerous occasions in early 1997 asked DOE to complete its audit and/or provide information as to its findings so that Archway could make any necessary adjustments for the 1997-98 school year budget. DOE provided no information and Archway's budgets for the 1997-98 and 1998-99 school years followed its previous format, which had been approved by its independent auditors. Thereafter, DOE's audits for 1997-98 and 1998-99 school years concluded that there were about 2.7 million in disallowed costs for these two school years. These disallowances are similar to those stated for the 1994-95 school year. After receiving the DOE's audit for 1994-95, Archway instituted a number of changes and reforms.

Archway argued that the DOE "has an overriding obligation to deal forthrightly and fairly" with the public. F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418, 426 (1985), and that equitable estoppel applies to "prevent fundamental injustice from

taking place." Essex County Improvement Auth. v. RAR Development Assocs., 323 N.J. Super. 505, 523 (Law Div. 1999). See, Middletown Policemen's Benevolent Assn. Local No. 124 v. Twp. Of Middletown, 162 N.J. 361, 367 (2000) (quoting Gruber v. Mayer and Twp. Comm. Of Twp. Of Raritan, 39 N.J. 1, 13 (1962). Archway stated that courts have applied equitable estoppel where the government's silence, omission, or delay precipitates the very conduct it seeks to penalize, Summer Cottages Assn. of Cape May v. City of Cape May, 19 N.J. 493, 503-504 (1955); In re Allstate Ins. Co., 179 N.J. Super. 581, 593 (App. Div. 1981); Anske v. Borough of Palisades Park, 139 N.J. Super. 342, 349-50 (App. Div. 1976); Watford v. Unsatisfied Claim and Judgment Fund, 113 N.J. Super. 495, 505 (App. Div. 1971).

Archway argued that DOE's silence and the delay in the issuance of its audit regarding the 1994-95 school year, placed it in an untenable position and that it had no choice but to continue its existing practices which had been approved by its independent auditor, KPMG Peat Marwick, and in the past by DOE.

Also, Archway argued that the dismissal of DOE's determination as to non-allowable costs for the 1997-98 and 1998-99 school years would not prejudice its essential government (audit) functions. See, Wood v. Borough of Wildwood Crest, 319 N.J. Super. 650, 656 (App. Div. 1999).

DOE argued that the doctrine of equitable estoppel is not applicable and that the DOE's audit findings for the 1997-98 and 1998-99 school years should not be dismissed. In O'Malley v. Dep't of Energy, 109 N.J. 309, 317 (1987), the court stated that "the essential elements of equitable estoppel are a knowing and intentional misrepresentation by the party sought to be estopped under circumstances in which the misrepresentation would probably induce reliance, and reliance by the party seeking estoppel to his or her detriment." The purpose of this doctrine is to prevent harm to a party who has changed his position to his detriment based upon a reasonable reliance on the conduct of another. Middletown Twp. Policemen's Benev. Ass'n Local No. 124 v. Twp. Of Middletown, 162 N.J. 361, 367 (2000); O'Malley, supra.

DOE argued that in this matter it did not make a voluntary and intentional misrepresentation nor were the circumstances such as to induce reliance on its silence or the substantial time that expired before the 1994-95 audit was released.

DOE argued that the audit was highly complex and entailed the review of a massive amount of information. In addition, DOE had to check in the allegation of illegal administration activities stated in an anonymous letter received by DOE. It represented that its staff worked in good faith to complete the audit as quickly as possible, and that since it had advised Archway that the audit was taking place, this should have put Archway on notice that there could be a problem. Also, DOE stated that because of the complexity of the audit, it would have been premature for it to provide Archway with any opinions or findings until the audit was completed. DOE argued it is Archway's responsibility under the regulations to fix its tuition rates based only on allowable costs.

Also, DOE argued that Archway has an affirmative and independent obligation to comply with the regulatory requirements and DOE was under no obligation to counsel Archway on how to conduct its internal operations until its auditing process was completed.

DOE noted that the second essential element of equitable estoppel requires a showing of reasonable reliance upon the conduct of the party against whom estoppel is sought. Summer Cottagers' Ass'n of Cape May, 19 N.J. at 504. DOE argued that Archway has failed to establish how its action during its audit procedure constituted a bases for reasonable reliance.

DOE argued that there is no basis for Archway's assertion that it was unable to take any corrective action for the 1997-98 and 1998-99 school years because of DOE's action. DOE argued that it was Archway's failure to comply with the regulations, and not any act or omission of the Department, that resulted in Archway's use of non-allowed expenses in determining its tuition charges for the disputed years.

DOE noted that equitable estoppel is applied to a governmental body only under extraordinary circumstances, and only where its application will not "prejudice essential governmental functions." Twp. Of Middletown, 162 N.J. at 367. DOE argued that Archway has failed to establish any exceptional circumstances. DOE argued that the cases cited by Archway are factually distinct from the present matter since in those cases there was a reasonable reliance by the party asserting the doctrine.

Also, the DOE argued that it should not be estopped from seeking to recover the portion of tuition payments allegedly wrongfully charged to the public school districts for the two years in issue. DOE has the obligation to enforce the school laws and thereby ensuring that Archway properly calculates the tuition to be charged and to prevent the misuse of public funds on expenses unrelated to student needs.

Having reviewed the briefs, I agree with the DOE's arguments and I **CONCLUDE** and **ORDER** that Archway's motion should be denied.

This order may be reviewed by **DEPARTMENT OF EDUCATION** either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

September 21, 2006
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ t/a

/cad

ATTACHMENT IV

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

GRANTING MOTION FOR

PARTIAL SUMMARY DECISION

OAL DKT. NOS. EDU 6956-00, 8646-00, 4834-01, 4608-03, 4607-03 and 427-06

AGENCY DKT. NOS. 271-7/00, 381-10/00, 227-8/99, 392-12/02, 216-5/03 and 57-2/06

ARCHWAY PROGRAMS, INC.,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION,

Respondent,

and

PEMBERTON TOWNSHIP BOARD OF EDUCATION,

Petitioner,

v.

ARCHWAY PROGRAMS, INC.,

Respondent,

and

ARCHWAY PROGRAMS, INC.,

Petitioner,

v.

BOARD OF EDUCATION OF EWING TOWNSHIP,

Respondent.

Steven D. Weinstein and **Anthony Merlino**, Esqs., for Archway Programs, Inc. (Blank, Rome, Comisky and McCauley, attorneys)

Melanie M. Brooks and **Soakie Bae**, Deputies Attorney General for New Jersey Department of Education (Stuart Rabner, Attorney General of New Jersey, attorney)

Frederick W. Hardt, Esq., for Pemberton Township Board of Education

Jeffrey F. Belz, Esq., for Ewing Township Board of Education

BEFORE **BEATRICE S. TYLUTKI**, ALJ T/A:

This matter concerns the four Archway Programs, Inc. v. New Jersey Department of Education cases (EDU 6956-00, 8646-00, 4834-01, and 4607-03), the Pemberton Township Board of Education v. Archway Programs, Inc. case (EDU 4608-03) and the Archway Programs, Inc. v. Ewing Township Board of Education case (EDU 427-06). These cases were transmitted to the Office of Administrative Law for disposition pursuant to N.J.S.A. 52:14B-1 through -15 and N.J.S.A. 52:14F-1 through -13. All these cases deal with the audits and report of the Department of Education (DOE) regarding the accounts of Archway Program, Inc. (Archway) for its private school for the handicapped (PSH), and have been consolidated.

Briefly, the consolidated case involves:

EDU-6956-00 – the disallowance by the DOE of the 3% staff salary increase given by Archway as shown in the 1999-2000 school budget.

EDU 8646-00 – Archway's objections to the non-allowable costs set forth in DOE's fiscal monitor's report for the 1998-99 school year (Thomas report).

EDU 4834-01 – Archway's objections to the non-allowable costs set forth in DOE's audit for the 1994-95 school year.

EDU 4607-03 – Archway's objections to the non-allowable costs set forth in DOE's audits for the 1995-96, 1996-97, 1997-98 and 1998-99 school years.

EDU 4608-06 – Pemberton Township Board Education (Pemberton) seeks a set-off against its tuition payments to Archway based on the DOE's audits.

EDU 427-03 – Archway sues for tuition payments from Ewing Township Board of Education (Ewing), and Ewing alleges it is entitled to a set-off based on the DOE's audits.

Archway is a non-profit corporation which provides educational and human service programs for individuals with special needs. This matter concerns only the programs for special education students at its PSH. These special education students have individual education plans (IEPs) prepared by their school districts and are sent by their school districts to Archway for their education. During the periods in issue, more than 240 special education students from over 100 school districts were enrolled in Archway's PSH. The school district pays tuition for their student's education at Archway's PSH.

During the tenth day of hearing in the consolidated case (November 13, 2006), Steven D. Weinstein, Esq., appearing on behalf of Archway, orally presented a motion regarding EDU 6956-00, which deals with the staff salary increase given by Archway during the 1999-2000 school year. He argued that DOE incorrectly determined that the salary increases were not allowable costs for the determination of the tuition to be charged to the participating school districts (Tr. 4/13/06, p.65-70).

Deputy Attorney General Melanie M. Brooks, on behalf of DOE, submitted a written brief and thereafter Weinstein submitted a written response.

FACTS

The pertinent facts as to this motion are not in issue. In November 1998, the DOE released an audit of Archway's PSH for fiscal year 1994-95, and determined that Archway had included 2.5 million dollars in non-allowable costs (later reduced to 2.3 million) in its calculation of the tuition rates charged at its PSH (R-1, A-4). DOE ordered that the tuition overcharges be refunded to the participating school districts, restricted Archway's right to accept new students, and started to take administrative action to revoke Archway's license as a state-approved PSH and to close Archway's PSH at the end of the 1998-99 school year.

Archway's Board of Trustees dismissed Archway's CEO, Dr. James Mason. He was replaced by Dr. Robert Scanlon, a member of the Archway Board of Trustees and the former Pennsylvania Commissioner of Education. Scanlon and the Board of Trustees reduced the budget and implemented other fiscal reforms. They negotiated an arrangement with DOE which allowed Archway's PSH program to continue and DOE appointed Wayne Thomas to act as Archway's fiscal monitor.

In light of its fiscal problems and the adverse publicity, Archway was concerned about future enrollment and the possibility that some school districts would send their students elsewhere. Archway was also aware of its staff's concerns about their job security. Archway had in the past experienced a high turnover of staff since its salary packages were not as good as that paid by the public schools. In order to encourage its staff to remain with Archway, it included a 3% salary increase for all staff members in its 1999-2000 school year budget, which was adopted on May 25, 1999 (A-S5).

Since Archway's income was based largely on tuition, there was an uncertainty as to whether Archway would have sufficient revenue to pay the salary increase. Therefore, it was decided not to start paying the salary increase at the beginning of the 1999-2000 school year (A-S7). In its letters of employment given to its staff, Archway did not included the 3% pay increase (R-10, R-11).

By early 2000, enrollment had stabilized and Scanlon implemented the 3% salary increase. The staff received the increment beginning in their February 18, 2000 paychecks (A- S7). The salary increase was paid to the staff over a six-month period.

On February 18, 2000, Douglas Otto, Archway's Executive Director for Educational Services, sent a letter to the staff informing them of the pay increase (A – S9, R-13). The letter describes the increase as a "one-time Professional Retention Payment" that was being given because of the "surplus in education fund during the 1999-2000 academic year" (Id.). Scanlon gave credible testimony that he did not see this letter before it was sent to the staff, and that the letter incorrectly stated that the salary increase was due to a surplus. He stated that the staff was aware that the salary increase was in the budget. Later, Scanlon discussed the letter with Otto who stated it was intended to boost the staff's morale and was not an official statement of Archway's reason for and the source of the salary increase. It was presented that the phrase "professional retention payment" was used because Archway's internal policy did not provide for mid-year raises.

There was testimony at the hearing that not all staff members got a 3% salary increase (Tr. 11/3/06, p. 154, lines 9-18). Archway noted in its brief, that the DOE only showed at the hearing, that one employee received a raise that appears to exceed 3% of his salary.

Archway did not have a salary guide in place for the 1999-2000 school year, and salaries were determined on an individualized basis (Tr. 8/14/06, p. 193, lines 2-12). Although there was testimony that Archway intended the 3% increase to continue in the next school year, Archway adopted a salary guide for its staff for the 2000-01 school year, which was significantly different from how salaries were previously decided. (Tr. 8/14/06, p. 193 – 5).

In March 2000, Thomas informed James Verner, Supervising Auditor for the DOE of the initiation of the salary increase. By letter dated March 14, 2000, Verner informed Robert Poznek, Archway's Chief Financial Officer, that the salary increase

might not be an allowable cost for tuition calculations (R-26). Poznek provided information about the salary increase to Verner (A-S7, R-13), and later appealed the decision to disallow the salary increase to Michael Azzara, Assistant Commissioner of DOE (R-16).

Azzara denied Archway's appeal and thereafter Archway asked for an administrative hearing (EDU 6956-00).

APPLICABLE REGULATIONS

The pertinent regulations that governed tuition rates for PSHs at the time in issue provided that:

> N.J.A.C. 6:20-4.4[1] deals with non-allowable costs and subsection (a) 48 includes [c]osts of a salary increase or merit pay award when such amount(s) were not in accordance with N.J.A.C. 6:20-4.3 (a) 13 or 14 or the merit pay award(s) are not consistent with the plan(s) on file with the Commissioner;"
>
> N.J.A.C. 6:20-4.3(a)[1] deals with standards for bookkeeping and accounting systems of PSHs and includes
>
> ....
>
> "13. An approved private school which incurs contingent pay increases shall have in place an employee contract which contains the criteria by which the increase shall be paid...
>
> 14. An approved private school for the handicapped which incurs merit pay increases shall have adopted a formal board policy which outlines the criteria of the merit pay plan(s)..."
>
> N.J.A.C. 6:20-4.4[1] deals with non-allowable costs and subsection (a) 35 includes "[a] in payment or benefit to an employee in lieu of salary (bonus);"

[1] The text of the regulations cited herein were previously codified at N.J.A.C. 6:20-4.1 et seq., and are contained in exhibit R-8.

ARGUMENTS OF THE PARTIES

Weinstein argued that the DOE's decision as to the salary increase was a complete misapplication of its own regulations and a bureaucratic insensitivity to the unique circumstances that influenced when and how Archway paid the salary increase. He noted that the DOE's determination was based on N.J.A.C. 6:20-4.4(a) 35, which prohibits "payment or benefit to an employee in lieu of a salary (bonus)"; and N.J.A.C. 6:20-4.3(a) 13 and 14, which set forth the requirements for merit and contingent pay increases.

Weinstein argued that the testimony of Scanlon clearly shows that the salary increase was not a bonus but an increase of the staff's salary which was a budgeted item and payable as such, and was not paid for from surplus. He noted that Verner stated that the DOE's regulations did not prohibit mid-year increases provided that the increases conformed to N.J.A.C. 6:20-4.3(a) 13 and 14, contingent and merit pay increases. Weinstein argued that Archway's delay in paying the salary increase did not require it to satisfy the merit and contingency requirements set forth in N.J.A.C. 6:20-4.3(a) 13 and 14, and that these requirements are not applicable in this matter. Weinstein argued that the delayed start of the salary increase was a prudent and sound financial management decision in light of the uncertainty as to Archway's future and the enrollment of students in its PSH. He stated that bonuses are payments in excess of what is normally received and given for superior achievement or as a share of profits, Y.A.L.E. School, Inc. v. State of N.J. Dep't of Educ., 92 N.J.A.R. 2d (EDU) 571, 1992 WL 355927. He stated that the facts in the matter clearly show that the increases were not bonuses since they were paid to all staff members and the staff did not have to do anything special to receive them, nor were they given due to surplus revenue generated during the first part of the school year.

Weinstein argued that Otto's February 18, 2000 letter incorrectly described the salary increase and that Scanlon presented convincing testimony that the salary increase was in the budget for the school year and that the delay in payment was due

solely to a fear that there might be a drastic reduction in enrollment and therefore an inability to pay for the salary increase.

Brooks argued that the DOE properly determined that the 2000 salary increase was not an acceptable cost for tuition calculations because these payments did not conform with the regulatory requirements for allowable salary increases. She argued that since the salary increases were not part of the staff's regular 1999-2000 salary at the beginning of the school year, the payments did not constitute a salary increase in conformity with N.J.A.C. 6:20-4.4(a)48; 6:20-4.3 (a) 13 or 14. She stated that Archway did not dispute that the increases were not merit-based payments as set forth in N.J.A.C. 6:29-4.3(a)14 nor were the increases based on a contingency as defined in N.J.A.C. 6:20-9.3(a) 13. She argued that since from September through December of 1999 Archway's staff did not receive any portion of the increase, the increase cannot be properly considered to be part of their 1999-2000 salaries. She argued that the salary increase should be considered to be a bonus which is a non-allowable cost pursuant to N.J.A.C. 6:20-4.4(a)35.

Brooks argued that the courts have distinguished between regular salary payments and mid-year salary increases made by a PSH without any contractual or other obligation to its employees, Y.A.L.E School, supra.; Search Day Program, Inc. v. New Jersey State Dep't of Educ., EDU 2446-00, Initial Decision (Sept. 30, 2003), adopted, Commr. (Nov. 12, 2003) <http://lawlibraryrutgers.edu/oal/search.html>.

Brooks noted that in the Search Day case, the ALJ expressly rejected the PSH's argument that the across-the-board, lump-sum payments to its employees were retroactive salary increases rather than bonus payments made in lieu of salary. The ALJ noted the DOE's detailed regulatory scheme for PSH tuition rates, and that if at the end of the school year there exists a surplus of income, it had to be refunded to the sending school districts and cannot be used to grant a retroactive salary increase to the staff, supra. In the Y.A.L.E. School case, payments that had been made at the discretion of the PSH, and not out of any contractual obligation to its employees, were properly characterized as non-allowable bonuses despite the fact that the PSH had

expressed to its employees in the fall of that school year that they would receive these payments in the future, supra. Brooks argued that the effect of reversing the DOE's decision in this matter would allow any PSH to use unexpended tuition payments by distributing the funds to its employees mid-year, under the guise of a salary increase, thereby preventing the return of this money to the sending districts; a result that the regulations were designed to prevent.

In addition, Brooks argued that there is proof that not all staff members got the 3% increase and that Archway did not show that the budgeted three percent increase was carried over into the employees' salaries for the following school year.

CONCLUSION

I **FIND** that Scanlon presented persuasive testimony that Archway's Board of Trustees adopted a budget for the 1999-2000 school years which contained allocated money for the 3% salary increase for Archway's staff for the school year. Archway's intent as to the salary increment would not have been an issue if it started to pay the increased salaries starting at the beginning of the school year. However, by delaying the initiation of the payment of the increases, an issue has been raised as to whether the additional salary payments are bonuses and therefore not allowable costs for tuition calculations.

Having reviewed the arguments of the parties, I agree with Weinstein's arguments and I **CONCLUDE** that the delay in the initiation of the payment of the salary increase did not convert it into a bonus. I **CONCLUDE** that the facts in this matter are different from those in the Y.A.L.E. School and Search Day cases, and that the salary increase in this case was not paid from surplus income but from anticipated revenue provided that there was no substantial reduction in the number of students sent to Archway's PSH. The fact that one staff member may have received more then a 3% salary increase and the fact that Archway completely changed its salary structure for the following school year is insufficient to convert the 3% salary increase into a bonus. Therefore, I **CONCLUDE** and **ORDER** that Archway's motion be granted, and that the

3% salary increase during the 1999-2000 school year be considered to be an allowable cost for the computation of tuition.

This order may be reviewed by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

May 2, 2007
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Mh/mg/mamf

ATTACHMENT V

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

GRANTING PARTIAL SUMMARY DECISION

OAL DKT. NOS. EDU 6956-00, 8646-00, 4834-01, 4608-03, 4607-03 and 427-06
AGENCY DKT. NOS. 271-7/00, 381-10/00, 227-8/99, 392-12/02, 216-5/03 and 57-2/06

ARCHWAY PROGRAMS, INC.,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION,

Respondent,

and

PEMBERTON TOWNSHIP BOARD OF EDUCATION,

Petitioner,

v.

ARCHWAY PROGRAMS, INC.,

Respondent,

and

ARCHWAY PROGRAMS, INC.,

Petitioner,

v.

BOARD OF EDUCATION OF EWING TOWNSHIP,

Respondent.

Steven D. Weinstein and **Anthony Merlino**, Esqs., for Archway Programs, Inc. (Blank, Rome, Comisky and McCauley, attorneys)

Soakie Bae, Deputy Attorney General for New Jersey Department of Education (Anne M. Milgram, Attorney General of New Jersey, attorney)

Frederick W. Hardt, Esq., for Pemberton Township Board of Education

Jeffrey F. Belz, Esq., for Ewing Township Board of Education

BEFORE **BEATRICE S. TYLUTKI**, ALJ T/A:

This matter concerns the four Archway Programs, Inc. v. New Jersey Department of Education cases (EDU 6956-00, 8646-00, 4834-01, and 4607-03), the Pemberton Township Board of Education v. Archway Programs, Inc. case (EDU 4608-03) and the Archway Programs, Inc. v. Ewing Township Board of Education case (EDU 427-06). These cases were transmitted to the Office of Administrative Law for disposition pursuant to N.J.S.A. 52:14B-1 through -15 and N.J.S.A. 52:14F-1 through -13. All these cases deal with the audits and report of the Department of Education (DOE) regarding the accounts of Archway Program, Inc. (Archway) for its private school for the handicapped (PSH), and have been consolidated.

Briefly, the consolidated case involves:

EDU-6956-00 – the disallowance by the DOE of the 3% staff salary increase given by Archway as shown in the 1999-2000 school budget.

EDU 8646-00 – Archway's objections to the non-allowable costs set forth in DOE's fiscal monitor's report for the 1998-99 school year (Thomas report).

EDU 4834-01 – Archway's objections to the non-allowable costs set forth in DOE's audit for the 1994-95 school year.

EDU 4607-03 – Archway's objections to the non-allowable costs set forth in DOE's audits for the 1995-96, 1996-97, 1997-98 and 1998-99 school years.

EDU 4608-06 – Pemberton Township Board Education (Pemberton) seeks a set-off against its tuition payments to Archway based on the DOE's audits.

EDU 427-03 – Archway sues for tuition payments from Ewing Township Board of Education (Ewing), and Ewing alleges it is entitled to a set-off based on the DOE's audits.

Archway is a non-profit corporation which provides educational and human service programs for individuals with special needs. This matter concerns only the programs for special education students at its Private Schools for the Handicapped (PSH). These special education students have individual education plans prepared by their school districts and are sent by their school districts to Archway for their education. During the periods in issue, more than 240 special education students from over 100 school districts were enrolled in Archway's PSH. The school district pays tuition for their student's education at Archway's PSH.

After Archway and DOE had presented their witnesses at the hearing, Steven D. Weinstein, Esq., appearing on behalf of Archway, presented a signed stipulation which settled the matter (EDU 427-03) between Archway and Ewing, which was received by my office on July 30, 2007, and which is attached hereto. Neither DOE or Pemberton have presented any objection to said settlement.

I have reviewed the record and terms of this settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.
2. The settlement fully disposes of all issues in controversy between Archway and Ewing in this matter identified as EDU 427-03.

I **CONCLUDE** that EDU 427-03, which is part of the consolidated Archway matter, is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that the proceedings as to EDU 427-03 be concluded.

This order may be reviewed by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** either upon interlocutory review pursuant to N.J.A.C. 1:1-19.10 or at the end of the entire contested case pursuant to N.J.A.C. 1:1-18.6.

August 13, 2007

August 13, 2007
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ T/A

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

BLANK ROME LLP
A Pennsylvania LLP
210 Lake Drive E., Suite 200
Cherry Hill, New Jersey 08002
(856) 779-3600
Attorneys for Petitioner, Archway Programs, Inc.

Archway Programs, Inc.,	:State of New Jersey :Office of Administrative Law
Petitioner,	:
v.	:OAL Docket # EDU-4834-01 (**94-95**) :OAL Docket # EDU-8646-00 (**Thomas Report**)
New Jersey Department of Education,	:OAL Docket # EDU-4607-03 (**96-99**) :OAL Docket # EDU-6956-00 (**Salary Case**)
Respondent.	:
Pemberton Township Board of Education,	:
Petitioner,	:OAL Docket # EDU 4608-03
v.	:
Archway Programs, Inc.	:
Respondent.	:
Archway Programs, Inc.	:
Petitioner,	:OAL Docket #EDU 0427-06
v.	:
Ewing Township Board of Education,	: **ADMINISTRATIVE ACTION**
Respondent.	:

STIPULATION AND CONSENT ORDER BETWEEN ARCHWAY PROGRAMS, INC., AND THE EWING TOWNSHIP BOARD OF EDUCATION

It is hereby **STIPULATED** and **AGREED** by Petitioner, Archway Programs, Inc. (hereinafter "Archway"), by and through its counsel, Steven D. Weinstein, Esq., and

Respondent, Ewing Township Board of Education (hereinafter "Ewing"), by and through its counsel, Jeffrey F. Belz, Esq., as follows:

1. The Consolidated Docket Numbers identified above involving matters between Archway and the New Jersey Department of Education ("DOE"), all involve appeals of DOE determinations that Archway included non-allowable costs in tuition rates charged to sending school districts ("Sending Districts"). At the conclusion of the Archway-DOE cases, after all appeals have been exhausted, there will be final amounts determined for each year of any amounts Archway owes to Sending Districts. From those final amounts, the DOE will determine the *pro rata* amounts, if any, due to each Sending District for each year in question.

2. Archway's Complaint against Ewing in the matter identified as OAL Docket # EDU 427-06 shall be resolved as follows:

(a) Ewing shall owe Archway $20,546.41 for unpaid tuition for the 2003-04 school year, plus accrued interest at the rate of one percent (1%) per month as provided in then *N.J.A.C. 6A:23-4.2(h)(2)* ("Final Amount Due From Ewing").

(b) The Final Amount Due from Ewing shall be offset against any *pro rata* refunds determined to be due to Ewing by the DOE pursuant to ¶1 hereof and the party deemed to owe monies after the offset shall be responsible to make payment to the other.

3. Any and all litigation by and between Archway and Ewing shall be and is hereby **COMPLETELY AND FINALLY RESOLVED** by this voluntary settlement and the entry of this Stipulation and Consent Order and any further Decision and Order implementing the terms hereof.

DATED: August 13, 2007

HON. BEATRICE S. TYLUTKI, A.L.J., t/a

CONSENT TO AS TO FORM AND SUBSTANCE:

ARCHWAY PROGRAMS, INC.

By: _____
Steven D. Weinstein

EWING TOWNSHIP BOARD OF EDUCATION

By: _____
Jeffrey F. Belz, Esq.

ATTACHMENT VI

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

GRANTING PARTIAL SUMMARY

DECISION

OAL DKT. NOS. EDU 6956-00, 8646-00,
4834-01, 4608-03, 4607-03 and 427-06
AGENCY DKT. NOS. 271-7/00, 381-10/00,
227-8/99, 392-12/02, 216-5/03 and 57-2/06

ARCHWAY PROGRAMS, INC.,

Petitioner,

v.

NEW JERSEY DEPARTMENT
OF EDUCATION,

Respondent,

and

PEMBERTON TOWNSHIP BOARD
OF EDUCATION,

Petitioner,

v.

ARCHWAY PROGRAMS, INC.,

Respondent,

and

ARCHWAY PROGRAMS, INC.,

Petitioner,

v.

BOARD OF EDUCATION OF EWING
TOWNSHIP,

Respondent.

Steven D. Weinstein and **Anthony Merlino**, Esqs., for Archway Programs, Inc. (Blank, Rome, Comisky and McCauley, attorneys)

Soakie Bae, Deputy Attorney General for New Jersey Department of Education (Anne M. Milgram, Attorney General of New Jersey, attorney)

Frederick W. Hardt, Esq., for Pemberton Township Board of Education

Jeffrey F. Belz, Esq., for Ewing Township Board of Education

BEFORE **BEATRICE S. TYLUTKI**, ALJ T/A:

This matter concerns the four Archway Programs, Inc. v. New Jersey Department of Education cases (EDU 6956-00, 8646-00, 4834-01, and 4607-03), the Pemberton Township Board of Education v. Archway Programs, Inc. case (EDU 4608-03) and the Archway Programs, Inc. v. Ewing Township Board of Education case (EDU 427-06). These cases were transmitted to the Office of Administrative Law for disposition pursuant to N.J.S.A. 52:14B-1 through -15 and N.J.S.A. 52:14F-1 through -13. All these cases deal with the audits and report of the Department of Education (DOE) regarding the accounts of Archway Program, Inc. (Archway) for its private school for the handicapped (PSH), and have been consolidated.

Briefly, the consolidated case involves:

EDU-6956-00 – the disallowance by the DOE of the 3% staff salary increase given by Archway as shown in the 1999-2000 school budget.

EDU 8646-00 – Archway's objections to the non-allowable costs set forth in DOE's fiscal monitor's report for the 1998-99 school year (Thomas report).

EDU 4834-01 – Archway's objections to the non-allowable costs set forth in DOE's audit for the 1994-95 school year.

EDU 4607-03 – Archway's objections to the non-allowable costs set forth in DOE's audits for the 1995-96, 1996-97, 1997-98 and 1998-99 school years.

EDU 4608-06 – Pemberton Township Board Education (Pemberton) seeks a set-off against its tuition payments to Archway based on the DOE's audits.

EDU 427-03 – Archway sues for tuition payments from Ewing Township Board of Education (Ewing), and Ewing alleges it is entitled to a set-off based on the DOE's audits.

Archway is a non-profit corporation which provides educational and human service programs for individuals with special needs. This matter concerns only the programs for special education students at its Private Schools for the Handicapped (PSH). These special education students have individual education plans prepared by their school districts and are sent by their school districts to Archway for their education. During the periods in issue, more than 240 special education students from over 100 school districts were enrolled in Archway's PSH. The school district pays tuition for their student's education at Archway's PSH.

At a conference on August 13, 2007, Frederick W. Hardt, Esq., appearing on behalf of Pemberton, presented a signed stipulation which settled the matter (EDU 4608-06) between Archway and Pemberton, and which is attached hereto. Neither DOE or Ewing have presented any objection to said settlement.

I have reviewed the record and terms of this settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.
2. The settlement fully disposes of all issues in controversy between Archway and Ewing in this matter identified as EDU 427-03.

I **CONCLUDE** that EDU 4608-06, which is part of the consolidated Archway matter, is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that the proceedings as to EDU 4608-06 be concluded.

This order may be reviewed by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** either upon interlocutory review pursuant to N.J.A.C. 1:1-19.10 or at the end of the entire contested case pursuant to N.J.A.C. 1:1-18.6.

August 13, 2007

DATE

Beatrice S. Tylutki

BEATRICE S. TYLUTKI, ALJ T/A

Respondent, Pemberton Township Board of Education (hereinafter "Pemberton"), by and through its counsel, Frederick W. Hardt, Esquire, as follows:

1. The Consolidated Docket Numbers identified above involving matters between Archway and the New Jersey Department of Education ("DOE") all involve appeals of DOE determinations that Archway included non-allowable costs in tuition rates charged to sending school districts ("Sending Districts"). At the conclusion of the Archway-DOE cases, after all appeals have been exhausted, there will be final amounts determined for each year of any amounts Archway owes to Sending Districts. From those final amounts, the DOE will determine the *pro rata* amounts, if any, due to each Sending District for each year in question.

2. Pemberton's Complaint against Archway in the matter identified as OAL Docket #EDU 4608-03 shall be resolved as follows:

(a) Pemberton shall owe Archway unpaid tuition of $36,670.74 for the month of December, 1999, $38,288.14 for the month of May, 2000, and $20,836.84 for the month of June, 2000 (totaling $95,795.72)("Final Amount Due From Pemberton").

(b) The Final Amount Due From Pemberton shall be paid to Blank Rome LLP within seven (7) days of the date of this Order.

(c) If this sum is not paid within the time specified it shall accrue interest at the rate of 1% per month as provided in then N.J.A.C. 23-4.2 (h) (2) which shall then be deemed the Adjusted Final Amount Due From Pemberton.

(d) Pemberton shall continue to have a right to participate in any *pro rata* refunds determined to be due to Pembeton by DOE pursuant to paragraph 1 hereof.

3. Any and all litigation by and between Archway and Pemberton shall be and is

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210 Lake Drive E., Suite 200
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(856) 779-3600
Attorneys for Petitioner, Archway Programs, Inc.

Archway Programs, Inc.,	:State of New Jersey :Office of Administrative Law
Petitioner,	:
v.	:OAL Docket # EDU-4834-01 (**94-95**) :OAL Docket # EDU-8646-00 (**Thomas Report**)
New Jersey Department of Education,	:OAL Docket # EDU-4607-03 (**96-99**) :OAL Docket # EDU-6956-00 (**Salary Case**)
Respondent.	: :
Pemberton Township Board of Education,	: :
Petitioner,	:OAL Docket # EDU 4608-03
v.	:
Archway Programs, Inc.	:
Respondent.	:
Archway Programs, Inc.	: :
Petitioner,	:OAL Docket #EDU 0427-06
v.	:
Ewing Township Board of Education,	: **ADMINISTRATIVE ACTION**
Respondent.	:

STIPULATION AND CONSENT ORDER BETWEEN ARCHWAY PROGRAMS, INC., AND THE PEMBERTON TOWNSHIP BOARD OF EDUCATION

It is hereby **STIPULATED** and **AGREED** by Petitioner, Archway Programs, Inc. (hereinafter "Archway"), by and through its counsel, Steven D. Weinstein, Esq., and

hereby **COMPLETELY AND FINALLY RESOLVED** by this voluntary settlement and the entry of this Stipulation and Consent Order and any further Decision and Order implementing the terms hereof.

Dated: August 13, 2007

BEATRICE S. TYLUTKI, A.L.J. /ta

CONSENT TO AS TO FORM AND SUBSTANCE

ARCHWAY PROGRAMS, INC.

By: _____
Steven D. Weinstein

PEMBERTON TOWNSHIP BOARD OF EDUCATION

By: _____
Frederick W. Hardt

475-08

#473-08

CAROLYN MACCHIA,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner – a former tenured teacher of television production in respondent's schools whose position was eliminated in a reduction in force (RIF) in 2007 – contends that she is entitled to a permanent substitute position assigned to the in-school suspension program, which was open after the RIF. Another teacher eliminated during the RIF, who had not yet attained tenure, was rehired to serve in the in-school suspension program position.

The ALJ found, *inter alia,* that: the only priority or seniority rights that a tenured teacher who was subjected to a RIF has over a non-tenured teacher applicant are for positions that fall under the same certificate to which the teacher has earned her tenure; the stipulated job duties of the permanent substitute in the in-school suspension program do not call for any instruction to be given and the listing for the position only requires a county substitute certificate; therefore, it is not a teaching staff member position subject to the tenure laws. The ALJ concluded that the petitioner is not entitled to the position as it is outside the scope of her tenure and seniority rights, and denied the petitioner's request for reinstatement.

The Commissioner rejected the Initial Decision of the OAL, finding that: the factual record in this matter is incomplete and does not provide a determination by the County Superintendent of the appropriate certification, if any, required for the position sought by petitioner in this matter; accordingly, it cannot be concluded that the position of permanent substitute assigned to in-school suspension is not a teaching staff position requiring full instructional certification. The Commissioner directed the respondent Board to submit this position to the County Superintendent immediately for determination of what certification, if any, is necessary to hold it, and the petition was dismissed without prejudice.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

December 5, 2008

OAL DKT. NO. EDU 1396-08
AGENCY DKT. NO. 363-11/07

CAROLYN MACCHIA,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have petitioner's exceptions and the reply thereto by the Board of Education (Board), both duly filed pursuant to *N.J.A.C.* 1:1-18.4.

In her exceptions, petitioner contends that the Administrative Law Judge (ALJ) erred in finding that the position of permanent substitute, as constituted in the Board's district, is not a teaching staff position requiring an instructional certificate. Petitioner asserts that the ALJ failed to recognize the Board's misuse of the county substitute credential, ignoring that: 1) the permanent substitute is not, as contemplated by N.J.A.C. 6A:9-6.5(a), a temporary employee replacing another teacher due to an inadequate supply of certificated staff, but rather a permanent, full-year employee assigned to an in-school suspension position for which certificated staff members – specifically, petitioner – are available; and 2) the Board's use of the credential as a "minimum" qualification is belied by the fact that a fully certified individual may also – and currently does – hold the position, thus revealing its true character as a teaching staff assignment. Petitioner further asserts that the Initial Decision has erred in its analysis, pursuant

to *David Dowding v. Board of Education of the Township of Monroe, Middlesex County*, 1990 *S.L.D.* 1711, of the in-school suspension assignment's duties, focusing solely on the absence of instruction rather than on the full scope of the assignment, as well as ignoring that 1) the Board's own handbook provides for monitoring of student behavior by "an assigned teacher" (Exhibit J-1A) and 2) the person assigned is solely responsible for controlling students and identifying misbehavior that may lead to further discipline – duties that fall squarely within the scope of responsibility of a teaching staff member. (Petitioner's Exceptions at 1-2 and 4)[1]

In reply, the Board counters that petitioner cites no legal authority precluding it from requiring a county substitute credential for non-teaching positions, and, moreover, even if petitioner's argument is credited, the outcome of this matter would not change because petitioner would not be entitled to a non-teaching staff position regardless of whether its incumbent had a county substitute certificate (*sic*) or no certificate at all. The Board further reiterates that, where there has been no county superintendent determination that an instructional certificate is necessary for an in-school suspension position and the evidential record demonstrates that no instruction is taking place, case precedent is clear that the position is not a teaching staff position to which tenure rights can be asserted. Finally, the Board contends, citing *Board of Education of the Lakeland Regional School District, Passaic County v. City Council of the Borough of Ringwood et al., Passaic County,* 96 *N.J.A.R.*2d (EDU) 101, that duties relating to monitoring and/or controlling students – as are also performed by classroom aides, bus drivers and security guards – do not translate to "instruction" and do not automatically require an instructional certificate. (Board's Reply at 1-4)

[1] Petitioner additionally incorporates, at 2-4, the entirety of Point III of her OAL brief.

Upon review and consideration, the Commissioner rejects the Initial Decision's conclusion that the Board's in-school suspension assignment is not a teaching staff position, finding instead that the record is insufficient for determination on this point.

The Commissioner concurs with petitioner that a finding of "no instruction" does not, in itself, necessarily end the inquiry as to whether a position is of such character as to require the individual holding it to possess full certification. Unfortunately, neither the stipulated facts nor the documents in evidence in this matter provide any information whatsoever regarding the direction, supervision and reporting responsibilities of the person assigned to the in-school suspension room, who is left alone with students (Stipulation of Facts, Exhibit J-1, No. 17) and apparently performs the duties identified in the record (*Ibid.*, Nos. 16 and 18) in the absence of a certificated staff member (*Ibid.*, No. 19).[2]

Moreover, because the Board maintains that the in-school suspension assignment and the permanent substitute position – for which no job description exists (*Ibid.*, No. 20) – are not teaching staff positions, it apparently did not submit its staffing configuration to the County Superintendent for "unrecognized title" review pursuant to *N.J.A.C.* 6A:9-5.5(b).[3] However, neither is there any indication that the County Superintendent reviewed the Board's staffing pursuant to regulations requiring approval of the necessary qualification for paraprofessionals, *N.J.A.C.* 6A:32-4.7, notwithstanding that the in-school suspension position as characterized by the Board – as well as the classroom aide duties to which permanent substitutes are also routinely assigned (*Ibid.*, No. 19) – would clearly qualify as "[assisting] in the

[2] It is irrelevant in this context that the person currently holding the position happens to have an instructional certificate rather than a county substitute credential.

[3] Petitioner's representation on exception (Exceptions at 4, footnote) that such review did not, in fact, occur was not challenged by the Board on reply.

supervision of student activities under the direction of a principal, teacher or other designated certified professional personnel." *N.J.A.C.* 6A:32-4.7(a)[4]

Consequently, this matter comes before the Commissioner with neither a complete factual record nor a determination by the County Superintendent – the official charged by law with assessment of staff qualification as the representative of the Commissioner best in the position to review local district program/staffing configurations in the first instance – of the appropriate certification, if any, required for the position sought by petitioner in this matter. Thus, the Commissioner cannot determine whether the Board is, in fact, assigning the holder of a permanent substitute position to regular duties requiring full certification, in which case its use of the county substitute credential as an acceptable qualification would, indeed, be improper as charged by petitioner, as well as a violation of her tenure rights.[5]

Accordingly, the Initial Decision of the OAL is rejected in so far as it concludes, on the present record, that the Board's position of permanent substitute assigned to in-school suspension duty is not a teaching staff position requiring full instructional certification. Instead, the Board is directed forthwith to submit this position to the County Superintendent for

[4] Although the Board notes in its reply exceptions, *supra*, that there has been "no determination" by the County Superintendent that certification is necessary for the position at issue, it does *not* say that the position was *actually reviewed* and *found* not to require certification.

[5] While it is clearly permissible for a board to retain the holder of a county substitute credential as a permanent employee assigned to report daily for the purpose of filling in for absent teachers on a daily or weekly basis, *Marybeth Driscoll v. Board of Education of the West Essex Regional School District, Essex County*, 95 *N.J.A.R.*2d (EDU) 348, petitioner is correct that the credential cannot be used for regular or long-term assignment to duties requiring full certification. This conclusion is not altered by the Board's citation to a precedent having no meaning in the present context (*Lakeland Regional, supra*), a budget appeal in which the Commissioner – in sustaining the municipalities' reduction for other reasons – made no comment on the board's bare assertion (at 104) that the line-item in question supported the salaries of two aides for "[utilization] in the school discipline process, thus, freeing teachers and supervisors from supervising in-school suspension, lunch room, Saturday detention and bus duties."

determination of the certification, if any, necessary to hold it, and the petition of appeal is dismissed *without prejudice* to petitioner's right to refile should she believe that her tenure rights continue to be violated following the County Superintendent's determination.

IT IS SO ORDERED.[6]

Priscilla E Day

COMMISSIONER OF EDUCATION

Date of Decision: 12/05/08

Date of Mailing: 12/08/08

[6] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1396-08

AGENCY DKT. NO. 363-11/07

CAROLYN MACCHIA,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY

Respondent.

Gregory T. Syrek, Esq., for petitioner (Bucceri and Pincus, attorneys)

Robert J. Merryman, Jr., Esq., for respondent (Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: June 26, 2008 Decided: September 8, 2008

BEFORE **JEFFREY A. GERSON**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Carolyn Macchia, was formerly employed by respondent, Bayonne Board of Education, as a teacher of television production from September 1999 through June 2007. Petitioner holds an instructional certificate with an endorsement for Teacher of Technical Operations: Television Production and was tenured in this position. On or

about April 27, 2007, respondent abolished two teaching positions in its Television Production program. As a result of this reduction in force (RIF), petitioner and another teacher, James Burton, were terminated effective June 30, 2007. Mr. Burton holds an instructional certificate with an endorsement as Teacher of Audio-Visual Broadcast Production Technology, but had not yet achieved tenure in this position.

Respondent rehired Mr. Burton, but not petitioner, as a "permanent substitute teacher" for the 2007-2008 school year. As a permanent substitute, Mr. Burton receives $21,000 per year as a salary. Mr. Burton was assigned to the In-school Suspension Program where he is to monitor students who have committed some infraction. Mr. Burton's responsibilities in this position include taking attendance, making sure that work assignments provided by the classroom teacher are distributed, collecting work completed, and monitoring student behavior. No instruction takes place during this program and the permanent substitute is not expected to provide any assistance to the students with respect to their school work. Although it is not currently Mr. Burton's responsibility to do so, permanent substitutes often act as classroom aides and monitor after school detention. The only requirement for the position of permanent substitute is that the staff member must have at least a County Substitute certificate. Neither petitioner nor Mr. Burton holds this certificate.

LEGAL DISCUSSION:

I. Tenure and Certification Requirements

The New Jersey State Board of Education (State Board) has established a certificate system requiring that "any person employed as a teaching staff member by a district board of education shall hold a valid and appropriate certificate." N.J.A.C. 6A:9-5.1(a); N.J.S.A. 18A:26-2. The Board has provided for three distinct types of certificates – Instructional, Educational Services, and Administrative. N.J.A.C. 6A:9-2.1; N.J.A.C. 6A:9-5.2. An educator may hold more than one of these certificate types. A "teaching staff member" is not limited to educators (i.e. teachers) but includes any

> member of the professional staff of any district or regional board of education, or any board of education of a county vocational school, holding office, position or employment of such character that the qualifications, for such office, position or employment, require him to hold a valid and effective standard, provisional or emergency certificate, appropriate to his office, position or employment, issued by the State Board of Examiners and includes a school nurse and a school athletic trainer.
>
> [N.J.S.A. 18A:1-1.]

Therefore a teaching staff member is anyone employed by a board of education whose job description requires them to hold an instructional, service, or administrative certificate.

Educational personnel are tenured in New Jersey under the Tenure Act, N.J.S.A. 18A:28-1 to -18. The tenure statute prevents school boards from abusing their superior bargaining power over teachers in contract negotiations and protects teachers from dismissal for unfounded, flimsy or political reasons. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 71 (1982) (citations omitted). The Tenure Act should be applied liberally to further its purpose of shielding teaching staff who qualify for its protection. Id. at 74. An employee of a board of education is entitled to tenure if (1) she works in a position for which a teaching certificate is required (i.e. she is a teaching staff member);[1] (2) she holds the appropriate certificate; and (3) she has served the requisite period of time. Ibid.; N.J.S.A. 18A:28-5.

"Tenure is achieved in a specific 'position,' and the scope of the tenured position is initially limited by the 'certificate' the teaching staff member must hold to satisfy the prerequisite of qualifications for his or her employment." Nelson v. Board of Education, 148 N.J. 358, 366 (1997) (citing Ellicott v. Bd. of Educ., 251 N.J. Super. 342, 348 (App. Div. 1991)). The Court in Nelson reaffirmed the contention that, except for those

[1] Certain positions that are not generally considered "teaching staff members" and do not require certificates, including secretaries, assistant secretaries, and business managers, can acquire tenure simply by being employed for more than three years. N.J.S.A. 18A:17-2.

positions specifically enumerated in corresponding statute and regulations,[2] "an educator who has attained tenure by virtue of the requisite service in a specific position will have tenure with respect to all positions under the particular certificate." Nelson, supra 148 N.J. at 366 (citing Dennery, supra, 131 N.J. at 634). Although transfer of tenure is authorized between endorsements, tenure is not transferable between certificates. See Dennery, supra 131 N.J. at 635-6 (reversing the Appellate Division's holding that the transfer of tenure between certificates is analogous to transferring tenure between endorsements, stating that such a holding would render meaningless the requirement "that there be actual service in a position under a certificate to gain tenure under that certificate").

One way in which a tenured teacher can be terminated is through a reduction in force (RIF). N.J.S.A. 18A:28-9. Under this section, boards of education have the authority to eliminate a position, even when held by a tenured staff member, "for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article." Ibid. Teachers can be protected from being "riffed" on the basis of seniority, where the employee with the least amount of service in the district would be the first subjected to the RIF. N.J.S.A. 18A:28-11; N.J.A.C. 6A:32-5.1. Seniority "provides a mechanism for ranking all tenured teaching staff members so that reductions in force and reemployment can be effected in an equitable fashion and in accord with sound educational policies." Litchman v. Bd. of Educ. Village of Ridgewood, 93 N.J. 362, footnote 4 (1983). When a staff member is "riffed," they are placed on a preferred eligibility list which entitles them to future open positions within the district under which they have accrued seniority. N.J.A.C. 6A:32-5.1; N.J.S.A. 18A:28-12. However, seniority only accrues for the job title (typically the endorsement) served by the employee. Ibid. Specifically, the courts have held that "a teacher seeking reinstatement **within the endorsements on his or her certificate** is entitled to preference in a RIF as against a non-tenured applicant within a same certification." Ellicott, supra, 251 N.J. Super. at 349 (citing Capodilupo v. Bd. of Educ.

[2] Endorsements under the administrative certificate such as supervisor and principal, as well as the school nurse endorsement under the educational services certificate, do not allow for transferability of tenure between positions.

West Orange, 218 N.J. Super. 510, 515 (App. Div. 1987) (emphasis in original)). Again, the priority rights of tenured teachers over non-tenure teachers to be reinstated apply only "in a position **within the certificate** of a dismissed tenure teacher." Id. (citing Bednar v. Westwood Bd. of Educ., 221 N.J. Super. 239, 242 (App. Div. 1987) (emphasis in original). Accordingly, the only priority or seniority rights that a tenured teacher that was subjected to a RIF has over a non-tenured applicant are for positions that fall under the same certificate to which the teacher has earned her tenure.

II. In-School Suspension Position

Petitioner claims that she is entitled to the permanent substitute position assigned to the in-school suspension program, which was open after the RIF, by virtue of her tenure as a teaching staff member. Petitioner's claim is based on N.J.S.A. 18A:28-12, discussed supra, which states in relevant part that

> if any teaching staff member shall be dismissed as a result of such reduction, such person shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs **in a position for which such person shall be qualified** and he shall be reemployed by the body causing dismissal
>
> [N.J.S.A. 18A:28-12 (emphasis added).]

Petitioner essentially argues that since she is qualified to hold the substitute position, she is entitled to it under the statute. "The language of the statutes is not ambiguous. A 'position' to which a tenured teaching staff may claim entitlement under N.J.S.A. 18A:28-12 upon abolition of the 'position' she previously held pursuant to N.J.S.A. 18A:28-9 is one as a teaching staff member." Driscoll v. Bd. of Educ. of W. Essex Reg'l High Sch., 95 N.J.A.R.2d (EDU) 348, 349. The State Board specifically held in Driscoll that "employment as a permanent substitute is not as a 'teaching staff member.' Hence, a tenured teacher is not entitled by statute to be employed in that capacity following a reduction in staff." Ibid. (citations omitted). The reasoning behind the State Board's decision was that the permanent substitute position at issue in Driscoll did not require a

State teaching certificate.[3] Ibid. Instead, "a county substitute certificate is sufficient qualification for this employment," thus the position did not qualify as a "teaching staff member" position. Since the tenure laws only apply to teaching staff member positions, tenured employees subject to a RIF have no rights to non-tenured positions such as permanent substitute positions.

The issue to be determined in this matter is whether the permanent substitute position to which petitioner claims entitlement requires an instructional certificate. If it does, then it is a tenure eligible position for which petitioner would qualify. If the permanent substitute position does not require an instructional certificate, then it does not qualify as a teaching staff member position and petitioner has no rights to it whatsoever. Ibid. Petitioner argues that the position in this matter is that of an "in-school suspension teacher," a position which has been recognized in the past as requiring an instructional certificate. However, petitioner does not address the State Board's holding in Dowding v. Bd. of Educ. of Twp. of Monroe, 1990 S.L.D. 1711. There the Board stated that "we reject the notion that in-school suspension is **necessarily** a teaching staff assignment within the position of 'teacher' requiring possession of a valid certificate in order to be qualified to serve in the assignment." Dowding, supra, 1990 S.L.D. at 1712. Instead, whether the position requires a State issued instructional certificate must be determined on a case by case basis and "turns upon the specific duties to be performed in that particular assignment, requiring assessment of whether the employment is of such character as to require that the individual assigned thereto hold appropriate certification in order to perform such functions." Ibid.; see also Lewis v. State-Operated Scl. Dist. of Patterson, EDU 9743-04, State Bd. of Educ. (August 5, 1998) <http://lawlibrary.rutgers.edu/oal/search.html> (Board remands since the Commissioner "failed to review the specific duties to be performed in that assignment in order to determine whether they were of such character as to require certification in order to be qualified to perform those functions"). Thus, it is not enough that it has been held that some permanent substitute or in-school suspension teaching positions required instructional certificates. Instead, the issue is whether the position in the instant matter requires such a certificate.

[3] As opposed to a County issued certificate such as a substitute certificate.

In support of his claim of entitlement to the position in question in the instant matter, petitioner cites cases in which in-school suspension positions were found to require State issued instructional certificates. However, each of these cases is distinguishable from the case at hand or actually weighs against petitioner's argument. In the first case relied upon by petitioner, the State Board held that a teacher subject to a RIF was improperly passed over for an in-school suspension position to which he was entitled. Rogan v. Edison Twp Bd. of Educ., 1985 S.L.D. 635. However, the State Board's decision in Rogan was based on the fact that the open position of "in house suspension teacher" was advertised by the local Board as requiring an instructional certificate with any endorsement. Id. at 636. In addition, the job duties of the in-school suspension teacher were to "assist students in the completion of assignments from regular teachers, as appropriate and necessary" and to "provide corrective guidance for students in an effort to prevent repetition of the offense(s) that led to in-house suspension. Id. at 640. A position which is openly advertised as requiring an instructional certificate qualifies as a teaching staff member position. In the instant matter, the permanent substitute position was listed as requiring a county substitute certificate, a requirement specifically held not to amount to a teaching staff position in Driscoll, supra, 95 N.J.A.R.2d (EDU) 348.

Petitioner's reliance on Cucolo v Bd. of Educ. Essex County Vocational Sch. Dist., 1985 S.L.D. 875 and Vanderhoof v. Bd. of Educ. Scotch Plains-Fanwood Regional, 1988 S.L.D. 2532, aff'd, No. A-5608-87T1 (App. Div. 1989) is also misplaced. The teacher in Cucolo had actually attempted to argue that his transfer from English teacher to in-school suspension teacher was a violation of his tenure rights. The ALJ found that "petitioner cannot accrue seniority as an 'in-school suspension' teacher since seniority can only accrue in a properly certificated position." Cucolo, supra, 1985 S.L.D. at 883-4. However, the Commissioner held that Cucolo's tenure and seniority rights still applied to the in-school suspension position. Id. at 888. Though the Commissioner did not look to the job duties of the position to determine if an instructional certificate were needed, the local Board's position was that such a certificate was absolutely required for the position. Id. at 886. Since the Board in Cucolo stipulated, and in fact argued

that the position required an instructional certificate, it can not be said that the case lends any support to the matter at hand. Like Rogan, supra, the Cucolo case is distinguishable from the matter at hand since the Board could not argue that the in-school suspension position was not subject to the tenure laws since the Boards themselves determined that a State issued certificate was required.

The State Board's decision in Vanderhoof does not support petitioner's case. Though the Commissioner and State Board rejected the ALJ's determination that Vanderhoof was not entitled to the in-school suspension teacher position, the decision rested on a fact absent from the present matter. The decision relied upon the "finding that the County Superintendent's approval of the unrecognized position title of in-school suspension teacher and his determination that an instructional certificate was required for qualification was dispositive as to whether the position was that of a teaching staff member within the meaning of N.J.S.A. 18A:1-1." Vanderhoof, supra, 1988 S.L.D. 2532. The State Board held that "the authority to determine what certification, if any, is required for service in an unrecognized position title is vested in the County Superintendent." Id. at 2533. In the instant matter, the permanent substitute position was listed as only requiring a County substitute certificate. Further, the stipulated job duties for the position do not require any instruction or any sort of student interaction whatsoever on the part of the substitute that could be "performed only by teaching staff members possessing instructional certificates." Dowding, supra, 1990 S.L.D. at 1713.

CONCLUSION:

Since the stipulated job duties of the permanent substitute position do not call for any instruction to be given and the listing for the position only requires a County substitute certificate, it is not a teaching staff member position subject to the tenure laws. Petitioner is not entitled to the position as it is outside the scope of her tenure and seniority rights. Accordingly, a finding in favor of the respondent is entered.

ORDER

It is hereby **ORDERED** that Petitioner's tenure rights have not been violated. Therefore, petitioner's request for reinstatement is **DENIED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

SEPT 8 08

DATE

JEFFREY A. GERSON, ALJ

Date Received at Agency: 9/8/08

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SEP 9 2008

DATE

OFFICE OF ADMINISTRATIVE LAW

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THOMAS LICCIARDI,	:	
PETITIONER,	:	
		COMMISSIONER OF EDUCATION
V.	:	
		DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT OLIVE, MORRIS COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Pro se petitioner challenged the Board's demand for legal fees, the appropriateness and proportionate amount of these fees, and the propriety of the Board's threat to withhold his diploma unless payment for the legal fees was made. Petitioner was one of several students disciplined in the aftermath of vandalism incidents which targeted the Mount Olive Bus Transportation Garage in efforts to delay or cancel school the following day. The Board sought the authority of the Commissioner to collect the reimbursement of attorney fees.

The ALJ identified the issue in this matter to be whether the Board can collect attorney fees incurred pursuing disciplinary action against a student arising out of acts of vandalism and can condition the receipt of a diploma on such payments, and found that: no statute authorizes the Commissioner to award counsel fees to a school district arising out of its pursuit of disciplinary action against a student; *N.J.S.A.* 18A:37-3 does not provide authority to the Commissioner to grant attorney fees; and a Board cannot withhold or threaten to withhold diplomas in order to collect discipline-related counsel fees. The ALJ denied the Board's request for an order directing petitioner to reimburse it in the amount of $1,196, and ordered that the Board be enjoined from withholding or threatening to withhold petitioner's diploma or transcript unless such payment is made.

Upon a full and independent review, the Commissioner adopted the Initial Decision as the final decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

December 5, 2008

OAL DKT. NO. EDU 7232-08
AGENCY DKT. NO. 146-5/08

THOMAS LICCIARDI,	:	
PETITIONER,	:	
		COMMISSIONER OF EDUCATION
V.	:	
		DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT OLIVE, MORRIS COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have exceptions filed by the Board of Education (Board) pursuant to *N.J.A.C.* 1:1-18.4 and *N.J.A.C.* 1:1-18.8, to which petitioner did not reply.

In its exceptions, the Board contends that the Administrative Law Judge (ALJ) erred in ordering the Board to grant petitioner his high school diploma, since petitioner did not specifically challenge the Board's withholding of such diploma and the ALJ made no finding that the Board's action was arbitrary and capricious, as is required in order for it to be overturned by the Commissioner on appeal. (Board's Exceptions at 2-5) The Board further contends that the ALJ's analysis with respect to attorney's fees is inapplicable to the matter at issue, which concerns the cost of an underlying disciplinary appeal, not the cost of the present litigation. According to the Board, *N.J.S.A.* 18A:11-1(d) – which authorizes it to do all things necessary for the proper conduct of its schools – fully entitles it to charge a student for fees which the student caused to be incurred, and the Commissioner is unquestionably empowered to order recovery of operational costs associated with a board's "handling of matters related to the proper administration of its District" – including legal fees, which are expressly included within the

"administrative costs" category of the Department's Comparative Spending Guide, Indicator 8, referenced in *N.J.A.C.* 6A:23-1.2. (*Ibid.* at 5-8, quotation at 6)

Upon review, the Commissioner finds that the Initial Decision fully and fairly addresses the Board's arguments as presented at the OAL and reiterated on exception, and is unpersuaded by the Board's objections as summarized above. While the Board may be literally accurate in its characterization of petitioner's written pleadings and the findings of the ALJ, there can be no question but that the central issue ultimately litigated in this matter was the Board's conditioning of petitioner's receipt of a high school diploma on his payment of legal fees associated with his disciplinary proceedings; moreover, while the ALJ may not have specifically held the Board's action to be "arbitrary and capricious," he clearly did find it – in a discussion that carefully distinguishes such fees from "attorney fees" in the usual sense – to be without lawful basis and, hence, unsustainable.

Accordingly, for the reasons expressed therein, the Initial Decision of the OAL – denying the Board's request for reimbursement from petitioner of $1,196 in legal costs and enjoining the Board from withholding or threatening to withhold petitioner's diploma or transcripts until such reimbursement is made – is adopted as the final decision in this matter.

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 12/05/08

Date of Mailing: 12/08/08

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 07232-08
AGENCY DKT. NO. 146-5/08

T.L.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT OLIVE, MORRIS COUNTY,
Respondent.

T.L., pro se

Marc H. Zitomer, Esq., for respondent (Schwartz, Simon, Edelstein, Celso and Kessler, attorneys)

Record Closed: September 10, 2008 Decided: October 21, 2008

BEFORE **JESSE H. STRAUSS**, ALJ:

STATEMENT OF THE CASE

Petitioner T.L. seeks review of a charge of $1,196 imposed on him by respondent Board of Education of the Township of Mount Olive, Morris County, (Board) for reimbursement of part of the legal fees incurred by the Board for the investigation of

certain acts of vandalism to Board property and the pursuit of charges against several students, including T.L. T.L. contends that the charges are inappropriate and disproportionate and that the Board acted improperly in threatening to withhold his diploma unless the payment was made. The Board seeks the authority of the Commissioner to collect the reimbursement of such attorney fees. N.J.S.A. 18A:37-19 permits a school district that incurs additional costs due to the implementation of a harassment and bullying policy to apply to the Commissioner of Education for reimbursement. N.J.S.A. 18A:37-3 provides that the parents or guardian of a minor who shall injure any public school property shall be liable for damages. At issue is whether the Board can collect attorney fees incurred pursuing disciplinary action against a student arising out of acts of vandalism and can condition the receipt of a diploma on such payments.

PROCEDURAL HISTORY

On June 3, 2008, petitioner filed a petition with the Commissioner seeking emergency relief. The Director of the Bureau of Controversies and Disputes of the New Jersey Department of Education transmitted the matter on June 5, 2008, to the Office of Administrative Law (OAL), pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, for determination as a contested case. I denied the emergency-relief application, as certain issues were moot in view of T.L.'s return to his regular classes from a suspension, and the other issues, including the demand to participate in graduation exercises, did not meet the criteria for emergency relief. The Board filed a Motion to Dismiss the Petition on July 2, 2008. As a result of a conference with the parties on September 3, 2008, T.L. agreed to withdraw the remaining issues in his petition except for that related to the legal-fee reimbursement. The parties agreed that the final issue would be addressed by summary decision. Additionally, the parties agreed to have the legal-fee issue addressed without the formality of the Board filing a separate petition with the Commissioner seeking authority to collect the fees.

I closed the record on September 10, 2008.

STATEMENT OF UNDISPUTED FACTS

I **FIND** the following undisputed facts to be the **FACTS** of this case.

On March 11, 2008, a group of students, including T.L., a Mount Olive High School student, attempted to build a cement wall with bricks in front of the gate at the Mount Olive Bus Transportation Garage in an effort to delay or cancel school the following day. Another gate was chained and locked shut. Pursuant to an investigation by the Mount Olive Police Department, T.L. was arrested and charged with defiant trespass and then suspended by the Board. Students other than T.L. again entered the bus garage on March 13 and let the air out of forty-four bus tires. The Board held a disciplinary hearing on April 7, 2008, after which T.L. was allowed to return to the high school on a modified schedule, receiving instruction in an alternate classroom with other pupils who were disciplined for the vandalism.

By letter of May 22, 2008, the Board's superintendent of schools, Rosalie Lamonte, notified T.L. and his parents that he was to reimburse the Board for his share of the costs to the Board related to his involvement in the vandalism incident of March 11, 2008. She advised that the Board had incurred significant costs in addressing the issues that arose out of the act of vandalism and referred to $8,372 in legal fees charged to the Board due to the handling of the matter. She directed that T.L. remit $1,196 within twenty-five calendar days, representing a one-seventh share of the legal fees since there were seven students who were disciplined by the Board for the various acts of vandalism. Superintendent Lamonte finally advised, "[N]ote that failure to satisfy this or any other financial obligation owed to the Board of Education due to [T.'s] involvement in these events may result in the withholding of [T.'s] high school diploma." P-1.

On June 10, 2008, Superintendent Lamonte sent T.L.'s mother, S.C., a "Repayment Promissory Agreement" for $1,196 and a detailed bill from the Board attorney. P-2; P-3; P-4. When S.C. did not return an executed agreement, Superintendent Lamonte sent an e-mail on June 18, 2008, stating, "[P]lease be aware

that your son's diploma will be withheld until the agreement is signed. The first payment is due July 1st." P-5.

The $8,372 for legal services was based on 54.5 hours of work by various attorneys of the law firm of Schwartz, Simon, Edelstein, Celso and Kessler related to the disciplinary charges brought against seven students.[1]

LEGAL ANALYSIS AND CONCLUSIONS

I **CONCLUDE** that no statute authorizes the Commissioner to award counsel fees to a school district arising out of its pursuit of disciplinary action against a student. The Board's reliance on N.J.S.A. 18A:37-3 and N.J.S.A. 18A:37-19 is misplaced.

N.J.S.A. 18A:37-3 provides:

> The parents or guardian of any minor who shall injure any public or nonpublic school property shall be liable for damages for the amount of injury to be collected by the board of education of the district or the owner of the premises in any court of competent jurisdiction, together with costs of suit.

N.J.S.A. 18A:37-19 provides:

> A school district that incurs additional costs due to the implementation of the provisions of this act shall apply to the Commissioner of Education for reimbursement.

The Commissioner's jurisdiction regarding controversies and disputes is limited by N.J.S.A. 18A:6-9, which provides in pertinent part:

[1] A partial statement of services from the law firm includes the following: "Finalize legal memorandum to file regarding the District's long-term options for disciplining the students involved in the bus vandalism incident"; "Confer with JLR regarding revisions to hearing notices"; "Telephone conference with Maureen DeMeo regarding hearing disposition letters of students involved in bus vandalism and changes to make to letters." P-4.

> The commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the state board or of the commissioner.
>
> [N.J.S.A. 18A:6-9.]

Although the commissoner has long been vested with broad remedial powers and significant responsibilities under the school laws, this statutory authority has consistently neither been construed nor exercised to include the power to award counsel fees. Balsley v. N. Hunterdon Reg'l Sch. Dist. Bd. of Educ., 117 N.J. 434, 442 (1990). The commissioner has consistently denied being clothed with the authority to award reimbursement for costs and counsel fees. See Winter v. Bd. of Educ. of N. Bergen, 1975 S.L.D. 236, 240; see also Bartlett v. Bd. of Educ. of Wall, 1971 S.L.D. 163. Although a rejected application for counsel fees has usually been made by a student or guardian against a school district, the same basis for rejection applies to a school district application. See W.C.K. o/b/o M.P.-Y.C. v. Bd. of Educ. of Dumont, EDU 09381-02, Final Decision (March 18, 2004) <http://lawlibrary.rutgers.edu/oal/search.html>, where the Commissioner rejected a school district's application for counsel fees after it prevailed on a petition to remove a non-resident student from the district's schools. Once again, the Commissioner reiterated that, in the absence of express statutory authority to award counsel fees, the commissioner may not direct that a party be compensated for legal fees.

Here, the Board's reliance on N.J.S.A. 18A:37-19 is misplaced. The enactment of this section of Title 18A was part of the legislation that amended Chapter 37 to prohibit harassment, intimidation and bullying on school property, at a school-sponsored function or on a school bus. Assembly Educ. Comm. Statement to Assembly Comm. Substitute for A1874 and A1526 (June 17, 2002). This legislation, L. 2002, c. 83, codified at N.J.S.A. 18A:37-13 to -19, requires school districts to adopt policies to prevent such conduct. Under N.J.S.A. 18A:37-19, the commissioner may consider applications from school districts for reimbursement of costs incurred to implement the law. See L.W. v. Toms River Reg'l Schs. Bd. of Educ., 381 N.J. Super. 465, 498-99

(App. Div. 2005). Although it is possible that those costs could include attorney fees, the commissioner's reimbursement authority is limited to a district's costs for implementation of its policy prohibiting bullying. This section of the statute does not contemplate attorney-fee reimbursement in the context of disciplinary proceedings following an act of vandalism.

The Board's reliance on N.J.S.A. 18A:37-3 is also misplaced for several reasons. Again, this statute does not expressly provide authority to the commissioner to grant attorney fees. Additionally, the Board's position is not supported by Board of Education of Piscataway v. Caffiero, 86 N.J. 308 (1981), upon which it relies. In Caffiero, the Supreme Court rejected constitutional challenges to the statute, concluding that it "does not violate due process of law in holding the parents or guardian of a public school pupil vicariously liable for the pupil's willful or malicious injury of school property," nor does it "deny equal protection of the laws." Caffiero, supra, 86 N.J. at 322, 325. There was no discussion of the commissioner's authority to award attorney fees in such cases, presumably since the case was heard in the civil courts and not in an administrative forum. Nevertheless, the Board has focused upon the Court's mention of a default judgment against the parents, which included investigatory and administrative costs,[2] to discuss at great length that because a school's administrative costs include legal fees,[3] N.J.S.A. 18A:37-3 permits an award of legal fees.

The reason Caffiero was heard in the civil courts rather than in an administrative forum is that N.J.S.A. 18A:37-3 requires no less. I need not, and cannot, determine whether the "costs of suit" contemplated by this statute include the costs of disciplinary proceedings, which are wholly independent of the costs of a suit against parents to recover damages for the injury to property. I, however, note that a district could initiate a suit in a court of competent jurisdiction to recover damages for an act of vandalism by a student without a requirement that it also initiate and pursue an independent disciplinary action against him and incur additional costs related to the disciplinary

[2] A judgment that was vacated pursuant to a consent order. Id. at 314, n.3.
[3] The Board relied on N.J.A.C. 6A:23, the chapter of regulations that govern a school district's finance and business services.

action. In other words, the disciplinary action is not a necessary element of recovering the damages and costs of suit related to the act of vandalism.

The relief permitted under N.J.S.A. 18A:37-3 is only available in a "court of competent jurisdiction," and the OAL is not such a court. The New Jersey Supreme Court has held that "administrative agencies 'are not judicial tribunals.'" In re Kallen, 92 N.J. 14, 24 (1983) (citation omitted); see In re Tyler, 236 N.J. Super. 478, 486 (App. Div. 1989), certif. denied, 121 N.J. 615 (1990) (finding that neither the OAL nor the State Board is a court). Administrative forums and courts are different. "Because administrative agencies need flexibility in exercising their executive role through rulemaking and adjudication, '[a]n agency, even in its adjudicatory role, is not a neutral forum whose sole function is to decide the controversy presented to it.'" Kallen, supra, 92 N.J. at 24-25 (quoting In re Uniform Admin. Procedure Rules, 90 N.J. 85, 92 (1982)). Administrative agencies belong to the executive branch of government. Their adjudicative functions "are actually an aspect of their regulatory powers and, in essence, do not embrace or constitute an exercise of judicial authority." In re Uniform Admin. Procedure Rules, supra, 90 N.J. at 93 (quoting Hackensack v. Winner, 82 N.J. 1, 29 (1980)).

Where the Legislature intends for the OAL to exercise judicial authority traditionally reserved to courts, it has expressly so provided in the statutory language. See N.J.S.A. 9:6-8.10a(b)(6) (amended by L. 1996, c. 32). In Tyler, supra, the appellant regional school district challenged the decision of the State Board of Education to exclude the testimony of the Division of Youth and Family Services (DYFS) investigator regarding confidential information obtained in the investigation of alleged incidents of child abuse. The Appellate Division reasoned that N.J.S.A. 9:6-8.10a(b)(6)[4] authorized a court to order disclosure of the DYFS investigative report and information, provided it was necessary to the case. Tyler, supra, 236 N.J. Super. at 486. Additionally, it held that the OAL was not authorized to make such a finding because it is not a court. Id. at 486-87. Later, the Legislature specifically amended N.J.S.A. 9:6-8.10a(b)(6) to extend

[4] At the time of the case, the statute only mentioned a "court" and did not include the OAL. N.J.S.A. 9:6-8.10a(b)(6) ("A court, upon its finding . . .).

the judicial authority to the OAL. L. 1996, c. 32 (amending the language to include: "A court or the Office of Administrative Law" (emphasis added)).

The statutory authority in this case allows a board of education to collect damages for injury to school property in any "court of competent jurisdiction." N.J.S.A. 18A:37-3 (emphasis added). There is no language extending that authority to the OAL. If the Legislature had intended to repose jurisdiction in the OAL or with the commissioner, it easily could have so provided, as it did when it amended N.J.S.A. 9:6-8.10a(b)(6). See L. 1996, c. 32.

In sum, the Board cannot obtain from the commissioner a grant of reimbursement of attorney fees incurred in the course of pursuing disciplinary action against a student. Nor can it withhold or threaten to withhold diplomas unless such attorney fees are paid. The Board has cited no authority supporting its contention that the commissioner can grant such relief regarding discipline-related counsel fees, be it for an act of vandalism or any other acts warranting discipline as described in N.J.S.A. 18A:37-2. Chapter 37 of Title 18A sets forth a comprehensive format for the presentment and adjudication of disciplinary charges by the Board. Chapter 37 is, however, devoid of specific statutory language granting the commissioner the authority to award attorney-fee reimbursement incurred in pursuing disciplinary action against a student for committing acts of vandalism.

Ballato v. Board of Education of Long Branch, 1990 S.L.D. 1285, cited by the Board, does not apply. There, the Commissioner held that it was not unreasonable for a board to withhold a student's actual receipt of a diploma if he or she has outstanding financial obligations for lost or damaged school property such as books or equipment. In the instant matter, since there is no financial obligation to pay legal fees related to disciplinary proceedings, there is no basis to withhold a diploma as a sword to exact such a payment.

ORDER

It is hereby **ORDERED** that the Board's request for an order directing T.L. to reimburse it the amount of $1,196 be **DENIED**.

It is further **ORDERED** that the Board be enjoined from withholding or threatening to withhold T.L.'s diploma or transcript unless said payment is made.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 21, 2008
DATE

Jesse H. Strauss
JESSE H. STRAUSS, ALJ

Date Received at Agency: 10/21/08

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OCT 22 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

id

#477-08

TIMOTHY POTOCKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PRINCETON REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, a tenured custodial supervisor employed by the Princeton Regional Board of Education, alleged that the Board's action transferring him from Princeton High School to the Riverside School, which resulted in a loss of his contractual premium of $1,850, reduced his salary in violation of his tenure rights. The Board contended that the disputed premium was negotiated specifically for the high school assignment in recognition of its greater complexity, and was analogous to an extracurricular coaching stipend to which there is no tenure entitlement.

The ALJ found that: 1) despite the transfer to a different school and regardless of any contractual provision to the contrary, petitioner is serving within the same position for tenure purposes; and 2) the disputed premium represents salary for integral duties rather than a stipend for additional tasks. The ALJ concluded that the reduction in petitioner's compensation as a result of the transfer violates *N.J.S.A.* 18A:17-3 and ordered reinstatement of the $1,850 premium.

The Commissioner adopted the ALJ's decision as the final decision in this matter. However, the Commissioner clarified that petitioner is not necessarily entitled to an additional $1,850, as ordered by the ALJ, nor is he entitled to the high school premium indefinitely; rather, petitioner is entitled to immediate restoration of the difference between the total salary (including premium) he has been receiving as custodial supervisor at the Riverside School and the total salary (including premium) he was receiving as custodial supervisor at Princeton High School at the time of his transfer, and to be kept at that level of payment until such time as it is surpassed by the duly negotiated total salary for the Riverside assignment.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

December 8, 2008

OAL DKT. NO. EDU 6574-07
AGENCY DKT. NO. 197-7/07

TIMOTHY POTOCKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PRINCETON REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions of the Board of Education (Board) and petitioner's reply, both filed pursuant to *N.J.A.C.* 1:1-18.4.

In its exceptions, the Board reargues the correctness of its own position and contends that the conclusion of the Administrative Law Judge (ALJ) is not supported by the decision on which she relies, *Belen v. Woodbridge Township Board of Education*, 142 *N.J. Super.* 486 (App. Div. 1976) – a case in which the court made no determination on the particular question at issue herein.[1] According to the Board, the decision that should control in this matter is *John Manley v. Board of Education of the Township of Old Bridge, Middlesex County,* Commissioner's Decision No. 450-05, decided December 19, 2005, wherein the Commissioner found no violation of tenure rights where the board ceased paying a teacher his

[1] As noted by the Board, the court deferred to the Commissioner on the question of tenure entitlement because it was then pending in a related administrative matter; however, the June 26, 1975 petition referenced by the court does not appear to have resulted in a Commissioner decision.

subject area coordinator stipend upon the teacher's transfer to a school that did not utilize subject area coordinators. (Board's Exceptions at 1-4)

In reply, petitioner urges adoption of the Initial Decision, conceding that while *Belen, supra*, does not offer specific support for the ALJ's conclusion, the ALJ clearly did not rely on *Belen* alone, but cited several other cases – most notably *Robert Barratt v. Board of Education of the Borough of Glassboro, Gloucester County*, Commissioner's Decision No. 17-01, decided January 10, 2001, affirmed by the State Board of Education, Decision No. 5-1, decided June 6, 2001 – that the Board has ignored in its exceptions. Petitioner further distinguishes *Manley, supra*, from the present matter, noting that in *Manley* the duties attached to the disputed stipend were found to be sufficiently distinct from the teacher's instructional duties so as to constitute a separate "position" that was not "engrafted" to the position in which Manley was tenured; whereas here, the duties for which petitioner formerly received extra compensation were an integral part of his tenured custodial position. Indeed, petitioner stresses, his current position is governed by the same job description as his former, and there is no substantive difference in his duties. (Petitioner's Reply at 1-4)

Upon review, the Commissioner finds that the ALJ fully and fairly considered the arguments of the parties in light of the operative facts and applicable law, and correctly concluded that – since petitioner remained in the same position for tenure purposes despite his transfer, with the premium at issue representing salary for integral duties rather than a stipend for additional tasks – petitioner's total compensation could not be reduced without violating his tenure rights.

With respect to the relief ordered, however, the Commissioner does clarify that vindication of petitioner's rights does not necessarily entitle him to an additional $1,850, as

ordered by the ALJ, nor does it entitle him indefinitely to the high school premium. Rather, petitioner is entitled to immediate restoration of the difference between the total salary (including premium) he has been receiving as custodial supervisor at the Riverside School and the total salary (including premium) he was receiving as custodial supervisor at Princeton High School at the time of his transfer,[2] and to be kept at that level of payment until such time as it is surpassed by the duly negotiated total salary for the Riverside assignment.

Accordingly, the Initial Decision of the OAL, as clarified above, is adopted as the final decision in this matter, and the Board is directed to restore petitioner's salary and benefits as set forth herein.

IT IS SO ORDERED.[3]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 12/08/08

Date of Mailing: 12/08/08

[2] The record does not permit a determination of the exact amount of petitioner's entitlement.

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 6574-07

AGENCY DKT. NO. 197-7/07

TIMOTHY POTOCKI,

Petitioner,

v.

BOARD OF EDUCATION OF THE PRINCETON REGIONAL SCHOOL DISTRICT, MERCER COUNTY,

Respondent.

Arnold Mellk, Esq., for petitioner (Wills, O'Neill and Mellk, attorneys)

James F. Schwerin, Esq., for respondent (Parker McCay, attorneys)

Record Closed: September 22, 2008 Decided: October 23, 2008

BEFORE **LISA JAMES-BEAVERS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Timothy Potocki, a tenured custodian supervisor employed by the Princeton Regional Board of Education, alleges that the Board's action transferring him

from the Princeton High School to the Riverside Middle School,[1] which resulted in a loss of his contractual premium of $1,850, reduced his salary in violation of his tenure rights under N.J.S.A. 18A:6-10.

The matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A prehearing conference was held on October 31, 2007, at which time the attorneys expressed the belief that the case could be resolved amicably. A second prehearing conference was held on November 15, 2007, at which time the parties were granted leave to cross-move for summary decision, pursuant to N.J.A.C. 1:1-12.1 to -12.5. A schedule was set forth for the parties to file motions and replies. The last submission, a response to the Board's cross-motion and certification of Potocki, was received by the undersigned on February 28, 2008. On September 22, 2008, upon receipt of correspondence from the Board that indicated that it did not plan to respond to the petitioner's motion pursuant to the prehearing order, I closed the record.

ISSUES

The issue to be determined is whether the Board's action transferring petitioner to another school, which resulted in a loss of his premium and, arguably, a reduction of salary, violated petitioner's tenure rights.

Having carefully reviewed and considered the entire record before me, I **FIND** and **CONCLUDE** that there is no genuine issue as to any material fact challenged and the criteria for summary disposition has been established, pursuant to our Supreme Court's determination in Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995). Accordingly, the matter is ripe for summary disposition.

[1] Petitioner refers to Riverside as a middle school, but the record shows that Riverside is a K-5 elementary school.

FINDINGS OF FACT

The parties have stipulated to the relevant facts in this matter, which are adopted as my **FINDINGS OF FACT**, as follows:

Potocki is a custodian supervisor employed by the Board, which is responsible for the administration and operation of the schools in the Princeton Regional School District. Potocki is tenured in his position as a custodian supervisor. He was assigned to Princeton High School until, on or about May 21, 2007, Potocki received notice that he was to be transferred, involuntarily, from Princeton High School to Riverside School effective June 1, 2007.

The 2004-2007 collective negotiations agreement between the Princeton Regional Educational Support Staff Association (PRESSA) and the Board provided that the custodian supervisor at Princeton High School would receive a yearly "contract premium" of $1,850. Petitioner's Exhibit B at 58. This premium is not paid to the custodian supervisor at Riverside School. It is only paid at the high school. A premium of $1,450 is paid to the custodian supervisor at the middle school. While serving as custodian supervisor at Princeton High School, Potocki's contract premium was subject to pension payment deductions; thus, it was incorporated into his annual salary. Potocki Certification. By letter dated June 11, 2007, Potocki received formal written communication of the reasons for his transfer. The letter set forth that Potocki's "experience and expertise as a head custodian are needed at Riverside where there has been inconsistency in the long-term care of the school facility." Petitioner's Exhibit C. Potocki's involuntary transfer reduced his yearly compensation by $1,850.

LEGAL ARGUMENTS OF THE PARTIES

Petitioner's Motion for Summary Decision

Potocki argues that compensation that is paid for the performance of duties that are part and parcel of the employee's tenured position is protected by the tenure statute. It provides, in pertinent part:

> No person shall be dismissed or reduced in compensation,
>
> (a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state . . . .
>
> [N.J.S.A. 18A:6-10.]

Potocki distinguishes between his transfer and a tenured employee's loss of compensation for performing extracurricular duties, such as coaching sports teams. He agrees that there is no tenure protection in such additional compensation. He also agrees that a Board may assign an employee to any position within the scope of his tenured position without violating his tenure rights "so long as there is no reduction in salary or benefits." Where, however, the duties for which an employee receives additional compensation are inexorably linked to the position in which he holds tenure, that compensation cannot be reduced without violating N.J.S.A. 18A:6-10. See Barratt v. Bd. of Educ. of Glassboro, EDU 8784-99, Initial Decision (November 27, 2000), remanded, Comm'r (Jan. 11, 2001), aff'd, St. Bd. (June 6, 2001) (case remanded to ALJ to determine whether the details of the position qualified it as extracurricular) <http://lawlibrary.rutgers.edu/oal/search.html>.

Potocki performed the duties of a custodian supervisor at Princeton High School and now performs them at Riverside School. His current position continues to be governed by the same job description and there is no substantive difference in his duties. Thus, Potocki argues, the reduction in his overall compensation, regardless of its contractual characterization as a "premium," is in violation of N.J.S.A. 18A:6-10.

Respondent's Cross-Motion for Summary Decision

Potocki obtained tenure in his employment position with the Board under N.J.S.A. 18A:17-3, which is the governing statute. It specifically provides that janitorial employees who have obtained tenure "shall not be dismissed or suspended or reduced in compensation, except as the result of the reduction of the number of janitors in the district made in accordance with the provisions of this title or except for neglect, misbehavior or other offense," and then only in the manner set forth under N.J.S.A. 18A:6-9 et seq. However, the Board argues that the language in the collective negotiations agreement (CNA) between the Board and the PRESSA makes the $1,850 premium more like an extracurricular-coaching stipend, rather than actual compensation. It provides:

> F. Specific Salary Provisions—Maintenance and Facilities Personnel
>
> 1. Custodian Supervisor
>
> A supervisor shall receive compensation based on size of building, age of building, age level of children within the building, and other factors. The compensation is incorporated in the Custodial Supervisor guide in Schedule A. Because of the larger size and greater complexity of the John Witherspoon Middle School and Princeton High School, contractual premiums for the supervisors of those buildings shall be paid in accordance with Schedule A.

The Board thus argues that the CNA clarifies that the stipend follows the school, not the supervisor. The premiums are based on assignment, which is within the prerogative of the Board. As recognized in the CNA, the responsibilities of a custodian supervisor are more complex at the high school and middle school than they are at the elementary school.

CONCLUSIONS OF LAW

As noted by both parties, N.J.S.A. 18A:17-3 specifically provides that janitorial employees who have obtained tenure "**shall not be** dismissed or suspended or **reduced in compensation**, except as the result of the reduction of the number of janitors in the district made in accordance with the provisions of this title or except for neglect, misbehavior or other offense," and then only in the manner set forth under N.J.S.A. 18A:6-9 et seq. (emphasis added). Since the law provides that, for purposes of tenure acquisition and tenure rights, Potocki is serving within the same tenure position despite the transfer, Potocki's position is more persuasive that a reduction in a tenured employee's compensation following his transfer from one assignment to another violates the prohibition set forth in N.J.S.A. 18A:17-3 against reduction in compensation, unless that reduction is the result of actions taken against the employee for neglect, misbehavior or other offense pursuant to the Tenure Hearing Act.

The Commissioner held in Reinertsen v. Board of Education of the Township of East Brunswick, EDU 10328-97, Initial Decision (May 27, 1998), adopted, Comm'r (July 8, 1998) <http://lawlibrary.rutgers.edu/oal/search.html>, that the reassignment of a tenured custodial employee from a head-custodian position to a custodian position was permitted by law, but held that the Board could not reduce his salary without violating the tenure laws. This comports with decisions that provide that the compensation of a tenured teacher cannot be reduced following his/her transfer from one teaching position to another, Bassett v. Board of Education of Oakland, OAL Dkt No. EDU 8061-83 (January 31, 1984), Comm'r (March 19, 1984), aff'd in part, St. Bd. (February 4, 1987), aff'd, 223 N.J. Super. 136 (App. Div. 1988), and those that provide that the compensation of a tenured secretarial/clerical employee cannot be reduced following his/her transfer to another secretarial/clerical position, Casey v. Board of Education of Cinnaminson, Burlington County, St. Bd., Dkt. No. 1-94 (October 5, 1995). In Casey, where the petitioner was reassigned from one clerical position to another clerical position following a reduction in force, the State Board of Education declared that a tenured employee who is reassigned within the same tenure position cannot be reduced in compensation, even if the reassignment resulted from a reduction in force. Since

Potocki had acquired tenure status pursuant to N.J.S.A. 18A:17-3, the Board was not permitted to reduce his compensation when it reassigned him from one school to another school.

The Board's argument that the compensation for the custodian position was established pursuant to the CNA with the PRESSA and therefore the reduced compensation is justified must fail. The New Jersey Supreme Court has held that contract terms may not contravene or supersede a specific term or condition of employment that is set by statute, and in particular, the Tenure Act. Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 76 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978); Belen v. Woodbridge Twp. Bd. of Educ., 142 N.J. Super. 486 (App. Div. 1976). The court in Belen suggested that a negotiated salary provision resulting in the reduction of a tenured employee's salary, even if it does not violate the PERC Act, would violate the Tenure Act. Since the tenure provisions of N.J.S.A. 18A:17-3 provide that Potocki may not suffer a reduction in compensation in his tenured position, the Board was not permitted to reduce his compensation when it transferred him from the high school to an elementary school. Despite the transfer, Potocki remains in the same position for tenure purposes, regardless of the description of any contrary provision in the CNA. Thus, what the Board calls a premium is more of a salary to Potocki than an extracurricular-duty stipend, and the fact that the CNA sets forth a justification for the premium cannot negate the statute.

School law decisions have been interpreted as prohibiting a local board from reducing a tenured employee's salary by board action or inaction, unless the board successfully brings tenure charges or the employee is laid off or demoted as the result of a reduction in force. See, e.g., Kalapos v. Trenton Bd. of Educ., 93 N.J.A.R.2d (EDU) 430 (overpayment due to clerical error); Galop v. Hanover Twp. Bd. of Educ., 1975 S.L.D. 358 (inadvertent placement on wrong step of salary guide). When Potocki obtained tenure as a custodian supervisor under N.J.S.A. 18A:17-3, he also acquired certain protections against dismissal, suspension and reduction in compensation. The only way in which the compensation of a tenured custodial employee can be reduced is if his position is reduced from full time to part time or from twelve months to ten months or some other comparable reduction in work time, and even then his rate of

compensation may not be reduced. See Casey, supra, State Bd., Dkt. No. 1-94 (October 5, 1995). Therefore, I **CONCLUDE** that the Board violated N.J.S.A. 18A:17-3 when, upon its transfer of Potocki from custodian supervisor in the high school to custodian supervisor at the Riverside School, it reduced his premium and, therefore, his compensation.

ORDER

For the foregoing reasons, I **GRANT** petitioner's motion for summary decision, **DENY** respondent's cross-motion for summary decision, and **ORDER** the reinstatement of Potocki's premium of $1,850 and the restoration of all lost wages and benefits.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 23, 2008
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: October 24, 2008

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

/bdt

481-08L

481-08

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

JON S. CORZINE
Governor

LUCILLE E. DAVY
Commissioner

December 10, 2008

Jennifer M. Perez, Clerk
Superior Court of New Jersey
Hughes Justice Complex
25 W. Market Street
P.O. Box 971
Trenton, NJ 08625

Re: *Request for Docketing of Judgment*

Dear Ms. Perez:

In accordance with *N.J.S.A.* 2A:58-10, I am enclosing the December 10, 2008 Order of the Commissioner of Education finding that Scott Keim and Roberta Cowan are subject to entry of a judgment on the docket of the court due to their failure to pay the tuition assessment ordered in the matter of *Board of Education of the Township of Hamilton, Mercer County v. S.K. and R.C.* By copy of this letter, I am advising Mr. Keim and Ms. Cowan, as well as counsel for the Township of Hamilton Board of Education, of the Commissioner's issuance of the enclosed Order.

If you require anything more, please contact this office at (609) 292-5706.

Very truly yours,

M. Kathleen Duncan

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes
MKD/MH
Enclosure
c: Scott Keim (with copy of Order)
Roberta Cowan (with copy of Order
Dennis DeSantis, Exq. (with copy of Order)
Jones Addo (with copy of Order)

AGENCY DKT. NO. 157-6/08

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	ORDER
V.	:	
S.K. AND R.C.,	:	
RESPONDENTS.	:	

On September 10, 2008, a final agency decision was rendered in this matter, wherein the Commissioner granted summary decision to the Board on its complaint seeking reimbursement from respondents S.K. and R.C. of the costs of tuition pertinent to the period of ineligible attendance of R.C.'s children, J.B. and Z.B., in its schools during the 2007-08 school year. Respondents had been directed to submit an answer to the Board's complaint and were informed that if no answer was submitted, each count of the complaint would be deemed admitted and the matter could then be decided on a summary basis. As no answer was subsequently submitted, the Commissioner granted summary decision in favor of the Board, and ordered respondents – jointly, severally or in the alternative – to remit to the Board tuition in the amount of $38,252.24. The Board subsequently notified the Commissioner that the respondents had failed to comply with her decision and it requested that the Commissioner seek entry of the assessment on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. Respondents offered no reasons why the judgment against them should not be so docketed, although given an opportunity by this agency to do so.

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, Scott Keim and Roberta Cowan are now subject to entry of a judgment by the court in the amount of $38,252.24, which represents the payment ordered at the conclusion of the contested case before the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 12/10/08

Date of Mailing: 12/10/08

#483-08SEC

AGENCY DKT. NO. 308-10/08

IN THE MATTER OF GABRIEL DE TOLLA,	:	
CLEARVIEW REGIONAL BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, GLOUCESTER COUNTY.	:	DECISION

The record of this matter and the decision of the School Ethics Commission (Commission) finding that Gabriel DeTolla (respondent) violated the School Ethics Act while serving as a member of the Clearview Regional Board of Education – forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 solely for review of the Commission's recommended penalty[1] – have been reviewed. No comments were received from respondent pursuant to *N.J.A.C.* 1:6C-18.3.

Upon review, the Commissioner is satisfied that, in recommending the penalty of censure, the Commission fully considered the nature, extent and circumstances of respondent's violations, as well as past decisional precedent and the fact that respondent is no longer a Board member. Therefore, the Commission's recommendation will not be disturbed.

Accordingly, the decision of the Commission as to penalty is hereby adopted and Gabriel DeTolla shall be censured as a member of the Clearview Regional Board of Education.

IT IS SO ORDERED.[2]

Lucille E. Davy
COMMISSIONER OF EDUCATION

Date of Decision: 12/11/08
Date of Mailing: 12/11/08

[1] It is noted that respondent did not appeal the Commission's finding of violation to the Commissioner pursuant to *N.J.A.C.* 6A:4.

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

IN THE MATTER OF GABRIEL DE TOLLA, CLEARVIEW REGIONAL BOARD OF EDUCATION, GLOUCESTER COUNTY	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**Docket No. C08-07**
	:	**DECISION**

PROCEDURAL HISTORY

This matter arises from a complaint filed by Raymond Miller on February 15, 2007 against Dr. Gabriel DeTolla, a member of the Clearview Regional Board of Education ("Board"). An Answer was filed by the respondent on May 11, 2007. The Commission invited the parties to attend its meeting on February 26, 2008 to present witnesses and testimony to aid in the Commission's investigation of this matter. Pursuant to N.J.A.C. 6A:28-6.7(d)4, the complainant filed additional papers on February 14, 2008, which included an affidavit and event log provided by the former Superintendent. A copy of the same was forwarded to the respondent on that date. Although the respondent also filed additional papers, the submission was outside the 10-day requirement provided in regulation, N.J.A.C. 6A:28-6.7(d)4, and, therefore, was not considered by the Commission. Both the complainant and the respondent appeared and presented testimony. Pursuant to N.J.A.C. 6A:28-6.7(d)5, the complainant filed post-hearing documents for the Commission's review on March 5, 2008. The respondent did not submit additional papers.

The Commission tabled the discussion of this matter and its determination on probable cause until its meeting on April 1, 2008, at which time the Commission found probable cause to credit the allegations that the respondent violated N.J.S.A. 18A:12-24(b), (c), (f) and (g) and N.J.S.A. 18A:12-24.1(c), (d), (e) and (f) of the Code of Ethics for School Board Members. In its decision issued thereafter, the Commission stated:

> The Commission finds ... that there is sufficient evidence to support the claim that the respondent violated the Act as he "participated in, played a primary role in, and exerted unauthorized pressure on the Clearview administration and the Superintendent with regard to his spouse's application for a position within the District." The Commission further finds sufficient evidence to support the claim that the respondent influenced and exerted pressure on new Board members by requesting their support in the hiring of his spouse and having them contact the Superintendent expressing support in the hiring of his spouse. Thus, the Commission finds that this matter should proceed to an adjudication on the merits of those claims and, specifically, whether the respondent violated N.J.S.A. 18A:12-24(b), (c), (f) and (g) and N.J.S.A. 18A:12-24.1(c), (d), (e) and (f) of the Code of Ethics for School Board Members. (Commission's decision, April 3, 2008)

The Commission dismissed the allegations that the respondent violated N.J.S.A. 18A:12-24(e) and N.J.S.A. 18A:12-24.1(a) and notified the respondent that the matter was being transmitted to the Office of Administrative Law (OAL) for a hearing, pursuant to N.J.A.C. 6A:28-6.8(a), because material facts were in dispute.

By notice dated May 30, 2008, the respondent was advised that a hearing date of July 17, 2008 was set. The record indicates that the respondent filed a "motion" at the OAL to dismiss this matter by letter dated June 2, 2008, based on the fact that he is no longer serving on the Board. By letter dated July 1, 2008, the Deputy Attorney General (DAG) representing the School Ethics Commission submitted an objection to this motion, noting that the respondent's current status does not moot the allegations in the complaint and further noting that, if the respondent is found in violation of the Act, the Commission could nevertheless recommend a penalty of reprimand or censure. The DAG therein noted, "it is my understanding that this matter will be addressed at the pre-hearing conference on July 17, 2008, and that no further response is required prior thereto." (Commission Response at p. 2) The respondent was copied on the Commission's letter in opposition to the motion.

By notice dated July 29, 2008, the Commission was informed that the respondent did not appear for the hearing; the file was returned from the OAL to the Commission for disposition and the respondent was accorded 13 days from July 29, 2008 to submit reasons for his failure to appear. The respondent did not file a written explanation with the Commission.

At its meeting on August 26, 2008, the Commission determined that, because the respondent failed to appear for the hearing at OAL to challenge its probable cause determination, *the allegations which the Commission found probable cause to credit are deemed admitted.* The Commission further determined that, pursuant to N.J.A.C. 6A:28-6.8(b), the complaint should be resolved by summary decision. Therefore, the respondent was accorded 30 days to submit a written statement setting forth the reasons why he should not be found in violation of the Act.

On September 4, 2008, the respondent filed a written statement in response to the probable cause determination. The respondent initially asserts that the complainant in this matter was using the Commission for a personal vendetta and that it was he (the complainant) who conducted himself in an unethical manner. As to the proofs herein, the respondent contends that:

> There has never been any evidence produced by the complainant that any perceived pressure was put on the Clearview administration. The only person to testify was Ms. Carroll (an irate superintendent whose dictatorial style was challenged by me as a board member and who also received a poor evaluation by me). And he has no corroborating witness for Ms. Carroll the superintendent. Mr. Miller's testimony is all hearsay as noted by the commission, therefore there is no one to agree with Ms. Carroll's account, but five people (including myself) that discount her exaggerated version of events. (Respondent's Statement at page 2) (emphasis in text)

As to the allegation that he exerted pressure on new board members to support the hiring of his spouse, the respondent asserts that he produced evidence to the contrary by submitting interrogatories from four board members stating otherwise. The respondent maintains that:

> No gain (financial or employment) to any member of my family ever resulted from these alleged conversations. My spouse's application was never completed and was even withdrawn. No discussion or vote ever took place of trying to place my spouse in employment at any public board meeting, unlike the actions of the complainant.*** (Id. at page 3).

The Commission notes that to the extent the respondent, in his September 4th submission, continues to challenge the evidence in this matter, the Commission cannot consider these arguments, but, instead, considers the respondent's claims as to why he should not be found in violation of the Act. N.J.A.C. 6A:28-6.8(b).

EVIDENCE BEFORE THE COMMISSION

The following documentation was brought before the Commission: the complaint and attachments, an affidavit with attached log of events submitted by Ms. Patricia Carroll, the former Superintendent, the respondent's Answer and attachments, as well as affidavits submitted by Board members Michael Riggs, Joseph Betlejewski, Frank Smith and Carmen Trifiletti on the respondent's behalf. As noted above, due to the respondent's failure to appear at the OAL to defend his position and pursuant to the ALJ's return of this matter to the Commission for disposition, the allegations which the Commission found probable cause to credit are deemed admitted. Thus, it is deemed admitted that the respondent "participated in, played a primary role in, and exerted unauthorized pressure on the Clearview administration and the Superintendent with regard to his spouse's application for a position within the District." It is also deemed admitted that the respondent influenced and exerted pressure on new Board members by requesting their support in the hiring of his spouse and having them contact the Superintendent expressing support in the hiring of his spouse. (Complaint at paragraphs 1 and 2)[1]

ANALYSIS

At its April 1, 2008 meeting, the Commission found probable cause to credit the allegations that the respondent violated N.J.S.A. 18A:12-24(b), (c), (f) and (g) and N.J.S.A. 18A:12-24.1(c), (d), (e) and (f) of the Code of Ethics for School Board Members.

Initially, the Commission considers whether the respondent violated N.J.S.A. 18A:12-24(b), which provides:

---

[1] The complaint filed on February 15, 2007 did not cite to specific sections of the Act that were alleged to have been violated. By letter dated March 8, 2007, the complainant asserts that the respondent violated N.J.S.A. 18A:12-24(b), (c), (e), (f) and (g) and N.J.S.A. 18A:12-24.1(a), (c), (d), (e) and (f) of the Code of Ethics for School Board Members and also asserts that the respondent violated district policy.

> b. No school official shall use or attempt to use his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family or others;

Pursuant to N.J.S.A 18A:12-23, a spouse is an immediate family member. The Commission notes in this connection that Ms. Carroll's affidavit states that she informed the respondent that it would be fiscally irresponsible to offer the respondent's wife a salary beyond the fourth step of the hiring guide and, therefore, she would not consider it. Notwithstanding Ms. Carroll's position on the issue in April 2006, the respondent pursued the matter in May 2006 when he spoke angrily to her on the phone and persisted in June when he met with her. (Carroll's Affidavit and Log) Based on the deemed admissions and evidence before the Commission, the Commission finds that the respondent attempted to use his position as a Board member to obtain an "unwarranted" privilege or advantage for his wife; namely, an unjustifiably high entrance salary. Notably, the statute does not require that he was successful in this endeavor, only that he made the attempt. Accordingly, the Commission finds that the respondent violated N.J.S.A. 18A:12-24(b).

The Commission next considers whether the respondent violated N.J.S.A. 18A:12-24(c), as set forth below:

> c. No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. No school official shall act in his official capacity in any matter where he or a member of his immediate family has a personal involvement that is or creates some benefit to the school official or member of his immediate family;

The record herein does not show that the respondent was acting in his official capacity when he contacted the Superintendent and exerted pressure on her to consider the employment of his wife at a higher salary. Rather, the actions taken by the respondent appeared to be wholly outside his authorized duties as a board member, as discussed more fully below. Therefore, the Commission dismisses the allegation that the respondent violated N.J.S.A. 18A:12-24(c).

The Commission turns to N.J.S.A. 18A:12-24(f), which states:

> f. No school official shall use, or allow to be used, his public office or employment, or any information, not generally available to the members of the public, which he receives or acquires in the course of and by reason of his office or employment, for the purpose of securing financial gain for himself, any member of his immediate family, or any business organization with which he is associated;

Again, it is deemed admitted that the respondent exerted unauthorized pressure on the Clearview administration and the Superintendent with regard to his spouse's application for a position within the District and that he influenced and exerted pressure on new Board members by requesting their support in the hiring of his spouse by having them contact the Superintendent expressing their support in that connection. As such, the Commission finds that the respondent used his public office for the purpose of securing financial gain for a member of his immediate family, in violation of N.J.S.A. 18A:12-24(f).

The Commission next considers whether the respondent violated N.J.S.A. 18A:12-24(g), which provides:

> g. No school official ... shall represent any person or party other than the school board or school district in connection with any cause, proceeding, application or other matter pending before the school district in which he serves or in any proceeding involving the school district in which he serves or, for officers or employees of the New Jersey School Boards Association, any school district.

Although the respondent had conversations with the Superintendent about his wife's apparent interest in working in the District, the Commission cannot find on this record that the respondent's actions rose to the level of "representing" his wife in an application or matter pending before the Board, particularly since the respondent's wife's application was withdrawn before the Board ever formally considered her as a candidate for any position. Therefore, the Commission dismisses the allegation that the respondent violated N.J.S.A. 18A:12-24(g).

Moving to the Code of Ethics for School Board Members, the Commission notes that the relevant sections of the code state:

> c. I will confine my board action to policy making, planning, and appraisal, and I will help to frame policies and plans only after the board has consulted those who will be affected by them.
>
> d. I will carry out my responsibility, not to administer the schools, but, together with my fellow board members, to see that they are well run.
>
> e. I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.
>
> f. I will refuse to surrender my independent judgment to special interest or partisan political groups or to use the schools for personal gain or for the gain of friends.

As set forth above, the actions taken by the respondent were wholly outside his authorized duties as a board member. Although the respondent indicated in his Answer that he

was, at the time, head of the personnel committee, there is nothing on this record to indicate that the committee had authorized his inquiries to the Superintendent. As such, while the Commission cannot find his conduct violated N.J.S.A.18A:12-24.1(c) which concerns "board action," such conduct does implicate N.J.S.A. 18A:12-24.1(e). Private action is defined as action taken by a member of a district board of education that is beyond the scope of the duties and responsibilities as a member of a district board of education. N.J.A.C. 6A:28-7.1. Mindful of the respondent's deemed admissions, the Commission finds that the respondent's actions were beyond the scope of his duties as a Board member. As to whether private action of this kind "may compromise the board," the Commission finds that it may. Ms. Carroll's affidavit indicates that she insisted that the district needed to be fiscally responsible and that offering the respondent's wife the salary that he pursued was not possible. It was also the Superintendent's perception that doing so would have repercussions among her staff. Accordingly, the Commission finds that the respondent violated N.J.S.A. 18A:12-24.1(e).

Next, the Commission considers whether the respondent administered the schools in violation of N.J.S.A.18A:12-24.1(d). A Board member may be found to have administered the schools when he "has become directly involved in activities or functions that are the responsibility of school personnel or the day to day administration of the school district or charter school or has given a direct order to school personnel." N.J.A.C. 6A:28-7.1. Here, it is important to note that a board may appoint a certificated or non-certificated employee only upon the recommendation of the chief school administrator. N.J.S.A. 18A:27-4.1. As such, the hiring of school employees is the responsibility of the chief school administrator and his/her designees. Mindful of the respondent's deemed admissions, the Commission finds that the respondent herein became directly involved in the District's hiring process when he repeatedly discussed the matter of his wife's candidacy for a position with Ms. Carroll, when he exerted pressure on her to consider hiring his wife at a higher salary than was the practice of the District and when he influenced other Board members to contact the Superintendent to this end. The Commission, therefore, finds that that the respondent violated N.J.S.A.18A:12-24.1(d) of the Code of Ethics for School Board Members.

Finally, although the Commission finds that this record does not support the conclusion that the respondent surrendered his independent judgment to special interest or partisan political groups,[2] because it is deemed admitted that the respondent exerted unauthorized pressure on the Clearview administration and the Superintendent with regard to his spouse's application for a position within the District and that he influenced and exerted pressure on new Board members by requesting their support in the hiring of his spouse, the Commission finds that the respondent used the schools for personal gain[3] in violation of N.J.S.A. 18A:12-24.1(f).

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[2] "Partisan political groups" means a number of persons who are organized and voluntarily united in opinion and who adhere to a particular political party or cause as opposed to the public interest at large. "Special interest groups" means a group of persons who are organized and have a specific interest in common. N.J.A.C. 6A:28-7.1.

[3] "Personal gain" means a personal involvement that is or creates some benefit to a member of the district board of education or a member of a charter school board of trustees or an immediate family member.

DECISION

For the reasons set forth above, the Commission finds that Dr. Gabriel DeTolla violated N.J.S.A. 18A:12-24(b) and (f) and N.J.S.A. 18A:12-24.1(d), (e) and (f) of the Code of Ethics for School Board Members. The Commission dismisses the allegations that the respondent violated N.J.S.A. 18A:12-24(c), and (g) and N.J.S.A. 18A:12-24.1(c) of the Code of Ethics for School Board Members.

PENALTY

The Commission recommends that the Commissioner of Education impose a penalty of censure, noting that board members have been censured for single findings of violations of N.J.S.A. 18A:12-24(b) (*See*, I/M/O Raymond Bonker, Lenape Valley Reg'l Bd. of Ed., C11-97 (March 30, 1998), approved by Commissioner, May 22, 2008, where a board member was censured for violating N.J.S.A. 18A:12-24(b) when he released staff email addresses in his campaign literature before the board had discussed and approved releasing them in public; I/M/O Lawrence James, Chesilhurst Bd. of Ed. C10-98 (December 15, 1998), approved by Commissioner February 2, 1999, where a board member was censured for violating N.J.S.A. 18A:12-24(b) when he asked the Business Administrator to intercede on his behalf in order to acquire an unsecured loan from the bank that held the Board's accounts). Board members have also been censured for single findings of N.J.S.A. 18A:12-24.1(d) (*See*, I/M/O Doris Graves, Pleasantville Bd. of Education, C47-05 (May 27, 2008); approved by Commissioner, July 10, 2008, wherein a board member was found to have violated 18A:12-24.1(d) when she spoke with the district's facilities coordinator and later appeared at a Board Personnel meeting regarding a personnel action affecting her cousin by marriage). In the instant matter, because the respondent is no longer serving on the Board, the Commission cannot recommend a more severe penalty.

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the School Ethics Commission's recommended sanction. Parties may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of violation may file, within **13 days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4 within **30 days** of the filing date of the decision from which the appeal is taken. The filing date shall be three days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the

Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (13 days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Paul C. Garbarini

Paul C. Garbarini
Chairperson

Mailing Date: October 28, 2008

Resolution Adopting Decision – C08-07

Whereas, the School Ethics Commission has considered the pleadings filed by the parties, the documents submitted in support thereof, and documents brought to the record pursuant to its investigation; and

Whereas, at it meeting of April 1, 2008, the Commission found probable cause to credit the allegations that the respondent violated N.J.S.A. 18A:12-24(b), (c), (f) and (g) and N.J.S.A. 18A:12-24.1(c), (d), (e) and (f) of the Code of Ethics for School Board Members; and

Whereas, the matter was transmitted to the OAL for hearing in accordance with N.J.A.C. 6A:28-6.8(a), but Dr. DeTolla failed to appear for the hearing and the matter was returned to the Commission for disposition; and

Whereas, at its meeting on August 26, 2008, the Commission determined that, because the respondent failed to appear for the hearing at OAL to challenge its probable cause determination, the allegations which the Commission found probable cause to credit are deemed admitted and it would resolve the matter by summary decision; and

Whereas, the respondent was accorded 30 days to submit a written statement setting forth the reasons why he should not be found in violation of the Act; and

Whereas, the respondent submitted a written statement which was considered by the Commission; and

Whereas, at its meeting on October 27, 2008, the Commission determined that Dr. Gabriel DeTolla violated N.J.S.A. 18A:12-24(b) and (f) and N.J.S.A. 18A:12-24.1(d), (e) and (f) of the Code of Ethics for School Board Members. The Commission dismissed the allegations that the respondent violated N.J.S.A. 18A:12-24(c), and (g) and N.J.S.A. 18A:12-24.1(c) of the Code of Ethics for School Board Members.

Whereas, at its meeting on October 27, 2008, the Commission recommended a penalty of censure;

Now Therefore Be It Resolved, that the Commission hereby adopts the proposed decision referenced as it decision in this matter and directs it staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini

Paul C. Garbarini, Chairperson

I hereby certify that this Resolution was duly adopted by the School Ethics Commission at it public meeting on October 27, 2008.

Joanne Boyle, Executive Director

486-08

STEVEN KORBA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CLINTON, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a former non-tenured kindergarten teacher in the respondent Board's district – challenged the Board's decision not to renew his annual contract for the 2007-2008 school year, following petitioner's alleged sexual harassment of a colleague. The Board filed a motion for summary decision, which was denied.

The ALJ found, *inter alia*, that: the Board's argument that petitioner's appeal should be dismissed for failure to exhaust administrative remedies is without merit; petitioner admitted to almost all of the allegations against him; petitioner's credibility as to statements he denied making was lacking; and petitioner failed to prove that his nonrenewal was arbitrary, capricious or unreasonable. Accordingly, his request for reinstatement was denied and the petition dismissed.

The Commissioner concurred with the ALJ that the respondent Board properly exercised its right to non-renew petitioner's employment and adopted the Initial Decision as the final decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

December 15, 2008

OAL DKT. NO. EDU 6494-07
AGENCY DKT. NO. 196-7/07

STEVEN KORBA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CLINTON, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

In this matter, petitioner asks that the Commissioner reinstate him to his position of Kindergarten teacher in respondent's district. The record presented to the Commissioner – which does not include a transcript of the proceedings in the Office of Administrative Law (OAL) – and the Initial Decision by the Administrative Law Judge (ALJ) have been reviewed.[1]

At the outset, the Commissioner concurs with the ALJ's determination that petitioner did not waive his rights to a hearing in the OAL by 1) failing to ask the respondent board for a written statement of reasons for the non-renewal and 2) declining to make an informal appearance before the board. The procedures discussed in *Donaldson v. North Wildwood Board of Education*, 65 *N.J.* 236 (1974), provide a non-tenured employee with the opportunity to appear informally before the employing board but do not require the employee to do so. This is appropriate in light of the fact that the applicable school law statutes and regulations do not require the respondent board to provide petitioner, a non-tenured teacher, with an opportunity to challenge its actions via a formal hearing, *i.e.,* with discovery and the

[1] Neither party filed exceptions.

examination of witnesses. *Donaldson, supra,* 65 *N.J.* at 246. Petitioner may only pursue such a hearing in the OAL, pursuant to *N.J.A.C.* 6A:3-1.3(d).

With respect to the ultimate issue in the case, the Commissioner agrees with the ALJ – for the reasons set forth in the Initial Decision – that respondent was not arbitrary, capricious or unreasonable in its decision not to renew petitioner. Thus, respondent met the standard to which petitioner – as a non-tenured teacher – was entitled, and petitioner's appeal must fail. The petition is dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 12/15/08

Date of Mailing: 12/15/08

[2] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6494-07
AGENCY DKT. NO. 196-7/07

STEVEN KORBA,
Petitioner,
v.
CLINTON TOWNSHIP BOARD OF EDUCATION,
HUNTERDON COUNTY,
Respondent.

Arnold Mellk, Esq., for petitioner (Wills, O'Neill & Mellk, attorneys)

Thomas Johnston, Esq., for respondent (Porzio, Bromberg & Newman, attorneys)

Record Closed: September 15, 2008 Decided: October 30, 2008

BEFORE **LISA JAMES-BEAVERS**, ALJ:

STATEMENT OF THE CASE

Petitioner Steven Korba, a nontenured kindergarten teacher, appeals his nonrenewal from respondent Clinton Township Board of Education (Board) for the

2007-2008 school year. The superintendent was concerned that Mr. Korba engaged in inappropriate conduct with respect to fellow teacher J.T.

PROCEDURAL HISTORY

On April 24, 2007, Korba was advised that the Board would not renew his employment for the 2007-2008 school year. On July 20, 2007, Korba filed a petition with the Commissioner of Education appealing his nonrenewal from employment with the Board. On August 6, 2007, the Board filed its answer stating that, as a nontenured employee, Korba failed to state a claim upon which relief can be granted since he was not entitled to renewal of his employment contract. The Commissioner of Education transmitted the contested case to the Office of Administrative Law (OAL), where it was filed on August 15, 2007. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The Board filed a motion for summary decision on February 14, 2008, and on March 3, 2008, Korba filed opposition to the motion. I denied the motion for summary decision on March 5, 2008. The case was heard on March 18 and 19, 2008. The record was held open for closing summations, and closed on September 15, 2008.

FACTUAL DISCUSSION

Korba testified that he was a kindergarten teacher at the Spruce Run School from September 2005 until June 2007. He received positive evaluations and observations from October 2005 to February 2007. In addition, parents of his students nominated him for Teacher of the Year for the Clinton Township School District, along with three other teachers. In March 2007 he had a disagreement with another teacher, J.T. He apologized to her in person, but she did not accept the apology. He apologized a second time through an e-mail, which is the subject of this case. It became the subject of an affirmative action investigation report of which he was not informed until his attorney showed him the report about a week prior to the hearing.

Korba explained in testimony that J.T. was a colleague of his with whom he had a working relationship. He said that he got to know J.T. when they taught together over

the summer of 2006, and during his second year at the school they formed a friendship. He said that further into the school year, J.T.'s behavior changed and she would not acknowledge him when he would open doors for her, and she would go right into her classroom. On March 13, 2007, he sent J.T. a text message saying, "Plan on seeing me again tomorrow." She sent him a text back, "Why?" He did not respond. The next day he went to her classroom, where she was alone. They had a conversation with the door closed. He told her that he was upset because she was not speaking to him and snubbing him. He said J.T. was visibly upset. He apologized to her, but she did not accept his apology. He had become aware that other teachers were saying there was something going on between him and J.T. When he spoke to J.T., he expressed anger toward gossips that were spreading rumors about the two of them. He was upset about the prospect of people saying things about her. He has a good reputation and was upset that others were talking about them. He denied threatening to do any harm to people spreading such gossip. He sent an e-mail to J.T. the night of March 14, 2007 (P-11). The purpose of his e-mail was to apologize for the conversation he and J.T. had had earlier that day. He was also apologizing for not talking to her and saying that he did not see her as a friend. He and J.T. had exchanged e-mails before, but they were related to school.

Korba further testified that he met with affirmative action officer Diane Radwill about complaints made by J.T. Referencing paragraph two of the Affirmative Action Investigation report (P-9), Korba stated that on March 13, 2007, after a meeting with guidance counselor Carole Frey, he decided to speak with J.T. When interviewed, he mentioned to Ms. Frey and principal Laura Schneider that he was concerned about the health of his parents. He told them he had a lot weighing on his mind. He told Frey and Schneider that it was wrong for other teachers to talk about J.T. and him. He said if he found out who was spreading rumors, he was going to confront them. He denied giving J.T. a directive for her to come to his classroom, and denied ever threatening her in any way. When they asked about his comment that he attended a New Jersey Education Association (NJEA) convention in Atlantic City to get to know J.T. better, Korba said that he did want to get to know her better as a friend.

Those present at the interview of Korba were Radwill, Schneider and Clinton Township Education Association (CTEA) representative Kathy Collins. He admitted that he remembered the substance of his conversation preceding the e-mail, not the actual words. He said that it was possible that he may have said a curse word. He doesn't recall whether he said he would confront those spreading the rumors. He was upset and said, "People think I'm a nice guy." He did not believe he went on to say that people do not know what he's capable of. He was upset with J.T. He took it out on her and felt bad about it. He told Ms. Schneider that he did not mean he was going to harm anyone. He admitted saying that he may need to lose his job over it, referring to gossip. On May 15, 2007, when he met with Radwill and Schneider, his first response was to ask if he could resign immediately. He did not explain the e-mail. Radwill and Schneider counseled him not to resign immediately. He testified that the e-mail was not sexual, but that he understands how it could look that way. He admitted telling J.T. that he did not see her as a friend, but he meant that he did not see her as a friend like a best friend; rather, they were more colleagues or coworkers.

In testimony, Korba denied having any knowledge of the affirmative action complaint procedures adopted by the Board (P-10). He agreed with most of the information in the affirmative action officer's report (P-9). Specifically, he agreed with everything except the notation that he was thought to have a crush on J.T. They were coworkers who were starting to develop a friendship. He did not have a crush on her. J.T. told him about a comment her husband made, regarding whether there was something he should know. J.T. never told Korba that his e-mail crossed the line or constituted sexual harassment. She never told him that she felt unsafe around him. He never had a chance to respond to these allegations. He agrees with the notation in the report that at the meeting, he asked if he could resign immediately. He meant that he was upset with the fact that he was being accused. At the same time as this was going on, he was dealing with seriously ill parents. He was also acting without advice of counsel. He was assured that the only reason for the interview was to obtain information. He was advised not to resign. Ms. Collins met with just Korba and advised him to seek counseling. On March 15, 2007, the superintendent suggested that he take the rest of the week off and said they would discuss the situation again the following Monday. On Monday, March 19, 2007, before school started, he received a call from

Ms. Schneider, who told him that he was to attend a meeting at 8:30 a.m. An NJEA representative was present at the meeting. He was advised at that meeting that he was being let go. He said that at the meeting, he was told not to speak.

Korba testified that he received a nonrenewal letter on May 18, 2007. After he was charged as noted in P-9, he did not request a statement of reasons why he was nonrenewed, nor did he ask for a full hearing. He did go through the grievance procedure, which was resolved in favor of the Board.

Korba testified that he received a letter of recommendation from guidance counselor Carole Frey dated May 18, 2007 (P-14). Mr. Korba admitted that, although the content was Ms. Frey's, he placed the letter on Spruce Run School letterhead. She mailed him three copies that were signed, but not on letterhead. He photocopied her letter to a blank letterhead page. He did not explain how he had access to Spruce Run letterhead, but admits that it was inappropriate for him to copy her letter onto letterhead. Ms. Frey did not know that he did so.

Diane Radwill, director of Special Services and affirmative action officer, testified that she is responsible for affirmative action training for the whole staff and for investigating incidents. She has training for all staff on the first day of each school year and has done so since fall 2003. She reviews what constitutes harassment, discrimination, and cyber-bullying. She also reviews to whom workers should report incidents and how to reach her. She may not have actually said the name of the policy in her training sessions, but she let staff know the guidelines. With reference to this incident, Ms. Frey and Ms. Schneider informed Ms. Radwill of what led up to them calling her. She interviewed both J.T. and Korba. J.T.'s demeanor was concerned and upset. J.T. told Radwill that Korba seemed angry and upset with her in March 2007. J.T. also related that her husband and colleagues felt that Korba had a crush on her. She felt that Korba's e-mail crossed the line and constituted sexual harassment. She felt she was unsafe at work. Frey and Schneider were present during her interview. They were also present for Korba's interview, along with CTEA president Collins. She believes she gave Korba a chance to explain during that interview. He put his hands on his head and asked if he could resign. She told him it was premature. He expressed

concern about J.T. Radwill wrote her report (P-9), and gave it to the county superintendent. She noted that Korba became distraught when he was advised that his e-mail had crossed the line. She did not question him on the details of his meeting with J.T. because he said he was not prepared to deal with it at that time. She did not invite him back to give an explanation at a later time. She did not give a copy of her report to Korba because it is not her policy to give the report to the alleged perpetrator of the harassment or discrimination.

Former superintendent of Clinton Township schools Dr. Elizabeth Nastus testified that she was in charge of 1,800 students and 260 employees, and she supervised the affirmative action officer. She became aware of the incident with Korba when she received a call from Schneider, who read Korba's e-mail to her over the telephone. She directed Schneider to meet with J.T. with Radwill present. She also directed Schneider to meet with Korba with Collins present. She had concerns about Korba's mental state because he sounded distraught in the e-mail. She met with J.T. after meeting with Korba on Monday morning, March 19, 2007. The building representative was present when she met with Korba and Schneider. Nastus asked Korba if he had followed up on referrals for counseling services. He had not. She did not prepare a record of that meeting. She told Korba that he would be suspended with pay pending further investigation. When she met with J.T., J.T. expressed to her that she was afraid of Korba and felt safer when he did not come to school.

Nastus further testified that on March 22, 2007, she sent Korba a notice to advise him that he had an opportunity to appear before the Board when it discussed his case at its March 26, 2007, meeting. On March 27, 2007, she sent a letter to Korba advising him that he was suspended with pay and encouraging him to seek assistance. Ultimately, Korba was nonrenewed after his contract expired on June 30, 2007. She has many considerations when she decides whether to renew an employee's contract. They are: the quality of teaching; how he fits in the district; how well he works with colleagues; and how well he works within his team. Korba did not prove to her that she could rely on him to interact well with all of his colleagues. After she sent Korba the nonrenewal letter, she did not receive from him any request for a hearing. Nastus admitted on cross-examination that, prior to the incident with J.T., she had no reason to

question Korba's ability to interact with other faculty members. She also admitted that the primary basis for the nonrenewal was the content of Korba's e-mail.

FINDINGS OF FACT

Korba was a non-tenured kindergarten teacher in the Clinton Township School District between September 2005 and June 2007. As such, he was a member of the Clinton Township Education Association. While Korba was employed by the Board, members of the CTEA were annually trained on the Board's anti-harassment policies and procedures.

On March 13, 2007, Korba sent a text message to fellow teacher J.T., who worked in a nearby classroom in the same school, saying that she should plan to see him the next day. When he saw her on March 14, 2007, he expressed anger to J.T. about purported rumors regarding them. He threatened to confront those spreading the rumors. Also on March 14, 2007, Korba told J.T. that he attended an NJEA convention in Atlantic City "to get to know her better, not to go to the workshops."

On the night of March 14, 2007, Korba sent a lengthy e-mail to J.T. to apologize, setting forth, in pertinent part:

> What is important is what I feel for you—you are the only person in this school that I give a damn about, you and [M.], but with you it is stronger. I didn't know you from a hole in the wall when I first met you, but I have grown to both admire and respect you. You are a mature, intelligent, strong-willed individual. More than that, you became somebody whose company I really started to enjoy. I liked being around you, and as you started to open up to me I began to see a different side of you—someone who is outgoing and friendly and who has a great sense of humor. You have the cutest laugh I have ever heard—every time I heard it I just wanted to hug you. I told you that I thought the world of you. That's an understatement. If you called me at 3:00 in the morning with a problem and no one to turn to, I would have been there in a moment's notice in my bathrobe and slippers. I loved working with you for the last year and a half, and I was looking forward to a lot more of it. Whatever we were to

> each other, it was strong enough that your husband was actually getting concerned about it. I guess he is doing a jig now. The truth is, you can't put a label on what I thought of you.
>
> And now I just threw that all in the toilet, flushed it, and then turned on the fan to get rid of the smell.
>
> . . . .
>
> I also tell you this because the person that you knew in me is gone. It really is starting to get harder to focus. I don't know what lies ahead and I don't know what kind of person I am going to become because of all this, but I do know that I can't be who I was. I was friendly with everyone in the school pretty much and I loved being a part of all this. Now I am starting to lose that passion. Somebody the other day caught me off guard when they asked if I was ok because I didn't look right. It is starting to show. People are going to take notice. And to be completely honest . . . I don't know if I am going to care much longer. I want to be here for the rest of the year . . . but I don't know that I can. . . . And I am telling you because I want you to know right now what I think of you before I make any more mistakes or start to walk down a road of darkness.
>
> Make no mistake. I do care about you, more than you will ever know.
>
> [P-11.]

J.T. complained about Korba to affirmative action officer Radwill pursuant to the Board's harassment-complaint procedures. Radwill investigated J.T.'s complaint and interviewed her and several witnesses. J.T. told Ms. Radwill that she felt that the e-mail constituted sexual harassment and she had become afraid to be alone with Korba. At his meeting with Radwill, Korba admitted sending the e-mail to J.T. on the evening of March 14, 2007, and admitted that it could reasonably be construed as sexually harassing. Korba saw a copy of the affirmative action officer's report only when his attorney showed it to him in preparation for the hearing. At a meeting with Schneider and Frey, Korba said that "he really didn't mean" the remarks about hurting those responsible for spreading the rumors. He also said that if he found out who was spreading gossip, he "may need to lose his job over it."

On March 19, 2007, Korba met with the Clinton Township superintendent, Dr. Nastus. On March 22, 2007, Dr. Nastus sent Korba a notice advising Korba that he would be discussed at the Board's March 26, 2007, meeting and he had a right to appear before it. On March 27, 2007, as a result of the investigation, Dr. Nastus suspended Korba with pay pending further administrative action and review. On March 29, 2007, the CTEA filed a grievance on behalf of Korba for reinstatement. On April 24, 2007, the Board gave Korba notice that his contract would not be renewed for the 2007-2008 school year. Korba did not request a statement of reasons or a hearing before the full Board. Korba remained suspended with pay for the remainder of the 2006-2007 school year. The Board prevailed in the arbitration of the CTEA's grievance, which was held in November 2007.

CONCLUSIONS OF LAW

The transmittal from the Commissioner of Education states that this matter is to be reviewed under the limited standard applicable to non-tenured staff as set forth in the cases cited. The controlling case, which is referenced in the transmittal, is Dore v. Bedminster Township Board of Education, 185 N.J. Super. 447 (App. Div. 1982). In that case, the local board voted not to renew the contract of teacher Dore, resulting in the denial of tenure. Dore requested a statement of the reasons for the nonrenewal and the Bedminster Board of Education informed him of criticisms that were not contained in Dore's formal evaluations. They were based on personal observations of board members and knowledge acquired through students' parents. The State Board reversed the Commissioner's decision to reinstate Dore, emphasizing the considerable discretion afforded to local boards in employing teaching staff members. The State Board concluded that the local board's action was not so arbitrary and capricious as to warrant the extraordinary remedy of overriding the managerial prerogative of a local board and requiring it to employ a teacher it does not want on its staff.

The Appellate Division affirmed the State Board's decision and stated that a board has "virtually unlimited discretion in hiring or renewing nontenured teachers."

Dore, supra, 185 N.J. Super. at 453. The Appellate Division then referred to Donaldson v. North Wildwood Board of Education, 65 N.J. 236 (1974), and indicated that the Donaldson Court set forth that absent constitutional constraints or legislation affecting the tenure rights of teachers, local boards of education have an almost complete right to terminate the services of a teacher who has no tenure and is regarded as undesirable by the local board. Id. at 456.

The Commissioner also cites in the transmittal of this case Guerriero v. Board of Education of Glen Rock, State Board (February 5, 1986), aff'd, No. A-3316-85T6 (App. Div. 1986); Wise v. Board of Education of Trenton, State Board (January 3, 2001) <http://www.nj.gov/education/legal/>; Kufel v. Union County Vocational-Technical School District, 96 N.J.A.R.2d (EDU) 446; and Pratt v. Board of Education of Butler, Morris County, State Board (January 6, 1999) <http://www.nj.gov/education/legal/>, in support of the limited nature of review for this matter.

In Guerriero, the State Board held that under Dore, the only substantive ground that was available to contest the local board's decision was a claim of deprivation of a constitutional or statutory right. In Wise, the State Board held that a district board has virtually unlimited discretion in hiring or nonrenewing non-tenured teachers, citing the Dore case and quoting language therein. The State Board, citing Guerriero, stated:

> Thus, where a non-tenured teacher challenges a district board's decision to terminate his employment on the grounds that the reasons provided by the board are not supported by the facts, he is entitled to litigate that question only if the facts he alleges, if true, would constitute a violation of constitutional or legislatively-conferred rights.
>
> [Wise, supra, State Board (January 3, 2001) <http://www.nj.gov/education/legal/>.]

Nevertheless, a board's discretionary authority is not unlimited, and the board's action will be set aside if it was taken for arbitrary or capricious reasons. Donaldson, supra, 65 N.J. at 240-41, 247; N.J.S.A. 18A:27-4.1(b). A determination not to grant tenure need not be grounded on unsatisfactory classroom or professional performance,

as there are many unrelated but equally valid reasons. Id. at 241. Thus, evaluations of classroom performance are not necessarily the controlling factor. Dore, supra, 185 N.J. Super. at 453-54. Korba received evaluations and observations that were commendable. In addition, he was nominated for Teacher of the Year. However, those factors are not determinative as long as the board had some reason for nonrenewal that was not arbitrary and capricious.

A determination within a board's discretionary authority is arbitrary, capricious or unreasonable if it is without a rational basis or is induced by improper motives. Kopera v. West Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960). A rational basis for a determination is lacking where the board's beliefs or assertions as to the underlying facts prove to be untrue, or if the facts are true, they do not warrant the board's conclusion or action. Id. at 296-97. The party challenging the board's action has the burden of proving unreasonableness. Id. at 297.

In the present case, Korba has admitted to almost all of the allegations of J.T. noted in the affirmative action officer's report. Therefore, even though she did not testify, J.T.'s allegations that Korba admitted can be found as fact.

N.J.A.C. 1:1-15.5 deals with hearsay evidence and provides:

> (a) . . . hearsay evidence shall be admissible in the trial of contested cases. Hearsay evidence which is admitted shall be accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability.
>
> (b) Notwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness.

N.J.A.C. 1:1-15.5(b) is the "residuum rule," which requires that findings be supported by a residuum of competent evidence. In re Tenure Hearing of Cowan, 224 N.J. Super. 737 (App. Div. 1988). In a case such as this, a superintendent may testify as to what

information she received that led her to her decision not to recommend renewal without having to prove the truth of the statements told to her. Here, however, Korba provided the residuum of competent evidence to support what J.T. told the investigating administrators regarding Korba's conduct leading up to the e-mail. Thus, it was not necessary for J.T., Schneider or Frey to testify. In addition, the e-mail speaks for itself.

While the findings of fact are based on what Korba admitted, Korba's credibility as to the statements he denied making is lacking. His attempt to bolster the recommendation Carole Frey gave him by placing it on school letterhead without her knowledge evidences a lack of integrity, at worst, and a lack of judgment, at best. Korba's actions regarding the recommendation make his alleged conduct and statements reported to affirmative action officer Radwill all the more believable.

It was not respondent's burden to prove by a preponderance of the credible evidence that there was just cause for Korba's termination, as though Korba were tenured. Rather, since he was not tenured, Korba had the burden to prove by a preponderance of the evidence that the Board's failure to renew him was arbitrary and capricious. Even if Korba is correct that the Board's evidence falls short of establishing sexual harassment, Korba's e-mail to a fellow kindergarten teacher that he admits could be viewed as sexual harassment gave the superintendent cause for concern as to how he would continue to work with others in the district. He would have to continue to have a working relationship with the teacher to whom he sent the e-mail. He would also have to continue working with those he suspected of spreading rumors about him and J.T. that made him upset. Therefore, based on the findings of fact set forth above, I **CONCLUDE** that Korba has failed to prove that his nonrenewal was without a rational basis or was induced by improper motives and, thus, arbitrary, capricious or unreasonable.

Regarding the Board's argument that Korba's petition should be dismissed for failure to exhaust administrative remedies, I agree with Korba that he had no obligation under Donaldson to appear before the Board. I **CONCLUDE** that while the law provides opportunities for an employee to convince the Board to renew him, the failure to take

advantage of those opportunities does not preclude an employee from seeking reinstatement from the Commissioner of Education. Korba was permitted to file his petition with the Commissioner of Education, rather than having an informal appearance before the Board. Therefore, I decline to dismiss Korba's petition on the basis of failure to exhaust administrative remedies.

ORDER

I hereby **ORDER** that the request for reinstatement is **DENIED** and the petition of Steven Korba is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 30, 2008
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: October 30, 2008

Mailed to Parties:

NOV 3 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

/bdt

WITNESSES

For Petitioner:

Steven Korba, petitioner

For Respondent:

Diane Radwill

Dr. Elizabeth Nastus

EXHIBITS

For Petitioner:

P-1 2006/2007 Employment Contract

P-2 CTSD Feedback Report

P-3 Observation Report dated December 13, 2005

P-4 Evaluation Report dated February 8, 2006

P-5 Observation Report dated October 21, 2006

P-6 Evaluation Report dated November 27, 2006

P-7 Evaluation Report dated February 27, 2007

P-8 Letter from Superintendent Nastus to petitioner dated March 31, 2006

P-9 Affirmative Action Investigation report dated March 14, 2007

P-10 Copy of Equal Employment Opportunity Complaint Procedure

P-11 Copy of e-mail from petitioner to J.T.

P-12 Letter from Superintendent Nastus to petitioner dated March 27, 2007

P-13 Letter from Superintendent Nastus to petitioner dated April 24, 2007

P-14 Letter from Carole Frey dated May 18, 2007, on Spruce Run letterhead

P-15 Memorandum from Nastus to petitioner dated March 22, 2007

For Respondent:

R-1 Copy of Equal Employment Opportunity Complaint Procedure

R-2 Copy of handwritten notes of meeting with J.T. dated March 19, 2007

R-3 Copy of decision by the Public Employment Relations Commission

#487-08

OAL DKT. NO. EDU 4458-08
AGENCY DKT. NO. 118-4/08

REGINA LUGO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF CRIMINAL HISTORY REVIEW, AND EMILY FISHER CHARTER SCHOOL FOR ADVANCED STUDIES, MERCER COUNTY,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner concurs with the Administrative Law Judge that petitioner's application to withdraw this matter is appropriately granted under the circumstances.

Accordingly, for the reasons expressed therein, the Initial Decision of the OAL is adopted as the final decision in this matter, which is hereby deemed withdrawn with prejudice.

IT IS SO ORDERED.*

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 12/15/08
Date of Mailing: 12/16/08

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4458-08

AGENCY DKT. NO. 118-4/08

REGINA LUGO,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF CRIMINAL HISTORY REVIEW AND EMILY FISCHER CHARTER SCHOOL FOR ADVANCED STUDIES, MERCER COUNTY,

Respondents.

Regina Lugo, petitioner, pro se

Jennifer Campbell, Deputy Attorney General, for the Department of Education, respondent (Anne Milgram, Attorney General of New Jersey, attorney)

Gregory E. Tomczak, Esq., for Emily Fischer Charter School, respondent

Record Closed: September 18, 2008 Decided: November 3, 2008

BEFORE **DANIEL B. MC KEOWN,** ALJ (t/a):

BACKGROUND FACTS

Petitioner Regina Lugo has been employed as business manager by the Emily Fischer Charter School for Advanced Studies. She sought a stay of the determination of the Department of Education's Office of Criminal History Review that she is disqualified from school employment pursuant to N.J.S.A. 18A:6-7.1. For purposes of this case, the background facts are recited as set out by Administrative Law Judge (ALJ) Joseph Fidler in his June 5, 2008, denial of Regina Lugo's (petitioner) application for Emergency Relief and the Motion for A Stay filed by the Emily Fischer Charter School ALJ Fidler wrote:

> For purposes of this proceeding, the following facts are undisputed. Petitioner Lugo was hired by EFSC [Emily Fischer Charter School] as its business manager in January 1998. On or about June 18, 1998, petitioner completed and mailed to the Department of Education's Office of Criminal History Review an Applicant Authorization and Certification from for the purpose of a criminal history background check as required by law. Petitioner circled two job categories on the authorization: administrator/supervisor and substitute teacher. The certification noted petitioner's understanding that her continued employment would be subject to approval by the Department based upon the results of the criminal history review.
>
> Petitioner's request for the criminal background check was recorded by the Department in July 1998. When the background check was conducted, it revealed petitioner's 1973 New York conviction for possession of a controlled dangerous substance. She was fined $100. for this offense by a New York municipal court. As a result of the criminal background check, the Department recorded petitioner as being permanently disqualified from school employment as of September 4. 1998. Petitioner did not learn of this determination, however, until she inquired of the Department in December 1999 to ascertain the status of criminal background checks for herself and other EFCS employees. She was told that the results had been sent to the Trenton School District because of the code used on the forms.
>
> Petitioner immediately informed EFCS of her disqualification, and on January 17, 2000, EFCS's Board passed a resolution providing that petitioner would continue in her role as bookkeeper

but would not have regular contact with the students. On or about September 1, 2000, EFCS's new administration building became petitioner's workplace. No students are present in the administration building. According to certifications filed on behalf of petitioner and EFCS in this matter, petitioner was informed by the Department in January 2002 that she was not allowed to show that she had been rehabilitated and that her disqualification from employment was final. A gap in the chronology until May 2005 is unexplained, but in that month EFCS placed petitioner in the position of outside consultant. She continued to perform the same duties she did as EFCS's business manager.

On June 30, 2005, EFCS's Executive Director, G. Dallas Dixon, wrote to the Department seeking an opinion regarding whether petitioner should be subject to a second record check upon re-employment because as business manager her position would not involve regular contact with students. He also suggested that petitioner should be allowed to show rehabilitation because her record check authorization was submitted before the statue was amended to eliminate that provision. On July 2-, 2005, Carl H. Carabelli of the Criminal History Review Unit respondent that petitioner's request for a background check was entered into the database on July 13, 1998, after the amendment to the statute became effective on June 30, 1998. He confirmed that petitioner was disqualified from school employment as of September 4, 1998, based upon a conviction identified as a disqualifier in the statute. Mr. Carabelli advised, 'Your administration in consultation with your school attorney will need to determine whether the position of "'business manager"' measure[s] up to secretary or clerical positions mentioned in the statute.

By letter dated November 1, 2005, Mr. Dixon informed the Department that the Board's attorney had definitively recommended petitioner's employment as business manager, by virtue of her title and lack of regular contact with students. He enclosed the legal opinion and the Board's resolution. Mr. Dixon asked that any objection to this course of action be made known within twenty-one days. There was not timely response, but nearly two years later, on November 15, 2007, petitioner received a written notice of disqualification from the Department. She was afforded ten days to challenge the accuracy of the determination and was advised that failure to respond in a timely fashion or to successfully challenge the determination would result in her employer being notified to terminate her employment. Petitioner responded on November 26, 2007, enclosing the previously referenced legal opinion and the Board's resolution.

> On April 21, 2008, the Department reiterated its position to EFCS that petitioner is disqualified from employment and that she must be removed immediately. On April 22, 2008, Executive Director Dixon informed petitioner of her termination from EFCS, effective that day. On April 28, 2008, the Board of Trustees of EFCS passed a resolution rescinding petitioner's termination and directed Mr. Dixon to reinstate her without loss of pay, benefits, or service. Counsel for EFCS now states that petitioner was re-terminated on Mary 27, 2008. Petitioner's Amended Petition of Appeal and Motion for Emergent Relief were filed with the Commissioner of Education on May 28, 2008. EFCS's Motion for A Stay was filed on June 3, 2008.

After ALJ Fidler recommended the denial of relief to petitioner Lugo and to EFCS, the Commissioner of Education affirmed in a written ruling on June 26, 2008. The Commissioner also noted that with respect to the plenary hearing that was to be conducted that the hearing be promptly scheduled in light of the lengthy history of the matter. The hearing was scheduled and conducted September 17, 2008, at the Quakerbridge Office of Administrative Law, Mercerville.

When the record opened, petitioner and EFCS made known petitioner's request to withdraw the petition of appeal. EFCS represents that rather than engaging petitioner as business manager on site, it would create a position of outside services by which it would contract with petitioner to provide the business services otherwise necessary and that because the position is one of outside services on a contract basis such a position falls beyond the scope of the criminal history statute. Petitioner would be connected to the school only by a dedicated home computer to be used for school business purposes. Petitioner shall no contact with school students in carrying out the responsibility assigned her, and she will not have access to the school houses except as essential to carry out her duty and then only under adult school personnel escort.

While there are no guarantees such a solution is workable as it plays out because of the nature of the statute, which appears to impose strict liability against school employment, it is clear that petitioner seeks to withdraw the issue presented in the present petition of appeal, rehabilitation, which I infer she realizes has been decided against her. Such a withdrawal must be with prejudice because if petitioner chooses to argue about an outside contract service opportunity that is denied her, then that argument goes to an issue not presented here.

Therefore, **I CONCLUDE** that given the unique facts of this case, petitioner's application to withdraw this petition of appeal is granted with prejudice.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Daniel B Mc Keown

11-3-08

DATE

DANIEL B. MC KEOWN, ALJ, T/A

Date Received at Agency:

NOV 6 2008

11-3-08

Mailed to Parties:

[redacted] AND
[redacted] ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

/lam

Martino, Lysa

From: System Administrator
To: EDU2; EDU3
Sent: Monday, November 03, 2008 2:37 PM
Subject: Delivered: Lugo EDU 4458-08 id 11-3-08

Your message

To: EDU
Subject: Lugo EDU 4458-08 id 11-3-08
Sent: 11/3/2008 2:37 PM

was delivered to the following recipient(s):

EDU2 on 11/3/2008 2:36 PM
EDU3 on 11/3/2008 2:36 PM

#488-08

IN THE MATTER OF THE TENURE	:	
HEARING OF FREDERICK W. CLAYTON,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
CAMDEN, CAMDEN COUNTY.	:	
	:	

SYNOPSIS

Board certified charges against tenured guidance counselor, alleging numerous irregularities with respect to student grades and transcripts, as well as respondent's offering of services and accepting of an appointment as interim principal of Brimm Medical Arts High School notwithstanding that he lacked the necessary certificate for the position. In an effort to limit what would otherwise be a lengthy inquiry, proceedings were initially limited to the charge of service without proper certification, which the Board deemed sufficient in itself for respondent's dismissal from tenured employment.

The ALJ found that respondent did, in fact, improperly serve as acting principal from August 25, 2003 through his removal in December 2003. The ALJ found such service to constitute conduct unbecoming a school employee, and concluded that respondent must be dismissed, since, as a primary role model, a principal who falsifies his credentials is guilty of both a serious breach of trust toward his employer and teaching the student body a destructive lesson.

The Commissioner declined to reach the merits of the tenure charge, instead remanding the matter to the OAL for further proceedings. The Commissioner found support in the record for respondent's contention that he was not given the opportunity to fully present testimony, evidence and argument, so that he had not received the due process contemplated by law. The Commissioner further required some resolution of the remaining charges, even if the ALJ on remand again recommended respondent's dismissal based on the single charge actually litigated.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

December 18, 2008

OAL DKT. NO. EDU 12196-06
AGENCY DKT. NO. 447-12/06

IN THE MATTER OF THE TENURE HEARING OF FREDERICK W. CLAYTON, SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have respondent's exceptions and the reply of the Board of Education (Board), pursuant to *N.J.A.C.* 1:1-18.4 and 1:1-18.8.

In his exceptions, respondent argues that the Initial Decision must be rejected on substantive grounds, since the Administrative Law Judge (ALJ): 1) wrongly refused to credit his (respondent's) testimony that he never served as principal of the Brimm Medical Arts High School and ignored material facts so demonstrating, instead crediting the testimony of other witnesses – including the testimony of Paula Veggian, which was confusing and inconsistent with her written certification – and creating his own definition of a "lead teacher" as someone who filled in for the principal for short periods of time only; 2) misconstrued the February 24, 2004 memorandum from Superintendent Annette Knox confirming that respondent served as lead teacher – an uncontested admission on the part of the Board that should have exculpated respondent – instead according it an unsupported "contextual" meaning contrary to its plain language; 3) ignored the fact that the Board was unable to produce any contract or other evidence that respondent applied for or accepted the position of acting principal, neglecting to draw an adverse inference from the fact that the Board not only had no contract but offered nothing to counter respondent's representation that no one ever questioned him regarding lack of follow up to the letter of August 26, 2003 (Exhibit P-6) –

purportedly sent by the Board to inform respondent that he was approved as acting principal and had five business days to sign and return his contract; 4) failed to consider that he received no benefit – monetary or otherwise – for his alleged service in a position that would have paid him $30,000 to $40,000 a year over and above his salary as guidance counselor, since "lead teacher" in the Camden district is an unofficial and unpaid position and he would not have expected additional compensation; 5) accorded no weight to the fact that respondent remained a member of the Camden Education Association, a bargaining unit from which he would necessarily have been excluded had he been employed as a principal; and 6) took into account neither the Board's statutory responsibility for ensuring that staff members are properly certified for their positions nor the fact that respondent's actions were directed solely toward enabling Brimm Medical Arts High School to open as scheduled, thus ignoring mitigating factors – as well as the absence of any evidence of prior discipline or misrepresentation by respondent regarding his certification status – to recommend dismissal of an eighteen-year employee for whom the Board had actually attempted to obtain principal certification prior to bringing tenure charges. (Respondent's Exceptions at 7-20)

Respondent additionally excepts to the Initial Decision on procedural grounds, contending that the ALJ decided this matter prematurely, without according respondent the full hearing to which respondent is entitled pursuant to *N.J.S.A.* 18A:6-10 and its implementing rules. According to respondent, although he was cross-examined as an adverse witness for the Board and presented evidence in that context, the ALJ had agreed that he could testify and present evidence on his own behalf following the upcoming videotaped deposition of Board witness Fred Reiss; however, he was prevented from advancing his case-in-chief and rebutting the evidence presented by the Board, as well as deprived of his

opportunity to submit a post-hearing brief pursuant to *N.J.A.C.* 1:6B-14.2 when the ALJ "inexplicably" failed to schedule further hearing dates, closed the record upon receipt of the Reiss deposition and issued an Initial Decision a few days later. Respondent contends that – had he been able to present his own case as anticipated – he would have been able to rebut the Board's claims by, for example, calling witnesses to confirm that he acted as lead teacher rather than principal and presenting videotape evidence of Board meetings in which his situation is discussed; had he done so, respondent asserts, the ALJ would not been able to conclude that respondent was guilty as charged by relying exclusively on the uncontested representations of the Board. Respondent urges, therefore, that if the Initial Decision is not rejected, it must be remanded to the OAL to allow for presentation of his case-in-chief. (Respondent's Exceptions at 21-23; appended Certification of Leonard C. Shiro, Esq.)

In reply, the Board counters that respondent has presented no basis on which the Commissioner may properly reject or modify either the ALJ's findings of fact or his conclusions of law, since both are amply supported by the record and due deference is owed the judgment of the ALJ, as the trier of fact, as to the sufficiency of evidence and credibility of witnesses. According to the Board, respondent is simply dissatisfied with the results of the ALJ's assessment – proffering counter-explanations that are both implausible and in direct conflict with the "overwhelming" testimony and documentary evidence presented by the Board, and ignoring the fact that misrepresentation of credentials is conduct far more serious than that which has resulted in dismissal in other tenure cases.[1] (Board's Reply at 2, 4-10)

[1] In this regard, the Board cites *In the Matter of the Tenure Hearing of Monica Meade-Stephens, State-operated School District of the City of Jersey City, Hudson County*, 92 *N.J.A.R.*2d (EDU) 550 (1992), wherein a teacher was dismissed due to "chronic tardiness and excessive absenteeism," and *In the Matter of the Tenure Hearing of Philip Sheridan, School District of Orange Township, Essex County*, 92 *N.J.A.R.*2d (EDU) 257 (1992), aff'd. 92 *N.J.A.R.*2d (EDU) 393 (1992), wherein a teacher was dismissed for "use of profanity, derogatory remarks about women, and racial and ethnic slurs."

The Board likewise dismisses respondent's procedural exception as meritless, contending that respondent was afforded every opportunity to present his own testimony, and that he noticed neither the Board nor the ALJ of any intent to call other witnesses – and, indeed, none appeared with him on the date of hearing to testify on his behalf; nor did he apply, following the deposition of Fred Reiss, to keep the record open, call additional witnesses or submit summation briefs – an opportunity which the ALJ was under no obligation to afford, since *N.J.A.C.* 1:6B-14.2 does nothing more than set forth a briefing schedule in cases where briefs are anticipated by the parties – so that he should not be permitted to do so now simply because he is dissatisfied with the ALJ's decision. (*Id.* at 10-11)

Upon careful review and consideration, the Commissioner must concur with respondent that he has not been afforded the due process to which he is entitled, so that this matter must be remanded to the OAL for further proceedings.

Although the final pages of the transcript of the August 14, 2008 OAL hearing (at 76-79) do, indeed, suggest that the ALJ and parties at that point considered the hearing in this matter concluded except for the impending deposition of Board witness Fred Reiss and the possible recalling of respondent to testify in response to such deposition, the fact remains that there is nothing in the record indicating that the ALJ ascertained with certainty – once the transcript of the deposition was received – that respondent was, in fact, resting his case; nor did he make it clear to the parties that, if a request from respondent for an additional hearing date was not received immediately following the actual deposition on August 25, 2008, the matter would be deemed concluded upon receipt of the deposition transcript and the record would close without further proceedings *of any kind* – including submission of post-hearing briefs. While it is true, as argued by the Board, that *N.J.A.C.* 1:6B-14.2 does not expressly

require post-hearing briefs, it *does* create an expectation of opportunity for their submission; consequently, respondent should not have been deprived – by misunderstanding or lack of communication – of the chance to provide a summative perspective on the testimony and evidence taken at hearing, together with legal argument addressing the nature of his alleged conduct and the appropriateness of the penalty sought by the Board in light of it. Moreover, given the material consequences of a tenure hearing on the charged party – potential loss of employment, as well as possible impact on pension and certification status – the Commissioner cannot in good conscience render a determination on the merits where there is reasonable basis to credit a respondent's contention that he or she has not been fully heard, whether with respect to presentation of testimony and evidence or as to submission of briefs.

Additionally, the Commissioner notes that – as set forth in the Initial Decision (at 2) and memorialized by the ALJ at hearing (Transcript at 5) – several other charges remain in this matter notwithstanding the agreement by the ALJ and parties to temporarily limit proceedings to the charge herein, which the Board deemed sufficient in itself to warrant respondent's dismissal. In view of the Commissioner's obligation in tenure matters – even if the ALJ again recommends respondent's dismissal upon reconsideration of his findings and conclusions in light of proceedings on remand – some resolution of the remaining charges is required, for example, a spreading on the record of reasons why such charges should be dismissed as moot or their withdrawal should be permitted by the Commissioner consistent with the standards of *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846.

Accordingly, for the reasons expressed herein, the Initial Decision of the OAL is rejected, and this matter is remanded for further proceedings as set forth above.[2]

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 12/18/08

Date of Mailing: 12/19/08

[2] In so holding, the Commissioner stresses that she implies no judgment on the merits of this matter, nor intends any inference that the ALJ is precluded from making the same factual findings or reaching the same conclusions of law following proceedings on remand.

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 12196-06

AGENCY DKT. NO. 447-12/06

CAMDEN CITY BOARD
OF EDUCATION,

Petitioner,

v.

FREDERICK W. CLAYTON[1],

Respondent

Nicholas J. Repici, Esq., for the petitioner (Genova, Burns and Vernoia, attorneys)

Leonard C. Schiro, Esq. and **Brian J. Manetta**, Esq., for the respondent (Mets, Schiro & McGovern, attorneys)

Record Closed: September 15, 2008 Decided: September 18, 2008

BEFORE **SOLOMON A. METZGER**, ALJ:

This matter arises out of tenure charges filed by the Camden City Board of Education against respondent, pursuant to N.J.S.A. 18A:6-10. The Commissioner of Education transmitted the matter to the Office of Administrative Law as a contested case, pursuant to *N.J.S.A.* 52:14F-1

[1] The documentary record often refers to respondent as Dr. Clayton. It is undisputed; however, that he does not hold a Doctorate. There are no charges in connection with this anomaly.

to -23. A hearing was conducted on August 14, 2008 and the record closed on September 15, 2008 with receipt of additional videotaped testimony.

The Board's charges encompass manifold irregularities around student grades and transcripts. In an effort to limit what would otherwise be a lengthy inquiry the Board focused on one charge it deems sufficient for removal[2]. It asserts that respondent offered his services and was appointed as interim Principal of Brimm Medical Arts High School, though he lacked the necessary certificate for the position.

Certain facts are undisputed. Respondent was hired by the Board as a guidance counselor in 1990. In the summer of 2003 he was working in that capacity at Brimm when the school principal resigned. The Superintendent of Schools recommended that respondent be appointed to fill the position on an interim basis. She so notified respondent in a memo of August 13, 2003 with copies to Department heads as well as to other Brimm staff (P-2). The Board made the appointment on August 25, 2003 (P-4, P-5). On August 26, 2003 the Superintendent wrote to respondent congratulating him on his new assignment (P-6). It develops that respondent lacks the necessary credential to serve as a school Principal. In November 2003 respondent resigned from the post for "personal reasons" (P-1). In December 2003 the Board rescinded the appointment and appointed Ms. Davida Coe-Brockington as interim principal retroactive to August 2003 (P-7, P-8).

Respondent was called as a witness by the Board. He denied being appointed Principal and if he was somehow technically given that post he denied knowing about it. He never received a Principal's salary. Respondent testified that he agreed to serve as "lead teacher" to help open the school for the fall 2003 semester and the Superintendent confirmed this in a February 2004 memo (R-1). He did not review any of the superintendent's reports to the Board or the Board's minutes in August 2003. He did not receive the Superintendent's August 26, 2003 letter of congratulations on his appointment. He did receive the August 13, 2003 memo from the superintendent, but this is when he told her that he did not have the proper credential and would instead serve as "lead teacher". He thought that resolved the matter and did not learn again that

[2] The parties agreed to go forward on this issue alone with the understanding that the remaining charges would be heard later if necessary.

he was thought of as the interim Principal until October 2003 when he reviewed it in the Board's minutes, after which he resigned. When shown that the October 2003 minutes make no reference to him, respondent thought he might have seen it in draft minutes.

Paula Veggian testified that she served as the scheduler at Brimm and prepared class lists, course selection sheets, teacher schedules and the like. She reported to the Principal and arrived at Brimm just as the former Principal was leaving; respondent was appointed to the post on an interim basis. There was a staff meeting in the Principal's conference room to announce the appointment. Ms. Veggian testified that she interacted with respondent daily in the fall of 2003 and he conducted himself as the Principal and that is how she treated him.

Davida Coe-Brockington is now Assistant Superintendent, but during the period in question was Principal of the Creative Arts High School. In December 2003 the Superintendent contacted her and asked if she would also temporarily oversee Brimm, as respondent lacked the required certification for the position. She agreed and briefly served as Principal, though she mainly monitored the school; respondent continued his day-to-day activities. She recalled that a new Principal was hired in April 2004. Ms. Coe-Brockington testified that the "lead teacher" concept is used when a school has no vice-Principal and the Principal is out sick or on vacation.

Dr. Fred Reiss was employed by the Board from 1968 until his retirement in June 2006. He last served as an assistant superintendent of schools and testified *via* videotaped deposition from California. Dr. Reiss stated that when the Brimm Principal resigned in the summer of 2003 the Board appointed respondent to serve as interim Principal, and he was paid from the Principal's account. Dr. Reiss testified that he and others attended a meeting at Brimm to help respondent effectuate a smooth opening of the school. Later in the year the Superintendent confided that she had reason to believe respondent lied to her concerning his credentials. She directed Dr. Reiss to review respondent's personnel file and he found no Principal's certificate. Respondent resigned from the post soon thereafter and the Board officially rescinded the appointment in December 2003. This is the substance of the record.

The Board must show by a preponderance of the credible evidence that respondent served as a school Principal though he lacked the requisite certificate, N.J.A.C. 6A:9-2.1 & 12.5. This

has been done. The letters, memos and Board minutes in August 2003, respondents own letter of resignation in November 2003, as well as the credible testimony of Dr. Reiss and Ms. Veggian, all point to the fact that respondent served as Brimm's Principal. The notion that he was appointed without his knowledge or worse against his will is inherently doubtful and finds little support in the record.

Respondent claims to have been the "lead teacher" and points to the February 2004 memo in which the Superintendent so refers to his role. He notes also that he did not receive a raise. Ms. Veggian and Ms. Coe-Brockington explained that "lead teacher" is a concept used mainly when a school does not have an assistant Principal and the Principal is out sick or on vacation. This is simply a teacher who fills in for brief periods. That is not what occurred here. Respondent's interim appointment as Principal was announced widely; no one was called to confirm that he acted simply as lead teacher. The February 2004 memo must be understood in the context of an after-the-fact effort to help respondent obtain the credential he lacked. It is also true that the Board retroactively appointed Ms. Coe-Brockington to the post in order that events might appear routine. These maneuvers do not undo respondent's conduct. There is no indication of a salary enhancement for respondent during this period, but this alone does not undermine the record as a whole.

Having concluded that respondent improperly served as Brimm's Principal from August 25, 2003 through his removal in December 2003, it seems clear that this was conduct unbecoming a school employee. As a primary role model, the Principal who falsifies his credentials is at once guilty of a serious breach of trust toward his employer and of teaching the student body a destructive lesson.

Based on the foregoing, I **CONCLUDE** that respondent's behavior constituted unbecoming conduct and it is **ORDERED** that he be removed from his tenured position as a guidance counselor with the Camden City Board of Education.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

9/18/08
DATE

SOLOMON A. METZGER, ALJ

Date Received at Agency:

SEP 19 2008

DATE

9/18/08
Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

/cad

WITNESSES

For Petitioner:

Frederick Clayton
Paula Veggian
Davida Coe-Brockington
Fred Reiss

For Respondent:

Frederick Clayton

EXHIBITS

For Petitioner:

P-1 Letter of Resignation, dated 11/03
P-2 Memo of Annette Knox, dated 8/13/03
P-3 October 2003 Superintendent's report
P-4 August 2003 Superintendent's report
P-5 Board minutes August 2003
P-6 Letter of Annette Knox to Mr. Clayton, dated 8/26/03
P-7 December 2003 Superintendent's report
P-8 Board minutes December 2003

For Respondent:

R-1 Memo of Annette Knox, dated 2/24/04

#489-08

OAL DKT. NO. EDU 5995-08
AGENCY DKT. NO. 126-5/08

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN GUY,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF HILLSIDE, UNION COUNTY.	:	

The record of this matter, the parties' proposed Stipulation of Settlement and Release, and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon such review, the Commissioner concurs with the ALJ that the proposed settlement is consistent with established standards governing settlement of tenure matters. *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846.

Accordingly, the settlement is hereby approved and the tenure matter dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 12/22/08
Date of Mailing: 12/22/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 05995-08

AGENCY DKT. NO. 126-5/08

IN THE MATTER OF THE TENURE HEARING OF JOHN GUY, SCHOOL DISTRICT OF TOWNSHIP OF HILLSIDE, UNION COUNTY.

John E. Croot, Esq., for petitioner (Schwartz, Simon, Edelstein, Celso& Kessler, LLC, attorneys)

Michael Barrett, Esq., for respondent (Bergman & Barrett, attorneys)

Record Closed: November 5, 2008 Decided: November 12, 2008

BEFORE **JOSEPH A. PAONE,** ALJ:

This matter was transmitted to the Office of Administrative Law on May 23, 2008, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A hearing was scheduled for August 26 and 27, 2008, but adjourned when the parties advised the undersigned that they had reached a settlement and were awaiting approval of the District's Board of Education.

On November 5, 2008, the fully executed Stipulation of Settlement and the Board Resolution approving the settlement, which are attached hereto, were submitted for my review.

Having reviewed the contents of the Stipulation of Settlement, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives, and the attached Board resolution.

2. Respondent, who is represented by counsel, acknowledges that he has a full understanding of his rights and is fully informed of the implications of the settlement.

3. The settlement, which allows respondent's resignation for the purpose of retirement and his receipt of his salary for the period of unpaid suspension, fully disposes of all issues in controversy and is consistent with the law and public policy.

4. As a tenured janitorial employee of the District, there are no licensing issues upon which action may be taken.

I **CONCLUDE** that this settlement meets the requirements of N.J.A.C. 1:1-19.1 and N.J.A.C. 6A:3-5.6, and that it should be approved. I, therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

November 12, 2008
DATE

JOSEPH A. PAONE, ALJ

Date Received at Agency: 11-14-08

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

NOV 14 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

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SCHWARTZ SIMON EDELSTEIN
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Morristown, New Jersey 07962
(973) 301-0001 (973) 993-3152
Attorneys for the Hillside
Board of Education

IN THE MATTER OF THE TENURE CHARGES AGAINST JOHN GUY,

BY THE BOARD OF EDUCATION OF HILLSIDE, UNION COUNTY, NEW JERSEY

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
AGENCY REF. NO. 126-5/08
OAL DOCKET NO. EDUTH 05995-2008N

ADMINISTRATIVE ACTION

STIPULATION OF SETTLEMENT AND RELEASE

WHEREAS, the Board of Education of Hillside ("the Board") is a body politic and corporate, organized and existing by virtue of the laws of the State of New Jersey, N.J.S.A. 18A:11-1, which is entrusted with maintaining and conducting the public schools of the Hillside School District; and

WHEREAS, John Guy ("Respondent") is a tenured custodian employed by the Hillside School District; and

WHEREAS, on April 15, 2008, Dr. Raymond J. Bandlow, Superintendent of Schools, filed sworn tenure charges of neglect, misbehavior and/or other just cause for dismissal against Respondent, together with a sworn statement of evidence in support of the charges, with Kenneth Weinheimer, Board Secretary; and

WHEREAS, on April 29, 2008, the Respondent filed an Answer denying the tenure charges of neglect, misbehavior and/or other just cause; and

WHEREAS, on May 6, 2008, after considering the sworn tenure charges and sworn statement of evidence against Respondent, together with the submission filed on his behalf, the Board determined to certify the charges to the Commissioner of Education for a hearing, pursuant to N.J.S.A. 18A:6-10 *et seq.*; and

WHEREAS, on or about May 7, 2008, the sworn tenure charges, together with a certificate of determination and certificate of service, were filed by the Board with the

Commissioner of Education, and Respondent was simultaneously served with the sworn tenure charges, sworn statement of evidence, certificate of determination and certificate of service, pursuant to N.J.A.C. 6A:3-5.1 *et seq.*; and

WHEREAS, the Department of Education subsequently transmitted the matter to the Office of Administrative Law as a contested case, where it was assigned to Administrative Law Judge Joseph Paone; and

WHEREAS, the parties, wishing to resolve the within matter amicably without the need for further, protracted litigation, while achieving the goals of both parties, hereby stipulate to settle same, subject to the terms and conditions set forth herein, upon approval by the Court and the Commissioner of Education;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the legal sufficiency of which is hereby acknowledged by the parties, they agree as follows:

1. Tenure Charges to be Moot/No Further Board Action

The Board agrees that upon approval of the within settlement agreement and release by the Commissioner that the subject tenure charges shall be moot and shall be withdrawn by the Board, and that no further action shall be initiated by the Board regarding the underlying charges. However, both parties agree that in the event that this agreement is not approved by the Commissioner of Education that they fully reserve their rights to proceed with this litigation and/or any other cause of action that they might have against one another and that their obligations under this agreement shall be null and void.

2. Resignation

Respondent has tendered his irrevocable resignation for the purpose of retirement (copy annexed hereto as Ex. A) from all employment with the Hillside Board of Education, subject to fulfillment of the terms and conditions set forth in this Stipulation of Settlement and Release ("this Agreement" or "this Settlement), said resignation to be effective as of the close of business on the date of approval of the within Settlement by the Commissioner.

3. Payment

In full and final satisfaction of all claims by respondent, as more fully detailed below, the Board shall pay respondent as follows:

Salary, less all normal payroll deductions (including but not necessarily limited to pension deductions if applicable), in lump sum fashion, for the period of unpaid suspension imposed by the Board at the time of the certification of the subject tenure charges to the Commissioner of Education, from May 8, 2008 through September 4, 2008, in the amount of $17,619.04, to be paid within the first

payroll period following receipt of the Commissioner's approval of this settlement.

4. No Further Compensation/Benefits

Respondent shall be entitled to no further compensation, emolument of employment or fringe benefit of any kind and specifically waives his right to same, including but not necessarily limited to payment for all unused vacation, sick and personal days and health insurance benefits, except that the Board shall maintain Respondent's health insurance until the effective date of his resignation. Respondent shall also be entitled to the same COBRA rights as any other former employee.

5. Release

In exchange for the above consideration, Respondent, and his heirs and assigns hereby irrevocably and unconditionally waive, release and forever discharge any claims or rights, whether known or unknown, which they have or may have against the Board, personally and officially, individually and collectively; its past and present Board members, officers, administrators, agents, employees, attorneys, and their successors, heirs and assigns, including, but not limited to any claims for attorneys fees, back pay or front pay, any claims for emotional distress or pain and suffering, any claims involving tax liability emanating from this settlement, and any claims arising under any federal, state or local ordinance, regulation or law including, but not limited to, the New Jersey and Federal Constitutions, Title VII of the Civil Rights Acts of 1871 and 1991, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Employee Retirement Income Security Act, the Federal Family and Medical Leave Act, the Fair Labor Standards Act, the Equal Pay Act, the Workers' Adjustment and Retaining Notification Act, the New Jersey Law Against Discrimination, the New Jersey Family Leave Act, the New Jersey Conscientious Employee Protection Act, the New Jersey Workers' Compensation Law, the New Jersey Wage and Hour Law, the Employer-Employee Relations Act, any collective negotiations agreement, any common law claim and any other claims for harassment, discrimination or retaliation of any kind, breach of promise, misrepresentation, negligence, fraud, estoppel, defamation, violation of public policy, wrongful or constructive discharge, or any other tort, contractual or quasi-contractual claim. Specifically exempted from this release are any claims for health insurance continuation coverage under and pursuant to Consolidated Omnibus Budget Reconciliation Act (commonly referred to as "COBRA"), provided that Respondent is not entitled to have the District pay any amounts for his or his dependents' health insurance coverage under COBRA.

6. No Admissions

Nothing contained in this Agreement shall be deemed to constitute an admission of wrongdoing or liability by either party.

7. Non-Disparagement

A. Respondent agrees not to disparage the Board, its past and present Board members, officers, administrators, agents, employees, attorneys, and their successors, heirs and assigns nor to make or solicit any comments, statements, or the like to the media or to others that may be considered to be derogatory or detrimental in nature. The Board agrees to the same terms regarding respondent.

B. The Board agrees to provide to prospective employers and the public, unless otherwise requested by respondent, directory type information concerning employment history, such as: dates of employment, positions held, salary history, and reason for separation—i.e., voluntary separation. Nothing contained herein, however, shall be construed to require the parties or its agents to make any untruthful statements regarding respondent.

8. Surrender of Board Property

Respondent shall forthwith surrender all school keys and property in his possession to the below named legal counsel who, in turn shall forward same to the Board's counsel.

9. Public Interest

The proposed settlement of this tenure dispute will serve the public interest in that the lengthy and expensive tenure dismissal process, which is now scheduled for plenary hearings on August 26 and 27, 2008, will be avoided.

10. Board Approval

The Board President has been duly authorized by the Board to execute this Agreement on behalf of the Board of Education.

11. Assent to Terms

Respondent hereby acknowledges that he enters into this Agreement with a full understanding of his rights and that he was fully informed of the implications of this Agreement by his legal counsel. Respondent also enters into same without duress and of his own free will and volition.

Respondent acknowledges that he was given the opportunity to fully consider this Agreement for a period of up to twenty-one (21) days and seven (7) days from the execution of this document to revoke this Agreement by delivering written notification to John E. Croot, Jr., Esq., 44 Whippany Road, Suite 210, P.O. Box 2355, Morristown, New Jersey 07962. It is understood that if this Agreement is revoked, it will not be effective or enforceable and Respondent will be entitled to none of the consideration described herein.

12. Entire Agreement

This Agreement represents the entire understanding of the parties and may be modified only in a subsequent written instrument, duly executed by the parties. No other representations of any kind shall be binding upon the parties.

13. Severablility

In the event that a court or agency of competent jurisdiction shall deem any part of this Agreement to be contrary to law, then the remaining portions of the Agreement shall remain in full force and effect.

14. Governing Law

This Agreement and all provisions hereof shall be governed by and construed under the laws of the State of New Jersey.

IN WITNESS WHEREOF, the signatures and/or seals of the parties or their duly authorized representatives have been set forth on the dates indicated below:

John Guy
JOHN GUY

Date: 8/24/08

WITNESS:
Ruth E. Guy
/s/

Date: 8/24/08

FOR THE HILLSIDE BOARD OF EDUCATION:
Nagy Sileem

Date: 10/2/08

NAGY SILEEM, BOARD PRESIDENT

ATTEST:
K Weinheimer

Date: 10/6/08

KENNETH WEINHEIMER
Board Secretary/Business Administrator

Exhibit A

Hillside Board of Education
195 Virginia Street
Hillside, NJ 07205

Dear Ladies and Gentlemen:

Subject to the terms and conditions of our Stipulation of Settlement and Release, and approval of same by the Commissioner of Education, I hereby tender my irrevocable resignation from all employment with the Hillside Board of Education, effective on the date of the Commissioner's approval of said Settlement.

Very truly yours,

John Guy

490-08

#490-08

BLOOMFIELD EDUCATION ASSOCIATION,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning education association challenged the respondent Board's alleged unilateral acceleration of designated retirement or resignation dates on behalf of seven teachers, seeking back pay and reimbursement of unpaid medical expenses.

The ALJ found that: the Board violated its contractual obligations by accelerating the accepted resignation/retirement dates of four of the claimants, but acted lawfully in waiving compliance with the sixty-day notice requirement and processing early resignations at the request of the remaining three claimants. The ALJ ordered that the Board pay two of the four claimants whose retirement date was unilaterally accelerated – because they were twelve-month employees who would have been paid during the summer – whatever salary they would have received during the 60-day contractual term of their notice; he further ordered the Board to reimburse all four of these claimants for verified medical, dental and prescription drug expenses incurred during the portion of the 60-day notice period when their health insurance was cancelled, with the amount capped for each claimant at the cost of continuing health insurance coverage under COBRA plus any co-payments for which the claimant would have been responsible had such insurance remained in effect. All other relief requested by petitioner was denied.

The Commissioner adopted the Initial Decision as the final decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

December 22, 2008

OAL DKT. NO. EDU 11979-08
AGENCY DKT. NO. 304-9/04

BLOOMFIELD EDUCATION ASSOCIATION,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner finds the Administrative Law Judge to have fully and fairly considered the facts in light of applicable law, correctly determined the entitlements of each of the individual claimants represented by the petitioning Association, and ordered appropriate relief based upon such entitlements.

Accordingly, the Initial Decision of the OAL is adopted, in its entirety, as the final decision in this matter.

IT IS SO ORDERED.*

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 12/22/08
Date of Mailing: 12/22/08

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11979-08
AGENCY DKT. NO. 304-9/04

BLOOMFIELD EDUCATION ASSOCIATION,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD,

Respondent.

Sanford R. Oxfeld, Esq., for petitioner (Oxfeld Cohen, P.C., attorneys)

Mark A. Wenczel, Esq., for respondent (Gaccione, Pomaco & Malanga, attorneys)

Record Closed: November 17, 2008 Decided: November 18, 2008

BEFORE **KEN R. SPRINGER**, ALJ:

STATEMENT OF THE CASE

Bloomfield Education Association (Association), the collective bargaining representative for teachers employed by the Bloomfield Board of Education (Board),

originally brought this proceeding on behalf of ten of its members.[1] Three teachers reached an amicable settlement with the Board, leaving seven teachers remaining as claimants. The controversy stems from two prior cases in which the Commissioner of Education had held that the Board could not unilaterally accelerate the designated retirement dates of its teaching staff. Bloomfield Educ. Ass'n ex rel. Salamone v. Bd. of Educ. of Bloomfield, OAL Dkt. No. EDUJ 8308-01 (Comm'r Dec. 29, 2003) (tenured teachers) http://lawlibrary.rutgers.edu/oaldecisions/initial/edu08308-01_1.html Carrelle v. Bd. of Educ. of Bloomfield, OAL Dkt. No. EDU 1852-03 (Comm'r Feb. 9, 2004) (non-tenured teachers) http://lawlibrary.rutgers.edu/oaldecisions/initial/edu01852-03_1.html As a result, the Association brought suit against the Board on behalf of various teachers, said to be similarly situated, seeking back pay and reimbursement of unpaid medical expenses.

Generally, the factual situations involved in this matter fall within three broad categories: first, instances where the Board accepted the original resignation date tendered by the teacher and thereafter unilaterally accelerated the resignation date; second, instances where the Board accepted a teacher's resignation on less than the full sixty-days notice; and, third, instances where the teacher notified the Board that he or she would not be returning for the following academic year and the Board fixed the date of resignation as the last day of the current school year.

PROCEDURAL HISTORY

On September 3, 2004, the Association filed a three-count petition with the Commissioner of Education (Commissioner). Respondent Board filed its answer on October 20, 2004. Subsequently, on November 16, 2004, the Commissioner transmitted the matter to the Office of Administrative Law (OAL) for hearing pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. It was originally docketed as OAL Dkt. No. EDU 11546-04.

[1] A collective bargaining unit has standing to participate as a party in proceedings before the Commissioner of Education. Winston v. Board of Education of So. Plainfield, 125 N.J. Super. 131 (App. Div. 1973), aff'd 64 N.J. 582 (1974).

Before the hearing, the Association filed an amended petition adding another teacher as a claimant. The OAL held a hearing on November 16, 2005. Three of the claimants, Benedict Salamone, Victoria Carrelle and Daniela DiCarlo, entered into individual settlements with the Board and filed papers dismissing their respective claims. Both sides filed post-hearing briefs on December 20, 2005.

Due to clerical error, the file designated OAL Dkt. No. EDU 11546-04 was inadvertently marked closed on December 26, 2005, and the case removed from the active hearing calendar. When the mistake was discovered, the case was reopened on October 22, 2008, under OAL Dkt. No. EDU 11979-08. The OAL held a telephone status conference on December 17, 2008, on which date the record closed.

FINDINGS OF FACT

The material facts are undisputed. **I FIND**:

Several background facts are common to all seven teachers. All seven of the claimants were previously employed as teachers by the Board. Teachers in the district are ten-month employees who receive no salary during the summer months, unless they elect to have a portion of their regular salary, equal to two months' pay, set aside during the academic year to be disbursed during the long summer vacation. Standard contracts for all non-tenured teachers in the district require either party to provide the other with sixty-day notice of intent to terminate the employment contract. Whenever the Board receives a letter of resignation, the payroll department sends out a form letter to the teacher offering to continue health insurance coverage for an additional eighteen months in accordance with the requirements of the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA), 29 U.S.C.A. §§ 1161 to 1167. This letter contains a quotation for the total cost that a former employee must pay to continue his or her health coverage, itemized as to medical insurance, prescription-drug insurance, dental insurance and a two-percent administrative fee. Unless the employee signs and returns

the form to the payroll department, the benefits terminate on the last day of the month that the resignation becomes effective.

Circumstances specific to each individual claimant will be discussed under the appropriate heading.

(1) Board Unilaterally Accelerates Resignation Date after Acceptance

Christa Luzzi, a non-tenured teacher, began working for the Board as a third-grade teacher at Watsessing School in September 2002. By letter dated February 28, 2003, she informed the Board of her intent to resign her position, stating that "my last day of school will be April 29, 2003" or sixty days from the date of the letter. At a meeting on March 11, 2003, the Board accepted Luzzi's resignation "effective April 29, 2003." Nonetheless, on March 14, 2003, the Board notified Luzzi that it had found a replacement for her position who "will begin work on March 26, 2003, making your last day at Watsessing March 25, 2003." Insofar as the record reflects, Luzzi never consented to the premature discontinuance of her employment. Luzzi did not receive salary for the remaining thirty-five days from March 26, 2003 to April 29, 2003. On or about March 6, 2003, the Board offered Luzzi an opportunity to continue her medical insurance at a cost of $396.84 per month. When Luzzi declined coverage or failed to return the signed document, her medical insurance terminated on March 31, 2003. Luzzi lost medical insurance coverage for twenty-nine days from April 1 to 29, 2003. There is no proof on the record, however, that she incurred any unpaid medical expenses during this period.

Daryl Spencer, a non-tenured special education teacher, started employment in the district in September 2003. She wrote to the Board on November 20, 2003, giving sixty-day notice of her intent to resign from her position, explaining that she "had signed a contract in another district for a position that relates to my recent educational training." Considering her offer at a meeting on November 25, 2003, the Board accepted her resignation "effective January 20, 2004" or sixty days from her notice of resignation. Thereafter, on December 17, 2003, the Board sent her a second letter advising that it

had "appointed a replacement for your position as Special Education Teacher at Bloomfield Middle School" and that "your last day of district employment will be Friday, December 19, 2003." Again, there is no evidence that Spencer agreed to the Board's unilateral change of her date of resignation. Spencer was not paid for thirty-two days from December 20 to January 20, 2004. While the Board offered to continue her medical insurance at the monthly cost of $306.11, it does not appear that Spencer took advantage of this opportunity. She did not introduce any proof of medical expenses incurred during the thirty-two day period.

(2) Resignations Submitted at the End of the Academic Year

When a resignation occurs at the end of an academic year, the practice of the Board has been to treat the resignation as satisfying the sixty-day notice requirement. Testifying for the Board, Heather Carr acknowledged that resignation on the last day of school is "presumed" to become effective upon the expiration of sixty days. Because most of the ten-month teachers do not receive salary during summer vacation, the practical effect of this convention is to continue paid medical benefits for two more months.

Margaret Mazza, a tenured teacher, commenced working for the district on September 1, 1997. By letter dated June 30, 2003, she tendered her resignation from her fifth-grade teaching position "as of September 1, 2003" because her husband had obtained an excellent job opportunity in Pennsylvania and "we will be moving out of the area." Notwithstanding the terms of her letter and the Board's past practice, the Board adopted a resolution on July 29, 2003, purporting to alter the effective day of her resignation to June 30, 2003 (which happened to coincide with the last day of school). It gave no explanation as to the reason for this unilateral change. Mazza did not accept the Board's proposal to continue her health coverage at a monthly rate of $422.91, so she lost health coverage for the period from July 1 to August 31, 2003. She did not enter into evidence any unpaid medical bills.

Diana Pacenka, a non-tenured teacher of English, began employment on September 9, 2001. Pacenka wrote to the Board on May 29, 2002, that she "will not be able to return next year as I plan to pursue another career at this time." Although Carr recalled that the Board accepted Pacenka's resignation, the Board's letter is missing from its files. Meanwhile, on June 14, 2004, the Board issued its COBRA letter, indicating that its records show "you will be leaving employment on June 30, 2002." The rest of the letter offered to continue Pacenka's health coverage beyond that date at the monthly rate of $396.84.

Pacenka replied to the Board on June 25, 2002, requesting an extension of her medical coverage through August 30, 2002. Reiterating her intent to resign at the beginning of the upcoming academic year, Pacenka explained in detail her understanding of when her resignation would take effect:

> In turning in my resignation in May, I extended you the courtesy of 90 days notice in [an] effort to assist you in finding a replacement. I did not realize that you would be releasing me of my duties prior to the commencement of the next school year. Being dedicated to the students of Bloomfield High School, I postponed all medical appointments until the conclusion of the school year as not to interfere with my teaching duties. Some of the care that I needed would have taken me out of school for days at a time. Without disclosing my personal medical conditions, I am going to need on-going treatment in two cases. Since receiving the notification have scheduled appointments with and seen some of my doctors, but I am still in need of continual medical care.

Despite its acknowledged receipt of Pacenka's letter, the Board never responded to her plea. Therefore, Pacenka did not receive the benefit of health insurance coverage during the period from July 1, 2002 to August 31, 2002. Pacenka did not offer proof of any unpaid medical bills.

(3) Board's Acceptance of Resignation on Less than Sixty-Day Notice

Alfonso Gonella, a non-tenured social studies teacher, began his teaching responsibilities at the high school on September 1, 2002. He submitted a letter on

December 3, 2003, advising that "Friday, January 30, 2004 will be my last date of employment with the Bloomfield Board of Education." Since this letter originated fifty-eight days before the designated date of resignation, the notice was two days shy of the sixty-day requirement. Waiving any deficiency, the Board voted on December 16, 2003 to accept Gonella's resignation "effective January 30, 2004, or when a replacement is found." At Gonella's request, the Board subsequently moved the date of resignation forward to January 7, 2004. Heather Carr, the district's personnel director, held several conversations with Gonella in late December. She testified that Gonella had accepted a new position in Bridgewater and was anxious to start his new job. While Gonella objects that Carr's testimony is not competent evidence because it is hearsay-based, an admission by a party falls within a recognized exception to the hearsay rule. N.J.R.E. 803(b). Hence, statements made by Gonella to Carr are admissible as competent evidence. Gonella never took the stand to dispute Carr's testimony. The Association's counsel contends that Gonella was deprived of twenty-three days of salary from January 8 to 30, 2004. Unlike the other claimants, Gonella did not lose any health benefits because his coverage continued through the end of January.

Yvonne Araujo, a non-tenured special education teacher, started working for the district on December 29, 2001. By letter dated November 5, 2003, she notified the Board of her resignation "as of November 5, 2003" or, in other words, immediately. Her letter went on to say, however, that she was "well aware of the sixty calendar days." It is unclear what Araujo meant by this ambiguous language. Affording her the benefit of the doubt, the Board interprets this sentence as meaning that Araujo intended her last day of employment to be January 5, 2004, or sixty days from the date of her letter. Heather Carr, the district representative who dealt directly with Araujo, clarified that Araujo wanted to be released as soon as possible, but was willing to honor her sixty-day commitment if necessary. Rather than demanding the full sixty-days of service, the Board resolved on November 11, 2003, to accept Araujo's resignation "effective December 19, 2003." In response to interrogatories, the Board explained that it had "hired a replacement teacher and December 19, 2003 was the last day of the payment period before the holiday break." Araujo never contacted the Board to complain that she had been forced to retire earlier than anticipated. Araujo lost potential salary for

seventeen days from December 20, 2003 to January 5, 2004. Although the Board offered her the right to continue her health benefits at a monthly cost of $1,083.81, she declined the opportunity. Consequently, Araujo lost five days of insurance coverage from January 1 to 5, 2004. She did not produce any actual medical bills for this period.

Darren Chestang, a tenured science teacher at the Middle School, had been employed in the district since September 1, 1997. On June 27, 2003, Chestang submitted his formal written announcement "of my resignation from the Bloomfield Public Schools effective June 30, 2003," giving the Board only three-days notice of his intended resignation date. His letter explained that he had "accepted a teaching position in another school district, which will allow me the opportunity to teach Science, be closer to home and enjoy some other immediate benefits." On July 29, 2003, the Board accepted Chestang's resignation "effective June 30, 2003," which is the date specified in Chestang's own letter. Thus, the Board accepted Chestang's offer on its own terms, without making any changes. Chestang declined the Board's offer to continue health insurance coverage at a cost to him of $1,083.81 per month. As a result, Chestang was without health benefits for sixty days from July 1 to August 29, 2003. The record does not contain any unpaid medical bills.

CONCLUSIONS OF LAW

Based on the foregoing facts and the applicable law, **I CONCLUDE** that the Board violated its contractual obligations by accelerating the resignation dates of claimants Luzzi, Spencer, Mazza and Pacenka. The Board acted within its legal rights when it waived compliance with the sixty-day notice requirement and accepted the early resignations submitted by claimants Gonella, Araujo and Chestang.

Tenured teachers voluntarily resigning from a public school district must give the employing board of education at least sixty-days written notice of their intention to resign, unless the board approves a shorter notice. N.J.S.A. 18A:28-8. While that statute pertains solely to tenured staff members, N.J.S.A. 18A:26-10 requires non-tenured teachers to abide by whatever notice provision is contained in their employment

contracts. Boguszewski v. Board of Educ. of Woodcliff Lake, 1979 S.L.D. 727 (Comm'r Nov. 30, 1979), aff'd 1980 S.L.D. 1477 (St. Bd. May 7, 1980) Here the district's standard contract for non-tenured teachers prescribes the same sixty-day notice applicable to tenured teachers. As noted in Boguszewski, "[t]he sixty-day notice provision is intended to protect both parties" and "the option of a shorter period of time is one that can be exercised only by mutual agreement of a board of education and the employee involved." (1979 S.L.D. at 729)

Both the Board and the Association request that the Commissioner's legal ruling in Salamone and Carrelle be applied to the present factual circumstances. In Salamone, the Bloomfield Board of Education initially accepted a tenured teacher's proposed resignation date, but then unilaterally sought to change that date to an earlier time. Applying general principles of contract law, the Commissioner held that written notification of retirement "was legally binding on both parties upon acceptance of its proffered terms by the Board" and that the Board's belated attempts to rescind or modify that date without mutual consent was "tantamount to an unlawful discharge." (at 12). Similarly, in Carrelle, the Commissioner held that the Board's effort to abrogate its earlier acceptance of a non-tenured teacher's resignation by changing the date without the teacher's consent was "impermissible" and "tantamount to an improper termination." (at 10).

Instances in which the Board unilaterally accelerated the resignation date fit squarely within the Commissioner's rationale in Salamone and Carrelle. Luzzi, for example, had given sixty-days notice of her intended resignation date, which was accepted by the Board. Later, the Board repudiated its acceptance and unilaterally sought to accelerate the retirement date. Likewise, Spencer gave the full sixty-days notice of her intended resignation. After accepting the proposed resignation date, the Board moved the date forward without obtaining Spencer's consent to the change. Both Luzzi and Spencer are entitled to relief.

While the resignations intended to take place at the beginning of the next academic year are distinguishable from the strict holdings in Salamone and Carrelle,

they are governed by the same legal principles. Unlike the two cited decisions, the Board never accepted the proposed resignation dates offered by Pacenka and Mazza. See, Salamone, in which the administrative law judge commented that the Board's argument "would have been more compelling had they not accepted Salamone's notice of retirement." Instead, the Board adopted resolutions fixing the retirement date as the last day of the current academic year, which could be viewed as the Board's counteroffer to the teacher's initial offer. Under such analysis, either the teacher did not accept the counteroffer (in which case the teacher never actually retired) or the teacher's failure to show up for work could be considered tacit acceptance of the Board's counteroffer. Neither result would represent the true intent of either the teacher or the Board.

Forcing teachers to forfeit two months of medical benefits would be contrary to recognized doctrines of contract law as well as fundamentally unfair to those who relied on the Board's past practice. When construing the rights of teachers with regard to retirement issues, the past practice of the contracting parties is entitled to "great weight" in determining the meaning of ambiguous or doubtful contractual terms. Hall v. Bd. of Educ., 125 N.J. 299, 305 (1991). Undisputed proofs establish that the parties followed the past practice of treating resignations tendered at the end of the current academic year as affording the district with sixty-day notice of a resignation to take effect at the commencement of the following academic year. Consistent with that approach, Mazza notified the Board that her resignation would become effective on September 1, 2002. Without specifying an exact date, Pacenka informed the Board that she would "not be able to return next year." Any misunderstanding regarding Pacenka's intentions are dispelled by her follow-up letter, in which she vigorously objected to the resignation date arbitrarily chosen by the Board and emphasized her intent to resign at the commencement of the upcoming academic year.

Teachers who act in good faith should not be put at an economic disadvantage for finishing out their last year of employment and giving the Board adequate time to find a replacement for the following year. Indeed, the gross unfairness of the Board's position is well illustrated by Pacenka's particular circumstances, having deferred

needed medical treatment to the summer months so as not to disrupt her students' continuity of education. Accordingly both Mazza and Pacenka are entitled to relief.

The last category, i.e., teachers who failed to give the full sixty-day notice of their intended retirement, presents a different set of equities. Although the Board could have rightfully demanded that Gonella and Araujo perform their teaching duties for the full sixty days, it released them sooner in order to accommodate their personal interests. They cannot be heard to complain about not receiving full compensation and benefits when they voluntarily left the job early without fulfilling their part of the bargain. The Board should not suffer monetary loss because it was gracious enough to forebear from strict enforcement of its contractual rights.

Conceivably, Chestang's resignation at the end of the current academic year could be regarded as another example of a teacher who intended to resign at the beginning of the next academic year. That interpretation, however, is incompatible with the language of his letter, which provides unambiguously that he wanted to resign in three-days time, "effective on June 30, 2003." In contrast to Salamone and Carrelle where the Board unilaterally changed the proposed date of retirement, here the Board accepted Chestang's offer exactly as written and approved his retirement on the date that he selected. Hence, Salamone and Carrelle do not provide support for awarding relief to Chestang, who got exactly what he said he wanted. Perhaps Chestang failed to fully consider his options or used imprecise language in expressing himself, but a judge should not write a better contract than the one to which the parties themselves agreed. Wyckoff v. Monmouth County, 127 N.J.L. 268, 271-272 (E. & A. 1941). Absent a showing of fraud or duress, Chestang is bound by the terms of his own agreement, no more and no less.

In fashioning relief, Luzzi and Spencer are entitled to be made whole for the salary that each would have received during the contractual term of her notice. Because Mazza and Pacenka are ten-month employees, they sustained no salary loss over the two summer months. Luzzi, Spencer, Mazza, and Pacenka are also eligible for reimbursement of any medical, dental or prescription drug expenses they incurred

during the portion of the sixty-day notice period when they were wrongfully denied health insurance coverage. Because the existing record does not contain any medical, dental or prescription bills, each claimant must furnish the Board with copies of such bills accrued during the relevant period, together with a sworn affidavit or certification attesting to the genuineness of the charges.

Mitigation is always an element in a contract suit for damages, with the burden of proving facts in mitigation of damages resting upon the party breaching the contract. Cohen v. Radio-Electronics Officers Union, Dist. 3, 275 N.J. Super. 241, 262 (App. Div. 1994), modified on other grounds, 146 N.J. 140 (1996). Here the Board has satisfied its burden of proving mitigation by showing that claimants could have avoided exposure to excessive health costs by purchasing continued insurance available under COBRA. Reimbursement of a claimant's health expenses, therefore, shall not exceed the cost of purchasing the appropriate insurance coverage plus the amount of any co-payments payable by the insured. For example, if a claimant incurred doctor's bills totaling $1,000 and would have been personally responsible for co-payments of only $200 if he had purchased medical insurance for $500, then the claimant's maximum reimbursement should be $700.

ORDER

It is **ORDERED** that the Board pay Luzzi whatever salary she would have received during the thirty-five days of employment from March 26, 2003 to April 29, 2003.

It is further **ORDERED** that the Board pay Spencer whatever salary she would have received during the thirty-two days of employment from December 20 to January 20, 2004.

It is further **ORDERED** that the Board reimburse claimants Luzzi, Spencer, Mazza, and Pacenka for all verified medical, dental and prescription drug expenses incurred during the portion of the sixty-day notice period when health insurance was

cancelled; provided, however, that the maximum amount of reimbursement for health expenses shall be capped for each claimant at the cost of continuing health-insurance coverage under COBRA plus the amount of any co-payments for which the claimant would have been responsible had such insurance remained in effect.

And it is further **ORDERED** that all other relief requested by the Association is denied.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Nov. 18, 2008
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Date Received at Agency: November 18, 2008

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

NOV 19 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

List of Witnesses

1. Heather Carr, Director of Personnel, Bloomfield Public School District

List of Exhibits

No.		Description
J-1	(a)	Copy of petitioner's first set of interrogatories, dated August 15, 2005
	(b)	Copy of respondent's answers to interrogatories, certified October 21, 2005
P-1		Copy of letter to Heather Carr from Yvonne Araujo, dated November 5, 2003
P-2		Copy of letter to Yvonne Araujo from Heather Carr, dated November 12, 2005
P-3		Copy of COBRA letter to Yvonne Araujo from the payroll department, dated December 8, 2003
P-4		Copy of letter to Heather Carr from Christa Luzzi, dated February 2003
P-5		Copy of letter to Christa Luzzi from Heather Carr, dated March 12, 2003
P-6		Copy of letter to Christa Luzzi from Heather Carr, dated March 14, 2003
P-7		Copy of COBRA letter to Christa Luzzi from the payroll department, dated March 17, 2003
P-8		Copy of letter to Thomas Dowd from Alfonso Gonnella, dated December 3, 2003
P-9		Copy of letter to Alfonso Gonnella from Heather Carr, dated December 17, 2003
P-10		Copy of COBRA letter to Alfonso Gonnella from the payroll department, dated January 7, 2004

P-11 Copy of letter to Thomas Dowd from Daryl Spencer, dated November 26, 2003

P-13 Copy of letter to Daryl Spencer from Heather Carr, dated December 17, 2003

P-14 Copy of COBRA letter to Daryl Spencer from the payroll department, dated December 5, 2003

P-15 Id. Copy of COBRA letter to Daryl Spencer from the payroll department, dated December 5, 2003

P-16 Id. Copy of letter to John A. Boppert, Esq. from Daryl Spencer, dated April 27, 2005

P-17 Copy of letter to Diana Fortkiewitz from Darren Chestang, dated June 27, 2003

P-18 Copy of letter to Darren Chestang from Heather Carr, dated July 30, 2003

P-19 Copy of COBRA letter to Darren Chestang from the payroll department

P-20 Copy of letter to Thomas Dowd from Margaret Mazza, dated June 30, 2003

P-21 Copy of letter to Margaret Mazza from Heather Carr, dated July 30, 2003

P-22 Copy of COBRA letter to Margaret Mazza from the payroll department, dated July 3, 2003

P-23 Copy of letter to Heather Carr from Diane Pacenka, dated May 29, 2002

P-24 Copy of letter to board members from Diane Pacenka, date stamped as received on July 25, 2002

P-25 Copy of COBRA letter to Diane Pacenka from the payroll department, dated June 14, 2002

491-08

OAL DKT. NO. EDU 11198-07
AGENCY DKT. NO. 276-9/07

JOSEPH SANTORA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HIGH POINT REGIONAL HIGH SCHOOL DISTRICT, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Settlement Agreement/Release, and Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon such review, the Commissioner observes that the President of the High Point Regional High School Board of Education signed the Settlement Agreement/Release on behalf of the Board. In that neither the file nor the settlement agreement contains a copy of the Board's resolution approving the settlement and designating this individual to sign the agreement on its behalf, nor, in the alternative, is the agreement signed by the Board attorney, who is the Board's duly authorized representative in litigation, the Commissioner cannot approve the within settlement agreement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Settlement Agreement/Release consistent with the concerns set forth above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 12/22/08
Date of Mailing: 12/22/08

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11198-07

AGENCY DKT. NO. 276-9/07

JOSEPH SANTORA,

Petitioner,

v.

BOARD OF EDUCATION OF THE HIGH POINT REGIONAL HIGH SCHOOL DISTRICT, SUSSEX COUNTY,

Respondent.

David Nash, Esq., for petitioner

Phillip E. Stern, Esq., for respondent (Sills, Cummis, Radin, Tischman, Epstein and Gross, attorneys)

Record Closed: October 22, 2008 Decided: October 30, 2008

BEFORE **LESLIE Z. CELENTANO,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on October 16, 2007, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

A hearing was scheduled on May 28, 2008. Prior to the hearing date the parties settled the matter. The attached Settlement Agreement/Release was submitted on October 22, 2008, indicating the terms of agreement which are incorporated herein by reference.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

October 30, 2008
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency:

NOV 05 2008

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

NOV 05 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

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SETTLEMENT AGREEMENT/RELEASE

This Settlement Agreement and Release ("Settlement Agreement") is made this day of June, 2008, by and between Joseph Santora ("Dr. Santora"), and the High Point Regional High School Board of Education ("Board").

RECITALS

WHEREAS, Dr. Santora is an employee of the Board, serving as a tenured teaching staff member; and

WHEREAS, the Board and Dr. Santora have engaged in a conflict regarding the Board's decision to withhold Dr. Santora's increment for the 2007-2008 school year; and

WHEREAS, Dr. Santora filed a Petition of Appeal before the Commissioner of Education styled, **Joseph Santora v. High Point Regional High School Board of Education**, Agency Docket No. 276-9/07, OAL Docket No. 11198-2007N("the Litigation"); and

WHEREAS, the Board and Dr. Santora desire to resolve amicably and in good faith all matters and issues arising out of the Litigation;

NOW, THEREFORE, in consideration of the foregoing and in consideration of their respective rights and obligations set forth herein and for other good and sufficient consideration, receipt of which is hereby acknowledged, Dr. Santora and the Board agree as follows:

ARTICLE I
Settlement and Release

1. **Settlement** – Dr. Santora and the Board hereby agree that for the consideration more specifically set forth below, the Litigation will be withdrawn, with prejudice.

2. **Release** – In return for the Board's obligations pursuant to this Settlement Agreement, Dr. Santora hereby releases and discharges any and all of the Board's former and current trustees, officers, employees, agents, contractors, representatives, predecessors, successors and assigns, from liability on or for all claims, demands, causes

of action, damages, costs, expenses, accounts, contracts, agreements, promises, compensation and all other liabilities of any kind or nature whatsoever, direct or indirect, known or unknown, which he may have had arising out of the Litigation.

ARTICLE II
Terms of Settlement

2.1 **Settlement**- Simultaneously upon the execution of this Settlement Agreement, Dr. Santora shall withdraw the Litigation, with prejudice.

2.2 **Consideration** - As consideration for Dr. Santora's Settlement and Release as set forth herein, the Board agrees to the following:

> Dr. Santora agrees to withdraw, with prejudice, any and all challenges to the withholding of his 2007-2008 increment. As a result, Dr. Santora will forever suffer the loss of the value of his 2007-2008 increment. Effective July 1, 2008, however, Dr. Santora shall be returned to the increment level he would have earned had his 2007-2008 school year increment not been withheld.

Dr. Santora expressly acknowledges and represents that he will neither seek nor be entitled to any further consideration from the Board in connection with this Settlement Agreement other than the consideration as detailed in this subsection.

ARTICLE III
Miscellaneous

3.1. **Entire Agreement** – This Settlement Agreement sets forth the entire agreement between the parties with respect to the subject matter hereof and supersedes any and all prior agreements relating thereto. There are no other understandings or

agreements between or among the parties with respect to the subject matter hereof, except as set forth herein, and as set forth in any other documents executed directly or in connection with this Settlement Agreement. No condition or provision of this Settlement Agreement may be modified, waived or revised in any way except in writing executed by all parties and referring specifically to this Settlement Agreement.

3.2. **No Admissions** – Nothing contained in this Settlement Agreement shall be construed to constitute an admission or acknowledgment by any party hereto of any wrongful or improper conduct, nor of any liability to any other party.

3.3 **Binding Effect** – This Settlement Agreement and all rights and duties set forth herein shall be binding upon and inure to the benefit of the parties hereto, as well as their respective successors and assigns.

3.4 **Governing Law and Choice of Forum** – This Settlement Agreement and its interpretation and performance shall be governed by the laws of the State of New Jersey, without giving effect to its conflicts of law rules.

3.5 **Captions** – The captions set forth in this Settlement Agreement are intended solely for the parties' convenience and ease of reference and are not intended to modify, limit, describe or affect in any way the scope, content or intent or this Settlement Agreement.

3.6 **Signature in Counterpart** – This Settlement Agreement may be executed simultaneously in counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same instrument.

3.7 **Authorization** – The Board hereby represents and warrants that the undersigned officer of the Board is fully authorized to execute this Settlement Agreement on the Board's behalf.

3.8 **Acknowledgments** – The parties to this Settlement Agreement acknowledge and agree that they have entered into this Settlement Agreement and have executed it without duress or coercion, and have done so with the opportunity to consult counsel. Each party further acknowledges and agrees that no other party has made representations, warranties, promises or agreements not set forth herein and no party

relies in any way upon any representation, warranty, statement of fact or opinion, understanding, disclosure or non-disclosure not set forth herein in entering into this Settlement Agreement and executing it, no party has been induced in any way, except for the consideration, representations, warranties, statements and covenants recited herein, to enter into this Settlement Agreement.

9.9 **Construction and Enforcement** – The terms of this Separation Agreement are the product of negotiations between the parties, and shall be construed without regard to any presumption or other rule requiring construction against the party causing this Settlement Agreement to be drafted.

IN WITNESS WHEREOF, the parties have executed this Settlement Agreement on the date above written.

JOSEPH SANTORA

HIGH POINT REGIONAL HIGH SCHOOL BOARD OF EDUCATION

BY: EDWARD VANDERBERG, PRESIDENT

OAL DKT. NO. EDU 8090-07
AGENCY DKT. NO. 191-7/07

STEPHANIE TAIBI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, HUNTERDON COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

On October 24, 2008, respondent filed with the Commissioner a motion for a stay pending appeal to the Appellate Division of her September 24, 2008 decision and order, which reinstated petitioner and restored back pay and benefits to her. As petitioner apparently elected not to return to employment in respondent's district, the stay's purpose was to delay payment to petitioner of the back salary and benefits. In its motion, respondent articulated the legal standards which must be satisfied for the awarding of a stay, and alleged facts to meet those standards.

The Commissioner sent petitioner a letter dated October 30, 2008, inviting her to answer respondent's motion. To date, no response has been received. Accordingly, respondent's motion is granted and the order requiring it to pay petitioner for past salary and benefits is stayed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/22/08
Date of Mailing: 12/23/08

* This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36.